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Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children

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THE OPPORTUNITIES, OR LACK THEREOF, FOR HOMOSEXUAL ADULTS TO ADOPT CHILDREN—*In re Adoption of Charles B*, 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

I. INTRODUCTION

> The question . . . is whether the reality of private biases and the possible injury they may inflict are permissible considerations . . . . We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[1]

Adult "homosexuals"[2] often face opposition when they attempt to adopt or gain custody of a child. However, when presented with such a controversy, a number of state courts have refused to consider an individual's homosexual orientation as determinative of parental unfitness.[3] Although adoption case law in this area is scarce, what is available presents promising possibilities for a homosexual person who wishes to become a parent through adoption.[4] Through the findings of research and gradual societal enlightenment, arguments for excluding homosexuals as prospective adoptive parents are being effectively refuted. Ho-

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1. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (natural father unsuccessfully sought removal of child from natural mother's residence where the mother lived with her new husband of a different race).

2. For a discussion of the development of homosexuals into a "class" of persons, see D'Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 917 (1986), which states in part that sexual orientation has become "the distinguishing characteristic that describes the essential nature of some men and women." D'Emilio also points out that identifying a group by a singular characteristic strengthens the use of categorizing which assists a system of oppression to continue. *Id.* at 920-21. "The identity and the oppression are bound together." *Id.* at 920.

3. S.N.E. v. R.L.B., 669 P.2d 875, 879 (Alaska 1985) (court found it impermissible to rely on social stigma attached to homosexuality as a justification for denying custody); *In re* N.L.D. & D.J.H., No. 17945 (Cal. Super. Ct. Feb. 24, 1986) (second parent adoption where lesbian permitted to adopt child of her lesbian partner); Guinan v. Guinan, 102 A.D.2d 963, 964, 477 N.Y.S.2d 830, 831 (1984) (homosexuality "does not alone render" individual "unfit as a parent"); *In re* Adoption of Charles B, 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990) (adoption granted, reversing appellate court's conclusion that homosexuals are not eligible to adopt as a matter of law).

4. A less familiar arrangement under which homosexual individuals might wish to adopt involves a parent who has custody of her natural child and that parent's life partner. The life partner seeks to become a second parent to the child. This is now commonly known as a second parent adoption. *See* Patt, *Second Parent Adoption: When Crossing the Marital Barrier is in a Child's Best Interest*, 3 BERKELEY WOMEN'S L.J. 96 (1988); Note, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729 (1986).

mosexual parents have proven to be commensurate in parenting ability with heterosexual parents.[5]

This casenote explores and explains adoption law with respect to homosexual petitioners, relative to the issues contemplated in *In re Adoption of Charles B.*[6] Part II of this casenote sets out the facts, holding, and rationale of the Ohio Supreme Court case, *Adoption of Charles B.* Part II also illustrates the judiciary's discretionary power to grant or deny an adoption, and one court's apparent willingness to analyze the facts of a controversial situation in a non-prejudicial manner. Part III of this casenote presents a comprehensive background of related and controlling statutory and case law. The adoption law in Ohio noted in *Adoption of Charles B* is examined as representative of adoption statutory language nationwide. Custody disputes are also discussed to the extent that they previously addressed issues similar to those confronted by homosexual individuals involved in adoption proceedings.

Part IV analyzes the reasoning in *Adoption of Charles B* and addresses three major issues which were not considered in the case but which are apposite to making an argument for or against adoption by homosexual persons. In an age where the goal of finding a permanent, stable home for parentless children is paramount,[7] it may be necessary for the legal community to change its perceptions of what constitutes a suitable family. Concomitantly, the legal community may need to consider less traditional home environments as appropriate for raising children. Therefore, the issue of the non-traditional family unit as a viable "alternative to the two-parent family" is briefly explored.[8] This section of the casenote also examines concerns raised by opponents to adoption by homosexual individuals in connection with the standard test used in evaluating a potential adoptive placement: the "best interest of the child" test.[9] The refutations to those concerns are also discussed. A third issue raised in this section of the casenote recognizes that the

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5. H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 7:3 (5th ed. 1989) (American society beginning to recognize homosexual parents as capable of loving and raising a child); *see also* Kweskin & Cook, *Heterosexual and Homosexual Mothers' Self-Described Sex-role Behavior and Ideal Sex-role Behavior in Children*, 8 SEX ROLES 967, 972 (1982) (study revealing that lesbian and heterosexual mothers share the same attitudes toward appropriate child behavior); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties-Part II*, 11 U. DAYTON L. REV. 275, 339 (1986) (citing Eaganhouse v. Eaganhouse, No. 78-1176 (Iowa Dist. Ct., Jones County Aug. 29, 1980) (where court accepted assertion that sexual preference did not affect ability to parent).

6. 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

7. ADOPTION LAW & PRACTICE § 3.06(1) (J. Hollinger Supp. 1989).

8. Note, *Adoption in the Non-Traditional Family - A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 191 (1987).

9. *See Adoption of Charles B*, 50 Ohio St. 3d at 90, 552 N.E.2d at 886; H. GITLIN, ADOPTIONS AMERICA'S GOOD NEWS FOR INFERTILE PARENTS 4 (1987).

constitutional equal protection guarantee might inhibit a denial of a homosexual's right to adopt; this is presently a judicially unsupported route.[10]

Part V summarizes the issues found in this casenote and predicts the future for homosexual individuals who wish to adopt a child. *Adoption of Charles B* is an important case for hopeful prognosticating, but, if societal opinion does not continue to advance in accepting homosexual individuals as "people who are . . . as emotionally healthy and socially well adjusted as those who are predominantly heterosexual,"[11] their opportunities to adopt may be thwarted except in the most extraordinary circumstances.

II. CASE FACTS

The dispute in *In re Adoption of Charles B*[12] arose from a petition to adopt a child submitted by "Mr. B," an active homosexual.[13] When the Licking County Department of Human Services (the Agency) contested the adoption, the Ohio Supreme Court faced a controversy of monumental importance. The court had the opportunity to direct a trend in the recognition, or the non-recognition, of a right of homosexual individuals to be evaluated like any other individual engaged in the adoption process.[14]

Mr. B was a psychological counselor with undergraduate and advanced degrees in child psychology.[15] The adoptee was an eight-year old boy, "Charles," afflicted with leukemia that was in remission at the time Mr. B petitioned to adopt.[16] Charles had a family history of emotional and physical abuse until the time his natural mother and alleged natural father voluntarily signed permanent custody papers terminating their parental rights.[17] Charles was subsequently turned over as a ward of the Agency.[18] Testing showed that "Charles also [had] a low I.Q.

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10. *See generally* Opinion of the Justices, 129 N.H. 290, 525 A.2d 1095 (1987) (upholding constitutionality of statute proscribing adoption by homosexuals).

11. Note, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 871 (1985). *But cf.* Note, *Out of the Closet and Into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401, 406 (1989) (present negative sentiment toward homosexual persons).

12. 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

13. *Id.* at 88-89, 552 N.E.2d at 884-85.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 88, 552 N.E.2d at 884. The Ohio Administrative Code defines "permanent custody" as a legal status which divests the natural parents of all rights and obligations with respect to their natural child and vests those rights and obligations in a public children services agency or a private child placing agency. 8 OHIO ADMIN. CODE § 5101:2-42-02(QQ) (1990).

18. 50 Ohio St. 3d at 88, 552 N.E.2d at 884.

. . . a speech disorder," "deficits in fine and gross motor skills," and "[suffered] from possible brain damage" as a result of "fetal alcohol syndrome."[19]

The Agency recommended that Mr. B counsel Charles.[20] Over time, the two developed a close, personal relationship.[21] A licensed psychologist observed and testified to the depth of their bond, while another psychologist attested to Mr. B's solid reputation in the counseling field.[22] In addition, Mr. B welcomed Charles into his extended family life, and Mr. B's mother and sister testified to the "grandmother" and "aunt" roles each developed toward Charles.[23] At the time Mr. B filed his petition to adopt,[24] the Agency had been attempting unsuccessfully to secure a permanent home for Charles with adoptive parents meeting the following criteria:

> a family of two parents with older siblings, at least one of which would be male; a family with a child-centered life style; a couple with definite parenting experience, preferably with adoption experience; parents with proven ability in dealing with behavior disorder issues; a family that is open to counseling; and a family that demonstrates an ability to deal with learning disabilities, speech problems and medical problems.[25]

The court considered these requirements to be "[a] tall order, indeed."[26]

After Charles' guardian ad litem[27] recommended that Mr. B was a suitable prospective parent, the Agency consented to the adoption.[28] However, the Agency revoked its consent prior to the adoption hear-

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19. *Id.*

20. *Id.* at 88, 552 N.E.2d at 885.

21. *Id.*

22. *Id.* at 93, 552 N.E.2d at 889.

23. *Id.*

24. Ohio Revised Code section 3107.04(A) requires the prospective adoptive parent(s) to file a petition for adoption. OHIO REV. CODE ANN. § 3107.04(A) (Baldwin 1990). Section 3107.05 details the information that must be included in the petition, for example, "the name of the person to be adopted," "the relationship to the petitioner of the person to be adopted," and some expression that the petitioner wishes to establish a parent/child relationship with the adoptee. *Id.* § 3107.05.

25. 50 Ohio St. 3d at 91, 552 N.E.2d at 887.

26. *Id.*

27. "A *guardian ad litem* is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation." BLACK'S LAW DICTIONARY 706 (6th ed. 1990). The guardian is charged with ensuring that the best interests of the individual he is representing are met. 8 OHIO ADMIN. CODE § 5101:2-42-02(S) (1990).

28. 50 Ohio St. 3d at 89, 552 N.E.2d at 885. Ohio Revised Code section 3107.06(C) states that consent to the adoption is required of "[a]ny person or agency having permanent custody of the minor or authorized by court order to consent." OHIO REV. CODE ANN. § 3107.06(C) (Baldwin 1990).

ing.[29] In spite of this revocation, the trial court granted an interlocutory order of adoption because it determined "that the adoption of Charles by Mr. B was in the best interest of Charles."[30] Upon the Agency's appeal, the appellate court found "that it could never be in a child's best interest to be adopted by a person such as Mr. B"[31] and that, "as a matter of law, homosexuals are not eligible to adopt."[32] The Ohio Supreme Court did not agree with this conclusion and reversed, thereby reinstating the judgment of the trial court.[33]

The Ohio Supreme Court's reversal exemplifies an equitable use of the "best interest of the child" test, identified by the court as the controlling measure for granting or denying an adoption.[34] The "best interest of the child" test measures and evaluates precisely what its designation implies — whether the adoptive placement and all its attendant circumstances would provide an environment best suited for the adoptee.[35] This test was used in *Adoption of Charles B* to the advantage of the homosexual adoption petitioner.[36] The Ohio Supreme Court carefully weighed the evidence before it. The evidence included: the psychological and factual history of both the petitioner and the potential minor adoptee; the quality of the relationship already existing between the two; the testimony of relevant witnesses; and the governing

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29. 50 Ohio St. 3d at 89, 552 N.E.2d at 885. Section 3107.11 requires that a hearing of the petition be scheduled after the petition has been filed. OHIO REV. CODE ANN. § 3107.11. The consenting party can revoke its consent until the entry of an interlocutory order or a final decree of adoption. *Id.* § 3107.09.

30. 50 Ohio St. 3d at 89, 552 N.E.2d at 885. Section 3107.14 provides for the entry of a final decree of adoption or an interlocutory order when the court finds that an adoption is in the best interest of the adoptee. OHIO REV. CODE ANN. § 3107.14.

31. 50 Ohio St. 3d at 90, 552 N.E.2d at 886.

32. *Id.* at 89, 552 N.E.2d at 885.

33. *Id.* at 90, 552 N.E.2d at 886. The trial court held that the adoption was in the best interest of the child and granted an interlocutory order of adoption. In April, 1989, S.B. 162 was introduced in the Ohio General Assembly. S.B. 162, 118th Gen. Assembly, Reg. Sess. (1989-90). If it had been enacted, this bill would have prohibited homosexual people from serving as foster parents or adopting. *Id.* The bill failed in committee and the Ohio Code sections which it sought to amend remain open the the possibility of adoption by homosexuals.

34. *Adoption of Charles B*, 50 Ohio St. 3d at 90, 552 N.E.2d at 886. *see also id.* at 93-94, 552 N.E.2d at 889 (citing State, *ex rel.* Portage County Welfare Dep't v. Summers, 38 Ohio St. 2d 144, 152, 311 N.E.2d 6, 12 (1974) (designating suitably qualified petitioner and promotion of child's best interest as requirements for potential adoption); *In re* Haun, 31 Ohio App. 2d 63, 70, 286 N.E.2d 478, 482-83 (1972) (requiring evaluation of entire adoptive situation to maintain the spirit of the adoption system); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 409 (1988) (best interest of child is ultimate standard in adoption); Rivera, *supra* note 5, at 330 (best interest of the child test is primary rule guiding courts when child's living situation at issue).

35. 50 Ohio St. 3d at 92, 552 N.E.2d at 888; *see also* H. CURRY & D. CLIFFORD, *supra* note 5, at 7:19.

36. 50 Ohio St. 3d at 94, 552 N.E.2d at 890.

statutory and common law.[37] The court then concluded that the adoption would be in the minor's best interest.[38] In essence, the court declared that there was no basis for denying a homosexual's petition when, by neutral standards, he would be an outstandingly qualified adoptive parent, and there was no showing that his sexual orientation/conduct would have probable negative impact on the child's welfare.

The court found support for its holding in *In re Burrell*,[39] where the court said that "[the questioned] conduct is only significant if it can be demonstrated to have an adverse impact upon the child."[40] *Whaley v. Whaley*[41] also supplied support. In *Whaley*, the Ohio court of appeals stated "that immoral conduct must be shown to have a direct or probable adverse impact on the welfare of the child."[42] The Agency, as the opponent to Mr. B's adoption of Charles, could not, and did not even attempt to, argue a potential adverse impact of Mr. B's homosexual orientation on Charles' welfare.[43] Hence, the Ohio Supreme Court properly stated that the controlling test in an adoption is the "best interest of the child" test, and accordingly, applied it to the situation.[44] The supreme court did not raise an equal protection argument to overturn the intermediate appellate court's decision to deny the adoption. Instead, the court remained within the parameters of the "best interest of the child" test. The concerns of social stigmatization, outdated classifications of homosexuality as a mental disorder, or the questionable effect a caretaker's sexual orientation may have upon the natural development of the child's sexual orientation were not addressed in the opinion.

Justice Resnick's dissenting opinion in *Adoption of Charles B* agreed with the majority's foundation for analysis, the "best interest of the child" test, but disagreed with the result after applying the test to the facts of this case.[45] Justice Resnick's opinion did not agree with the

37. *Id.* at 90-91, 552 N.E.2d at 886-87.

38. *Id.* at 94, 552 N.E.2d at 890.

39. 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979).

40. *Id.* at 39, 388 N.E.2d at 739. Conduct such as sexual promiscuity or any behavior which is the proffered reason for denying an adoption or grant of custody must pose some demonstrable, adverse threat to the child. *See* Adoption of Charles B, 50 Ohio St. 3d at 95, 552 N.E.2d at 890 (Resnick, J., dissenting). The adverse effect can be emotional, *Roe v. Roe*, 324 S.E.2d 691, 694 (1985) (citing intolerable emotional burden of homosexual's child being the object of social condemnation); or physical, *Adoption of Charles B*, 50 Ohio St. at 95, 552 N.E.2d at 890 (increased risk of exposure of child leukemia victim with an "altered immune system" to the AIDS virus) (Resnick, J., dissenting).

41. 61 Ohio App. 2d 111, 399 N.E.2d 1270 (1978).

42. *Id.* at 118, 399 N.E.2d at 1275.

43. 50 Ohio St. 3d at 95, 552 N.E.2d at 890.

44. *Id.* at 94, 552 N.E.2d at 890.

45. *Id.* at 94-95, 552 N.E.2d at 890.

appellate court's rationale for denying the adoption by reasserting that homosexuals are ineligible to adopt as a matter of law.[46] Instead, Justice Resnick determined from the facts that the adoption would not be in the child's best interest by using the same negative impact requirement discussed in the majority opinion.[47] She found a negative impact or "a nexus between the homosexuality of the prospective adoptive parent and the adoption that could have an adverse effect on the child."[48] As authority for her finding, she cited a physician's letter to the court which stated that Mr. B's proposed adoption of Charles would "place Charles at increased risk for exposure to HIV infection . . . [because] Charles has an altered immune system [due to leukemia]. The AIDS virus attacks the immune system further destroying it."[49] Justice Resnick based her dissent on the possible endangerment to Charles' health and life which would create a risk not in the child's best interest. Ironically, this rationale affirmed the positive viewpoint that groundless denials of adoption premised solely on a bias against homosexuality will have no source for reference, precedent, nor shared judicial opinion.

III. BACKGROUND

The source of a right to adopt (and to be adopted) is derived exclusively from the legislature.[50] "Most adoption acts begin with a provision setting forth who may adopt and who may be adopted."[51] The majority of adoption statutes are linguistically similar to one another and neutral in their reception toward non-traditional petitioners.[52] Nearly every jurisdiction allows a single person to adopt,[53] and only New Hampshire and Florida have statutes expressly prohibiting adoption by a homosexual.[54] Where a statute does not prohibit adoption by a particular class of persons, the court is left to determine whether the state will afford a non-traditional petitioner the opportunity to adopt.[55] It is therefore a function of the judiciary, working primarily from the recommendation of a state or private child placing agency, to use its discretion to affirm or overturn the proffered recommendation.[56]

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46. *Id.*
47. *Id.*
48. *Id.* at 95, 552 N.E.2d at 890.
49. *Id.* at 95, 552 N.E.2d at 891.
50. H. GITLIN, *supra* note 9, at 32. Adoption was not known at common law in the United States. H. CLARK, *supra* note 34, at 851; Note, *Adoption-The Welfare and Best Interest of the Child*, 5 WILLAMETTE L. REV. 93 (1968).
51. H. GITLIN, *supra* note 59, at 41.
52. *Id.*
53. *Id.*
54. FLA. STAT. ANN. § 63.042 (West 1985); N.H. REV. STAT. ANN. § 170-B:4 (1990).
55. *In re* Adoption of Charles B, 50 Ohio St. 3d 88, 90, 552 N.E.2d 884, 886 (1990).
56. See H. CURRY & D. CLIFFORD, *supra* note 5, at 7:19. It is the responsibility of the

Traditionally, the goal of the administrative agencies that investigate and recommend placement was to find an ideal environment for the child.[57] They sought exceptionally suited prospective parents who matched the child in physical appearance, intellectual capacity, and other characteristics.[58] It is not difficult to surmise that persons exhibiting less than mainstream characteristics and qualifications were unlikely candidates for successful adoption. But attitudes and goals for adoption have changed.[59] Now the desirability of locating a permanent home for a child is primary.[60] Detailed matching is no longer a pursuit and the focus has shifted toward "the *suitability* of a particular home for a particular child."[61] As a result, this lessened emphasis on stringent, superficial requirements has opened the door for non-traditional petitioners to adopt when they are "suitably qualified to care for and rear the child,"[62] and when "the best interests of the child will be promoted."[63] The "best interest" standard is routinely used by American courts as a basis for evaluating potential adoptive placements.[64]

The statute governing adoption in *In re Adoption of Charles B*[65] exemplifies a neutral statute with boundaries interpreted and set by the judiciary.[66] With respect to the issues of who may adopt and who may be adopted relevant to the case before it, the Ohio court cited Ohio Revised Code section 3107.03 that states "[t]he following persons may adopt: . . . (B) An unmarried adult," and also section 3107.02(A) which provides that "[a]ny minor may be adopted."[67] The *Adoption of Charles B* court lectured that there is no absolute right to adopt, citing as its authority the legislature's use of the permissive term "may" as

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agency to investigate the "conditions and antecedents" of the prospective parent as well as the adoptee to assess suitability of placement. OHIO REV. CODE ANN. § 3107.12(A) (Baldwin 1990). The results of the investigation are used during the hearing to assist in the court's decision whether to grant the adoption. *Id.* § 3107.12(B), (C).

57. ADOPTION LAW & PRACTICE, *supra* note 7, § 3.06(1).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (emphasis added); *see also* CLARK, *supra* note 34, at 909 & n.30 (the matching ideal is changing).

62. State, *ex rel.* Portage County Welfare Dep't v. Summers 38 Ohio St. 2d 144, 152, 311 N.E.2d 6, 12 (1974).

63. *Id.*

64. The legislation in those states which have adopted some derivative form of the Uniform Adoption Act will evince the Act's "greater emphasis on the best interest of the child as the basis for adoption . . . ." H. GITLIN, *supra* note 9, at 32. The following states have adopted the Uniform Adoption Act: Alaska, Arkansas, Montana, New Mexico, North Dakota, Ohio and Oklahoma. *Id.*

65. 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

66. OHIO REV. CODE ANN. § 3107.01-.44 (Baldwin 1990).

67. *Id.* § 3107.02(A), 3107.03(B).

opposed to the use of unconditional language.[68] Consequently, unmarried adults have a permissive right to adopt, not an absolute right.[69]

The court referred to section 3107.14(C) which provides:

> If, at the conclusion of the hearing, *the court finds* . . . that the adoption is in the best interest of the person sought to be adopted, it may issue . . . a final decree of adoption or an interlocutory order of adoption . . . .[70]

Relying on that section, the court carved out its role as the final arbiter of whether an unmarried adult *may* adopt.[71] It then took the opportunity to designate formally the "best interest of the child" test as the guide to its discretion, noting its common use in state courts nationwide.[72] Since Mr. B qualified as an unmarried adult, and there were no other impediments to his eligibility within the statute, the court decided that Mr. B was in fact eligible to adopt under the statute.[73] The court then proceeded to the apply the "best interest of the child" test to the case facts culminating in a favorable result for Mr. B.[74]

It is evident from *Adoption of Charles B* that the courts can provide a forum for influencing attitudes toward non-traditional petitioners, especially since the majority of state legislatures have extended the opportunity to adopt to virtually anyone.[75] The few cases involving homosexual adoption petitioners,[76] together with the larger number of cases involving homosexual parents seeking custody of their natural children,[77] provide little indication of the attitude courts will have to-

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68. 50 Ohio St. 3d at 90, 552 N.E.2d at 886.
69. *Id.*
70. § 3107.14(c).
71. 50 Ohio St. 3d at 90, 552 N.E.2d at 886.
72. *Id.*
73. *Id.*
74. *Id.*
75. H. CLARK, *supra* note 34, at 908. A minimum age requirement is one example of a limitation on the eligibility to adopt. Age restriction provisions "typically establish a minimum age for an adoptive parent and some also require that there be a specified age difference between the adoptive parent and the adoptive child." ADOPTION LAW & PRACTICE, *supra* note 7, § 3.06(2). Ohio law allows any minor to be adopted. OHIO REV. CODE ANN. § 3107.02(A) (Baldwin 1990). If the age of majority (18) is reached prior to the court's decision to allow or disallow the adoption but after proceedings to adopt have been initiated, the person to be adopted must submit to the court a written consent to the adoption before consideration will be given. *Id.* § 3107.02(C). An adult may be adopted when the adult is totally and permanently disabled, or is mentally retarded, or when the adoptee had a pre-existing parental type, nurturing relationship with the potential adoptive parents which was established while the adoptee was a minor. *Id.* § 3107.02(B).
76. *See, e.g., In re* N.L.D. & D.J.H., No. 17945 (Cal. Super. Ct. Feb. 24, 1986) (second parent adoption where lesbian permitted to adopt child of her lesbian partner); *Adoption of Charles B*, 50 Ohio St. 3d at 88, 552 N.E.2d at 884.
77. *See, e.g.*, S.N.E. v. R.L.B., 669 P.2d 875 (Alaska 1985); S. v. S., 608 S.W.2d 64 (Ky. 1980); Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980); Guinan v. Guinan, 102

ward a party with a homosexual orientation. It is difficult to detect any attitudinal trend except, perhaps, within a particular geographic region.[78]

Nadler v. Superior Court[79] is a landmark California case that may have paved the way for Ohio's prudent use of the "best interest" standard. *Nadler* involved a lesbian mother arguing for custody of her daughter in a divorce action.[80] The California superior court held that as a matter of law the petitioner was an unfit mother because she was a homosexual.[81] The California appellate court soundly disagreed, charging "that the trial court failed in its duty to exercise the very discretion with which it is vested" by neglecting to consider "how the best interest of the child [would] be preserved."[82] This court indirectly professed that blanket disqualification of an individual based upon one factor of that individual's personhood cannot be tolerated, for it is contrary to the goals of a "best interest of the child" evaluation. By denying the mother custody based on her sexual orientation without investigating the factual circumstances, the superior court seriously risked depriving the child of the best possible environment available.

In Massachusetts, *Bezio v. Patenaude*[83] reflects a similar attitude. The Supreme Judicial Court reviewed a lower court's ruling denying restoration of custody to a mother in part because the mother maintained a lesbian relationship allegedly creating "an element of instability that would adversely affect the welfare of the children."[84] The reviewing court embraced the testimony of psychology experts to overturn this ruling, stating "we believe the judge's finding that a lesbian household would adversely effect the children to be without basis in the record."[85] The experts testified that "homosexuality per se is irrelevant to parenting ability" as there is no evidence that children who are raised in a home with a homosexual parent are any more disturbed or maladjusted than children who are raised by heterosexual parents.[86] Once again, the court's espoused philosophy is that the trait of sexual

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A.D.2d 963, 477 N.Y.S.2d 830 (1984).

78. Rivera, *supra* note 5, at 335.

79. 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967).

80. *Id.* at 524, 63 Cal. Rptr. at 353.

81. *Id.*

82. *Id.* at 525, 63 Cal. Rptr. at 354.

83. 381 Mass. 563, 410 N.E.2d 1207 (1980).

84. *Id.* at 578, 410 N.E.2d at 1215. An additional reason given for the denial of custody was that the mother had exhibited in the past an unwillingness to assume responsibility for her children's care. *Id.* The Supreme Judicial Court answered that, while past history is a consideration, the "critical inquiry is current parental fitness." *Id.*

85. *Id.* at 579, 410 N.E.2d at 1216.

86. *Id.*

orientation is not determinative when applying the "best interest of the child" test. In fact, the Massachusetts court went so far as to say that homosexuality is irrelevant to this deliberation.[87]

A contrary result is found in *Roe v. Roe*[88] in which a homosexual father sought custody of his nine-year old daughter.[89] Although the Virginia court declined to say that a homosexual individual is per se an unfit parent, the court did not agree that the child should witness her homosexual father's behavior or expression of his sexual preference.[90] Such behavior was thought to disregard the mores of society and would allegedly expose the child to a future of ostracism or ridicule by the community.[91] The court held that "[t]he father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law."[92] Finding an adverse impact as a consequence of the nexus between the custody relationship and the father's homosexual orientation, the court concluded that "the best interests of the child [would] only be served by protecting her from the burdens imposed by such behavior."[93]

A court is obliged to protect the minor from supposed harm by ruling in the minor's best interest. The "best interest of the child" test is not a shield from adverse decisions when it is the court's belief that homosexuality entails activity that could be harmful to the minor. It is apparent then from the result in *Roe v. Roe* that the recognition and use of a "best interest of the child" test can generate negative results for a homosexual individual.

Another use of the "best interest of the child" test resulted in an adverse ruling for a bisexual applicant in the Arizona case, *Appeal in Pima County Juvenile Action B-10489*.[94] The issue before that court "when deciding whether to certify [the] applicant as suitable to adopt children [was] the best interest and welfare of any child who might be adopted by that person."[95] The court denied that the applicant's bisexuality was the sole reason it withheld the applicant's certification to adopt.[96] Instead, the court found other evidence to justify the denial. For example, the petitioner had a history of depression, an employment record of eight jobs within eleven consecutive years, and no support

87. *Id.*
88. 228 Va. 722, 324 S.E.2d 691 (1985).
89. *Id.* at 724, 324 S.E.2d at 691.
90. *Id.* at 728, 324 S.E.2d at 694.
91. *Id.* at 727-28, 324 S.E.2d at 693-94.
92. *Id.* at 727, 324 S.E.2d at 694.
93. *Id.* at 728, 324 S.E.2d at 694.
94. 151 Ariz. 335, 727 P.2d 830 (1986).
95. *Id.* at 338, 727 P.2d at 833.
96. *Id.* at 339, 727 P.2d at 834.

network.[97] The court then qualified its finding by reasoning that "appellant's ambivalence in his sexual preference was very appropriately a concern of the court"[98] because a state statute proscribed homosexual activity in Arizona.[99] "It would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed model."[100]

This harsh result presents an obstacle of judicial logic which would be difficult to surmount. Since the foundation for the holding is the "best interest of the child" test, a homosexual applicant would have to convince a court: (1) that homosexual conduct is irrelevant for consideration under the test; (2) that homosexual orientation is not equivalent to homosexual activity and orientation per se would not harm a child; or (3) that neither homosexual orientation nor the witnessing of homosexual behavior would be harmful to a child. The common usage of the "best interest of the child" test in judicial proceedings is the greatest weapon available for a homosexual individual seeking to adopt, even in those jurisdictions that believe a homosexual orientation is antithetical to the best interest aim. At least where a best interest standard is in place, petitioners are not automatically banned from eligibility and have the opportunity to persuasively argue that adoption by a homosexual can be in a child's best interest. Courts will necessarily retreat from their opposition to homosexual adoptions as more research is developed that demonstrates: that a homosexual orientation is innate and immutable;[101] that homosexual parents are commensurate in parenting ability with heterosexual parents;[102] that the incidence of pedophilia is no more common among homosexual individuals as among heterosexuals;[103] and that homosexuality is not a mental disorder.[104] These are concerns that promote prejudice against homosexuals. By using research that negates these fears in conjunction with the best interest

97. *Id.*

98. *Id.*

99. ARIZ. REV. STAT. ANN. § 13-1411 (1989).

100. 151 Ariz. at 339, 727 P.2d at 834.

101. *See* Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799, 861 (1975) (fact that majority of homosexuals had heterosexual parents suggests that child's sexual orientation is not modeled after that of child's parents).

102. Kweskin & Cook, *supra* note 5, at 967 (homosexual and heterosexual parents exhibit similar behaviors and attitudes toward parenting).

103. CHILDREN'S DIVISION, AMERICAN HUMANE ASS'N, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 216-17 (1969) (90% of child victims of sexual offenses are female and 97% of sex offenders against children are male).

104. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 281-82, 380 (3d ed. 1980) (homosexuality is not a mental illness nor a mental disorder).

standard, homosexual individuals will more easily convince courts that sexual orientation is irrelevant to the determination of adoptive parental fitness.

IV. ANALYSIS

In re Adoption of Charles B[105] is an important decision that may open the door to adoption for at least some homosexual adoption petitioners. As such, analysis of the decision's reasoning is necessarily relevant to a discussion of the right of all homosexuals to adopt. Although the Ohio Supreme Court in *Adoption of Charles B* overruled the appellate court's decision to deny *any* homosexual a right to adopt,[106] the supreme court never directly addressed three major issues that are integral to adoption law with respect to adult homosexuals. The three issues which the supreme court failed to discuss are: (1) the goals of adoption, (2) the arguments against homosexual adoption, and (3) the constitutional grounds in favor of allowing homosexual adoption. The failure of the supreme court to address these relevant issues represents a deficiency in the decision, and thus warrants separate discussion.

A. *The Court's Reasoning in Adoption of Charles B*

In *Adoption of Charles B*, the Ohio Supreme Court granted an adult homosexual the right to adopt a child where the circumstances of the adoptive placement were in the best interest of the minor adoptee.[107] The Ohio Supreme Court reached its result by applying the "best interest of the child" test, and determining that "the trial court did not abuse its discretion when it placed Charles with Mr. B for adoption."[108] The case is a landmark decision because it overcame an aggressive appellate court ruling that exuded and exemplified the anti-homosexual sentiment which pervades American society. Two of the contentions made by the intermediate court were that the goals of openly admitted homosexuality necessarily conflict with the aspirations of adoption statutes; and that alleged gay rights are not a relevant factor in an adoption decision.[109] The court stated:

> In our opinion, the concepts of homosexuality and adoption are so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision. Accordingly, we cannot impute to the legislature an intention that

105. 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).
106. *Id.* at 94, 552 N.E.2d at 890.
107. *Id.* at 88, 552 N.E.2d at 884.
108. *Id.* at 94, 552 N.E.2d at 890.
109. *Adoption of Charles B.*, No. CA-3382 (Ohio App. Oct. 28, 1988) (LEXIS, States

announced homosexuals are eligible to adopt. It is not the business of the government to encourage homosexuality.[110]

Through this line of reasoning, including references to presumed legislative intent that adoptive placements should mirror the composition of a birth family, the intermediate court reached its conclusion that "as a matter of law, it is not in the best interest of a seven-year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers."[111] It can be inferred that this court harbored several beliefs which influenced its decision: (1) that a homosexual orientation is abnormal; (2) that homosexual people harbor some unstated, unspeakable goals which are repugnant to the goals of raising a child in a happy, loving environment; and (3) that a non-traditional home cannot compete with others in which an adopted child could "pass as the natural child of the adoptive 'family'," nor can it achieve the object of "blending in" to the community.[112] Many members of society hold these beliefs[113] and foster the prejudice against allowing homosexuals to adopt. The Ohio Supreme Court left the appellate court's contentions virtually unchallenged,[114] and its failure to address these contentions makes the opinion deficient. It never countered the statement that the concept of homosexuality is inconsistent with the concept of adoption, nor the assertion of law that a homosexual person is unfit per se to parent. While the award to Mr. B of a right to adopt *effectively* overturned the assertion that homosexuals were not fit to parent, the court apparently opted not to use the case as a forum for judicial reprimand or societal enlightenment. Rather, the court implicitly confined itself to the rule of thumb that, where no adverse impact can be shown, the questioned activity (or orientation) is inconsequential.

Adoption of Charles B is a case where a favorable result for the homosexual petitioner was likely upon application of the "best interest of the child" test. Consequently, this case may not have opened the closed doors for all homosexual individuals who want to become parents. For example, it cannot be expected, nor is it probable, that all homosexual petitioners will possess the exceptional qualifications possessed by Mr. B.[115] It is equally unlikely that all adoptable children

110. *Id.*

111. *Id.*

112. *Id.*

113. Note, *supra* note 101, at 800-12 (discussing the background of anti-homosexual sentiment).

114. 50 Ohio St. 3d at 88, 552 N.E.2d at 884.

115. *Id.* Mr. B held an advanced psychology degree, and worked as counselor of abused children. *Id.*

will have a pre-existing, close relationship with their petitioner, as was the case between Mr. B and Charles. It is important then to consider what chance a homosexual petitioner with average qualifications has to become a parent through adoption. The following issues are significant and should be considered by a petitioner operating under less than extraordinary circumstances as he or she prepares to argue for a right to adopt: the goal of placing a child in a permanent home may overcome the reluctance of courts to go beyond the ideal traditional family and to consider non-traditional petitioners as adoptive parents; the commonly made arguments for denying homosexuals the opportunity to adopt and the refutations to those arguments; and the possible violation of an individual's equal protection guarantee under the United States Constitution when the denial of an opportunity to adopt is grounded almost exclusively upon an individual's sexual orientation.

B. The Non-Traditional Petitioner and the Goal of Adoption

The goal of finding and placing children in suitable homes has supplanted the goal of matching a child with adoptive parents who closely resemble the child in physical, mental, and personal characteristics.[116] It is now believed that placing a child in a permanent home environment is more important than to delay placement for the sake of meeting superficial criteria.[117] In order to achieve this new goal, it would be wise for placement agencies and courts to view more receptively the homes of non-traditional petitioners as potential placement sites.

There are several inherent personal characteristics, other than a homosexual orientation, that also provoke controversy and added scrutiny by a court when it is considering an adoption applicant for certification. They are advanced age,[118] or a differing race,[119] or religion[120]

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116. ADOPTION LAW & PRACTICE, *supra* note 7, § 3.06(1).

117. *Id.*

118. *See, e.g., In re* Adoption of K, 417 S.W.2d 702 (Mo. Ct. App. 1967) (advanced age could not disqualify adoption petitioner, but would be a factor in assessing ability to care for adoptee); *In re* Emanuel, 370 N.Y.S.2d 93 (1975) (advanced age did not disqualify, but petitioners would have to possess other exceptional qualities to compensate); *In re* Adoption of S, 22 Or. App. 304, 538 P.2d 947 (1975) (despite advanced age of petitioners, all circumstances considered together suggested adoption in child's best interest); *In re* Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973) (age is factor to be considered but not determinative).

119. *See, e.g.,* Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (difficulties inherent in interracial adoption were properly considered and not unconstitutional); *In re* Adoption of Minor, 228 F.2d 446 (D.C. Cir. 1955) (race may have relevance in adoption proceeding, but is not determinative and must be weighed along with other relevant considerations); *In re* Adoption of Gomez, 424 S.W.2d 656 (Tex. Ct. App. 1967) (statute prohibiting interracial adoption declared unconstitutional).

120. *See, e.g., In re* Goodman, 331 Mass. 647, 121 N.E.2d 843 (1954) (statute seeking same

between the potential adoptive parent and the child to be adopted. However, unlike homosexuality, these "non-traditional" characteristics are ordinarily regarded as mere factors when reviewing the prospective adoption as a whole.[121]

While it is popularly agreed that a young, married couple matching the child in religion and race is the model setting in which all adopted children should be placed, such an ideal setting is not necessarily a reflection of what the child will encounter in society. As a New Jersey court aptly stated, "[t]here is little to gain by creating an artificial world where the children may dream that life is different than it is."[122] Age, religion, and race are essential components of an individual and children will quickly discover that diversity is an essential, inescapable, and pleasurable part of life. Tolerance and acceptance under the law for diverse personalities, beliefs and lifestyles are fundamental elements of our government.[123] Hence, if a petitioner presents a strong case by asserting that he could offer a loving home in the best interest of a child, that petitioner should be duly considered in spite of the fact that his qualifications differ from societal norms. Not only would this judicial approach be consistent with the realities of life, but it would also help to achieve the primary aim of adoption, that of permanent placement in stable, suitable homes.

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faith for adoptees when practicable was not unconstitutional; where suitable parents of same faith available, preferred over petitioners of differing faith); *In re* Adoption of E, 59 N.J. 36, 279 A.2d 785 (1971) (ethics and beliefs may be considered as reflection of petitioners moral fitness, but adoption cannot be denied solely on basis of differing faith); Dickens v. Ernesto, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972) (statute seeking same faith for adoptees was not violative of Constitution's establishment clause in so far as it was consistent with "best interest of the child" standard).

121. ADOPTION LAW & PRACTICE, *supra* note 7, § 3.06(1).

122. M.P. v. S.P., 169 N.J. Super. 425, 436, 404 A.2d 1256, 1262 (1979).

123.

> The second principle that the Pilgrims insisted upon was equality . . . . [T]hey believed that God made each human soul equal to all others. To them, both political and religious equality were the natural consequences of this belief . . . . [W]e savor their commitment to natural law and to its effectuation through constitutional tradition, whereby such precepts like democracy, equality and justice are properly a condition of, and consequently, a limitation upon man's laws. True to their faith and to their faith in their beliefs, the Pilgrims shared their values with all members of their company, *for they included* in their "civil body politic" *those who joined their venture but not their religion* . . . . [T]he Pilgrims marked out a course later embraced by our history, one that directly affected the decision of our founding fathers to institutionalize the precepts of liberty, democracy, equality, justice and human rights in the constitutional order of the United States.

Sultan, *The Pilgrims: Planting the Constitutional Seeds*, 35 FED. BAR NEWS & J. 42, 44 (1988) (emphasis added).

C. *Arguments Against Allowing Homosexuals to Parent and Refutations to Those Arguments*

A homosexual orientation is unquestionably a trait which draws negative or surprised reaction when counted among the traits of an adoption petitioner. Many have speculated on why homophobia exists and have argued against the misconceptions and prejudices that have held homosexuals at bay from full participation in "mainstream" society.[124] Justice Blackmun, Associate Justice of the United States Supreme Court, expressed the paradox of the government's commitment to protection of individual freedoms that is tainted by a disinclination to extend those protections to all the activities of individuals that do not harm others.[125] He stated that "a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."[126]

If it can be shown that the homosexual orientation of an adoptive parent could have effects which would be detrimental to an adopted child's best interests, then the potential parent must be removed from consideration. Fulfilling the best interests of the child is properly the controlling purpose. But, a refused petitioner can justifiably insist that the rationale behind the denial be a legitimate one that is based in fact, and not merely unfounded bias.

The first argument that could discredit a homosexual person's parental suitability is that homosexuality is a mental disorder. If this were true, a person afflicted would indubitably be disqualified as a prospective parent. However, both the American Psychiatric Association and the American Psychological Association have declared that homosexuality is neither a mental illness nor a mental disorder.[127] Further, the American Psychological Association has sought to condemn public and private discrimination against homosexual people.[128] Without the backing of the leading representatives of psychiatric and psychological viewpoints, counsel opposing an adoption by a homosexual would be hard pressed to locate authority for an assertion that homosexuality is a mental disorder.

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124. For a discussion of the roots of homophobia, see Note, *Out of the Closet and Into the Courts: Homosexual Fathers and Child Custody* 93 DICK. L. REV. 401, 403-05 (1989); Herek, *The Social Psychology of Homophobia: Toward' a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923 (1986)(suggesting methods to attack homophobia from psychological standpoint).

125. Bowers v. Hardwick, 478 U.S. 186 (1986) (Blackmun, J., dissenting) (upholding Georgia statute proscribing homosexual sodomy since there is no constitutional right to engage in such activity).

126. *Id.*

127. AMERICAN PSYCHIATRIC ASS'N, *supra* note 104, at 281-82, 380.

128. "The sex, gender identity, or sexual orientation of natural, or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases." Note, *Assessing Children's Best Interests*, *supra* note 11, at 852 & n.127.

Another argument against allowing homosexuals to become adoptive parents is founded upon the belief that homosexuality is learned, environmentally influenced, and chosen, rather than innate and immutable. If a child's parental role model openly acknowledges and acts upon a homosexual orientation, it is feared that the child will pattern himself after the parent and likewise adopt an 'unnatural' sexual preference for the same sex. A trial judge in *In re Marriage of Cabalquinto*[129] expressed this opinion as follows: " 'a child should be *led in the way* of heterosexual preference, not be tolerant of this thing [homosexuality]' and that 'it can[not] do the [child] any good to live in such an environment.' "[130] This argument assumes that a same sex orientation is undesirable and ignores the wealth of evidence that sexual orientation is a characteristic with which an individual is born and not one that is subject to modification.[131] Acceptance of this evidence by society and the courts as conclusive would necessarily assuage concerns that an adopted child would take on an unnatural orientation.

When a child's home environment is supportive, the child's inherent predilections, sexual or otherwise, should surface and develop naturally.[132] While the issue is debatable, the evidence that sexual orientation *is* innate is both relevant and persuasive, and it must be cited when making an argument that a parent's homosexual orientation will not interfere with a child's psychosexual maturation.

The attitude that homosexual individuals engage in objectionable conduct provides a third potential blockade to their attempts to adopt children. The fact that twenty-five states criminalize homosexual activity by sodomy statutes[133] is a testament to societal animosity toward

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129. 100 Wash. 2d 325, 669 P.2d 886 (1983).

130. *Id.* at 328, 669 P.2d at 888 (emphasis added). *See also* S v. S, 608 S.W.2d 64, 66 (Ky. 1980) (basing custody decision on psychologist's report that child's heterosexual identity might be endangered by placement with natural mother who was homosexual); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595-96 (1977) (homosexuality as chosen alternative to heterosexuality, especially for young people whose unformed sexual preferences develop partly on basis of models in society).

131. For a comprehensive survey of research on putative causes of a homosexual orientation, see Note, *Assessing Children's Best Interests*, *supra* note 11, at 882-83 & n.189, 192-96, 200. *See generally* M. RUSE, HOMOSEXUALITY (1988) (discussion of homosexuality citing diverse philosophies as to its causes); Rivera, *supra*, note 5, at 334, 369 (experts have proven that "children do not become gay because their parents are gay").

132. Rivera, *supra* note 5, at 348 (home with two caring adults, regardless of their genders, is best environment for raising mentally healthy children).

133. ALA. CODE § 13A-6-63 (1990); ARIZ. REV. STAT. ANN. § 13-1411 (1989); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (1989); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 26-2002 (1984); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. §§ 510.010(1), 510.100(1) (Baldwin 1990); LA. REV. STAT. ANN. § 14.89 (West 1986); MD. ANN. CODE art. 27, §§ 553-544 (1988); MICH. STAT. ANN. §

homosexuals. Perverted and abnormally frequent or obsessive sexual activity is often assumed to be a uniform manifestation of a homosexual orientation.[134] Additionally, the most serious and damaging accusation made against homosexuals is that they constitute the majority of pedophiles.[135] This accusation lacks any basis in fact. "[S]tudies of child molestation suggest that sexual molestation of children is much more likely to be performed by heterosexual rather than homosexual men."[136] "Any type of abusive sexual activity among homosexual men is rare, and homosexual men on the whole are not attracted to children on any sexual basis."[137]

The attitudes and accusations amount to a character crucifixion of a group of people sharing a common trait, but otherwise possessing distinctly individual likes and dislikes, faults and merits. Merely addressing such criticisms is offensive and should be unnecessary, since doing so only fuels the validity of the prejudice. Nevertheless, there are studies that address and refute these groundless assertions.[138] One such study found that "males whose behavior is predominantly homosexual actually have less frequent sexual contacts than heterosexual males"

28.355 (1968); MINN. STAT. § 609.293 (1973); MISS. CODE ANN. § 97-29-59 (1987); MO. REV. STAT. §§ 566.010(2), .090(1) (1991); N.C. GEN. STAT. § 14-177 (1990); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); 18 PA. CONS. STAT. § 3124 (1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-22-2 (1988); TEX. CODE ANN. § 21.06 (Vernon 1986); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (1988).

It is interesting to note the language used to describe the crime. Statutory references to the act of sodomy exhibit not only an animosity toward the act but also an implicit condemnation of those who participate in it. Examples of these statutory references are: (1) "infamous crime against nature," ARIZ. REV. STAT ANN. § 13-1411 (1989); IDAHO CODE § 18-6605 (1987); (2) "unnatural or perverted sexual practices," MD. ANN. CODE art. 27, § 554 (1988); (3) "deviate sexual intercourse," KY. REV. STAT. ANN. §§ 510.010(1), 510.100(1) (Baldwin 1990); and (4) "detestable and abominable crime against nature," OKLA. STAT. ANN. tit. 21, § 886 (West 1983).

If a state legislature views sodomy as a crime worthy of punishment, it logically follows that the language it uses to describe the crime will be derogatory. But, this does not change the fact that the references are somewhat startling, especially considering that sodomy is by no means an exclusively homosexual activity.

134. *See, e.g.*, Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969) (Judge Skelton writing for the majority asserted in a homosexual employment discrimination case that "[a]ny schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene."), *cert. denied*, 397 U.S. 1039 (1970).

135. S. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION AND INTERVENTION 30 (1987) (correcting the fallacy that "[h]omosexuals molest children").

136. Note, *Out of the Closest*, *supra* note 11, at 411.

137. *Id.*

138. HUMAN DEVELOPMENT SERVICE, NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 27-29 (1982); B. TAYLOR, PERSPECTIVES ON PEDOPHILIA xii (1981). Both materials present and discuss the finding that heterosexual parents commit the vast majority of incest crimes.

and "the notion that gay men are constantly on the sexual prowl . . . is a fiction."[139] These documented studies prove that prejudiced generalizations are invalid, and that each petitioner should be judged as an individual with a unique personal history.

Perhaps the most compelling argument with regard to a child's best interest is the risk of social stigmatization the child might suffer because the parent is homosexual. This concern cannot be ignored when making a life-altering decision for a child such as adoption. Studies are actually being done to prove that homosexual people make good parents;[140] "have similar sex-role behavior and attitudes toward ideal child behavior;"[141] do not exhibit any greater tendencies toward aberrant sexual behavior;[142] and are not afflicted with a mental disorder.[143] The existence of these studies attests to the reality that society as a whole has not accepted homosexuals and has yet to be convinced that homosexual individuals are normal. Can it then be said that putting a child in the care of an individual who is on the fringe of societal acceptance is in a child's best interest? *Roe v. Roe*[144] makes the valid point "that the conditions under which [a] child must live daily . . . impose an intolerable burden upon her by reason of the social condemnation attached to [those conditions], which will inevitably afflict her relationships with her peers and with the community at large."[145]

There is a perceptible anti-homosexual sentiment in this country that will not be quieted by a continued refusal to consider homosexual people as adoptive parents. It is a hostile cycle. A court denies a homosexual person the opportunity to adopt to spare the child possible social stigmatization. Through that denial, there results an implicit confirmation that the social stigmatization is real and warranted. In many of the nation's most difficult but worthwhile battles, individuals experienced pain before they could overcome the prejudice which held them back.[146] So, the pertinent question is, should a court ignore "the reality

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139. Note, *Out of the Closet supra* note 11, at 406; *see also* S. GOLDSTEIN, *supra* note 135, at 30 (The belief that homosexuals molest children is a fallacy. "The offender is not homosexual. Pedophilia must be viewed as a completely separate issue from gender and sexual preference.").

140. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986) (citing Kweskin & Cook, *supra* note 5, at 967.

141. *Id.* at 908.

142. *See supra* notes 138-139 and accompanying text.

143. *See supra* note 127 and accompanying text.

144. 228 Va. 722, 324 S.E.2d 691 (1985).

145. *Id.* at 728, 324 S.E.2d at 694.

146. A tradition of minority "political and social struggles" is "deeply rooted in American history." These minorities sought relief "in American equal protection jurisprudence." D'Emilio, *supra* note 2, at 915 & n.3. For a description of this tradition, see L. TRIBE, AMERICAN CONSTITU-

of private biases and the possible injury they might inflict"[147] and risk exposing a child to some pain in order to avoid giving private biases effect in the law? Using a "best interest of the child" evaluation, the answer is probably no.

But, some courts have thought otherwise. For example, in *M.P. v. S.P.*,[148] a New Jersey court that granted custody to a lesbian mother addressed the threat of social stigmatization:

> If [the lesbian mother] retains custody, it may be that[,] because the community is intolerant of her differences[,] these [children] may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, *better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.*[149]

The Alaska Supreme Court expressed a similar rationale in *S.N.E. v. R.L.B.*[150] when it stated, "[i]n marked contrast to the wealth of testimony that Mother is a lesbian, there is no suggestion that this has or is likely to affect the child adversely. . . . Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian."[151]

The fact that these cases which discount the social stigma argument are custody cases may reduce their effective application to adoption proceedings. Custody cases differ from adoption petitions because custody cases usually involve a strong, pre-existing bond or relationship between the homosexual parent and his/her children which would be detrimental to sever. Despite this difference, the reasoning employed in custody cases is still persuasive. Acceding to prejudices will give them credence, and will thwart the goal of the law to implement truth through justice. It remains a decision for the judiciary: is the threat of social stigmatization potent enough to warrant denying a homosexual the opportunity to adopt in order to preserve the best interest of the child? The conclusion a court reaches will emanate in part from the judge's own moral standards and personal beliefs.[152] Therefore, it is

147. Palmore v. Sidoti, 466 U.S. 429 (1984).
148. 169 N.J. Super. 425, 404 A.2d 1256 (1979).
149. *Id.* at 438, 404 A.2d at 1263 (emphasis added).
150. 699 P.2d 875 (Alaska 1985).
151. *Id.* at 879.
152. *See* H. CURRY & D. CLIFFORD, *supra* note 5, at 6:14. The judge will make a decision after hearing all sorts of negative and positive evidence and,

difficult to predict what the ultimate impact of the social stigma argument against homosexuals as adoptive parents will be.

A final imposing argument against allowing homosexuals to adopt was raised in the dissent of *Adoption of Charles B.* Justice Resnick noted that homosexual individuals are in a high risk group for contracting AIDS and asserted that placing a child in a home with an individual from the high risk group amounted to deliberate exposure of a child to a fatal disease.[153] In *Adoption of Charles B*, the dissent focused on the child's leukemia weakened immune system and pointed out the risk the court was taking by placing him in an environment where a possibility existed that the child might be exposed to HIV (a virus that mercilessly attacks the immune system) - a virus which the petitioner did not have.[154]

The dissent's contention exemplifies the dangerous ammunition with which anti-homosexual activists arm themselves by using the incidence of AIDS in the homosexual, male community. This casenote is not intended to provide a medical survey on AIDS and HIV. However, a few brief comments will put the dissent's argument into perspective.

> HIV is transmitted by direct contact of genital or rectal mucosa with infected semen or vaginal secretions, or by blood. . . . No evidence exists that the virus is transmitted in the air, by sneezing, shaking hands, by sharing a drinking glass, by insect bites, or by being close to or touching an AIDS sufferer or an HIV-infected person. . . . Studies of household contacts of AIDS patients demonstrate that . . . casual transmission of the virus does not occur.[155]

Reviewing the possible means of transmission, it is clear that homosexual people are not the only members of the population at risk.[156] The ways a homosexual person can protect oneself from contracting the

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in doing so, he will necessarily apply his own standards and prejudices. Some judges are teetotalers or are adamantly opposed to marijuana; others don't give heavy weight to old criminal convictions (unrelated to child welfare); some do; some will let a parent's poverty or politics influence them; many are biased against lesbians and gay men. Of course, there are some judges who are themselves lesbian or gay. So, don't over-generalize or jump to conclusions. Each judge is different and each case unique.

Id.

153. 50 Ohio St. 3d at 95-96, 552 N.E.2d at 891.

154. *Id.* at 95-96, 552 N.E. 2d at 890-91.

155. Volberding, *The AIDS Epidemic: Problems in Limiting Its Impact*, THE AIDS CHALLENGE: PREVENTION EDUCATION FOR YOUNG PEOPLE, 17 (1988).

156. While the majority of AIDS victims contracted HIV through homosexual or bisexual activity, the pressing issue today is the means of transmission. Hence, if the means can non-discriminatorily subject individuals to HIV exposure, everyone is at risk who fails to acknowledge prevention. For related statistics on routes of transmission, see Schwarcz & Rutherford, *Acquired Immunodeficiency Syndrome in Infants, Children and Adolescents*, THE AIDS CHALLENGE: PREVENTION EDUCATION FOR YOUNG PEOPLE, 65 (1988).

virus through intercourse are identical to those used by a heterosexual person.[157] "AIDS is a sexually transmitted illness that does not discriminate on the basis of sexual orientation."[158] A monogamous relationship, responsible use of condoms, and avoidance of sexual relations when genitalia is infected with an abrasion or sore are a few of the means of prevention by which all heterosexual and homosexual people should abide.[159] There is no evidence that homosexual people would tend to ignore these precautions any more than a heterosexual people would. It follows that a court should no sooner deny a homosexual person the right to adopt because he *might* contract AIDS than it would a heterosexual person.

It would not be impossible for a judiciary's personal prejudices against homosexuals to mask themselves as "concerns" for a child's best interest in an adoption proceeding. Furthermore, any of the above arguments could succeed in persuading an unbiased court that adoption by a homosexual individual would not be in a child's best interest. Therefore, it is the task of the petitioner to refute any unfounded arguments and to attack prejudice where it is most vulnerable — where it has no basis in fact — when the judiciary fails to do so.

D. Constitutional Considerations

Under a "best interest of the child" standard, any constitutional challenge to a denial of adoption rights based solely upon a petitioner's homosexuality may not be persuasive. If a decision appears to have been made in a child's best interest and legitimate evidence is offered to support that decision, it would seem that any equal protection claim to fair treatment by the homosexual individual would be inconsequential. In addition, since there has been a reluctance to accept homosexuals as constituting a suspect class,[160] it is unlikely that this route would prove fruitful for guarding against exclusions based on a petitioner's homosexuality.

However, sound arguments have been made for labeling homosexuals as a suspect class. Many of the criteria for qualifying as a suspect class are met with respect to homosexuals. The factors constituting a suspect class, as stated in *Watkins v. United States Army*,[161] are: (1) "whether the group at issue has suffered a history of purposeful

157. "[H]omosexuals have the capacity to prevent transmission." R. BERK, THE SOCIAL IMPACT OF AIDS IN THE U.S. 10 (1988).

158. P. DOUGLAS & L. PINSKY, THE ESSENTIAL AIDS FACT BOOK 33 (1987).

159. *Id.* at 34.

160. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (discussed *infra* notes 177, 178 and accompanying text).

161. 847 F.2d 1176 (6th Cir. 1988).

discrimination;"[162] (2) "whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious;"[163] and (3) "whether the group . . . lacks the political power necessary to obtain redress from the political branches of government."[164]

The first factor, history of purposeful discrimination, was succinctly treated by the *Watkins* court through references to other federal decisions admitting such discrimination against homosexuals.[165] The second factor, gross unfairness, was broken into the following three parts:

> (1) "whether the disadvantaged class is defined by a trait that frequently bears no relation to ability to perform or contribute to society;"
> (2) "whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes;" and
> (3) "whether the trait defining the class is immutable."[166]

Again, the *Watkins* court had no difficulty deciding that these factors were met by homosexuals, although it stumbled over the immutability of the trait requirement.[167] The court was unwilling to state that homosexuality was strictly immutable. Consequently, it lessened the stringency of the requirement to "traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[168] The court felt that homosexuality met this mitigated prong of the test.[169] The court also ruled that the third criterion, political powerlessness, was met.[170] The court reasoned that fear inherent in "coming out of the closet" could account for the absence of a notable political voice from the gay community.[171]

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162. *Id.* at 1345.
163. *Id.* at 1346.
164. *Id.* at 1348.
165. *See* Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984) ("homosexuals have historically been the object of pernicious and sustained hostility"), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1369 ("Lesbians and gays have been the object of some of the deepest prejudice and hatred in American society."). *But see* D'Emilio, *supra* note 2, at 920 (demonstrating a convincing history of discrimination might not be feasible since, historically, the starting point of notable discrimination against gays and lesbians was the 1940s; prior to World War II, "(h)omosexuality was a far less visible phenomenon" and "[s]ociety did not so clearly categorize on the basis of sexual orientation").
166. *Watkins*, 847 F.2d at 1346.
167. *Id.*
168. *Id.* at 1347.
169. *Id.*
170. *Id.* at 1348.
171. *Id.* at 1348.

The opinion of the Ninth Circuit Court of Appeals in *Watkins* is certainly a positive step for homosexuals seeking equal treatment since that circuit is now subject to its decision. An opposing viewpoint, however, is expressed in other judicial arenas. For example, in *Ben-Shalom v. Marsh*,[172] the Seventh Circuit Court of Appeals found justification for denying an equal protection request for heightened scrutiny with respect to homosexuals, citing as its authority *Padula v. Webster*[173] which foreclosed "any finding that homosexuals are a suspect class."[174] In addition, the New Hampshire Supreme Court upheld the constitutionality of its statute which explicitly denies homosexuals the right to adopt.[175]

Whether homosexuals constitute a suspect class is debatable. Even so, in the area of adoption, a constitutional challenge would have an insubstantial effect if a court found that a petitioner's homosexual orientation would create an environment not in a child's best interest.

V. CONCLUSION

The most judicious method for determining a homosexual's adoptive right is a case by case analysis where the "best interest of the child" test governs, and the legal hypothesis that homosexuals are not eligible to adopt as a matter of law is rejected. Such was the case in *In re Adoption of Charles B*,[176] where the Ohio Supreme Court evinced a very open-minded and equitable approach to the volatile issue of a homosexual's opportunity to adopt. Additional factors such as the primary goal of placement over detailed matching, the refutations to arguments raised by opponents to homosexual adoption, and equal protection considerations might also be part of a court's analysis of a potential adoptive placement. In all cases, homosexual adults trying to

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172. 881 F.2d 454 (7th Cir. 1989).

173. 822 F.2d 97 (D.C. Cir. 1987).

174. *Ben-Shalom*, 881 F.2d at 465 (citing *Padula*, 822 F.2d at 97 (FBI's refusal to hire lesbian applicant upheld)). The *Padula* court stated that homosexuals, defined as individuals who engage in homosexual conduct, do not constitute a suspect class because of the Constitutional barrier that there is no fundamental privacy right to engage in homosexual conduct. *Padula*, 822 F.2d at 102-03. Therefore, laws affecting homosexuals should be subjected to rational basis scrutiny rather than strict scrutiny. *Id.* at 104. Since the applicability of strict scrutiny has been foreclosed, the court declined to reopen the issue by acknowledging a suspect class. *Id.* at 102 (denial of privacy right to engage in homosexual conduct is insurmountable barrier to suspect class claim).

175. Opinion of the Justices, 129 N.H. 290, 525 A.2d 1095 (1987) (rejecting arguments that House Bill 70, now N.H. REV. STAT. ANN. § 170-B:4 (Supp. 1989), violated: (1) the United States and New Hampshire equal protection clauses, suspect class argument inclusive; (2) the United States and New Hampshire due process clauses; (3) the right to privacy derived from the United States and New Hampshire Constitutions; and (4) the freedom of association from the United States and New Hampshire Constitutions).

176. 50 Ohio St. 3d 88, 552 N.E.2d 884 (1990).

adopt will find the best indication of their jurisdiction's attitude in the case law because it is within the judiciary's discretion to grant or deny an adoption. Additionally, it is most important for an individual to influence the court regarding his or her unique credentials to parent.

The ultimate goal of government is to expand freedom as far as American democracy can bear. As President Abraham Lincoln said with respect to the implementation of "equality": "[The signers of the Declaration of Independence] meant to set up a standard maxim [equality] for free society . . . and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere."[177] Equality of treatment and augmentation of happiness should extend into every aspect of living, and the right to be evaluated as a prospective adoptive parent based on one's individual merits is no exception.[178]

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177. A. LINCOLN, ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT 91-2 (1964).

178. Barbara Giddings, former editor of a Lesbian Review, stated: "what the homosexual wants . . . is acceptance of homosexuality as a way of life fully on par with heterosexuality, acceptance of the homosexual as a person on a par with the heterosexual." G. KELLY, THE POLITICAL STRUGGLE OF ACTIVE HOMOSEXUALS TO GAIN SOCIAL ACCEPTANCE 26 (1975). *See generally The Legal System and Homosexuality — Approbation, Accomodation, or Reprobation?*, 10 U. DAYTON L. REV. 445 (1985) (symposium discussing the history of homosexuals and society, laws in the mid-eighties, same-sex marriages, standards of review, homosexual teachers, homosexual aliens, civil liberties, employment discrimination, autonomy, laws and ordinances, and Constitutional issues).