CURRENT DEVELOPMENTS IN THE LAW

Beginning with this issue, the Public Interest Law Journal will feature summaries of cases from areas of public interest law which have undergone significant developments during the past year. The scope of Current Developments encompasses federal and state courts of all levels, and will periodically feature federal and state legislation as well.

A Survey of Recent Cases Affecting the Rights of Gays, Lesbians and Bisexuals

This section is not intended to be a comprehensive collection of cases affecting the rights of gays, lesbians and bisexuals, but rather a selection of issues currently being litigated, and how courts are resolving them.

Evans v. Romer, 854 P.2d 1270 (Colo. July 19, 1993), *cert. denied, Romer v. Evans*, 62 U.S.L.W. 16 d55 (U.S. Nov. 2, 1993).* VOTER-INITIATED AMENDMENT TO COLORADO CONSTITUTION PROHIBITING STATE LEGISLATURE FROM GRANTING PROTECTED STATUS TO GAYS, LESBIANS AND BISEXUALS VIOLATES THEIR FUNDAMENTAL RIGHT TO PARTICIPATE ON AN EQUAL BASIS IN THE POLITICAL PROCESS, AND MUST SURVIVE STRICT SCRUTINY TO BE VALID.

I. INTRODUCTION

During the 1992 election campaign, the subject of gay and lesbian equality entered the mainstream of American political discourse for the first time in history. A small but very significant part of this debate took place in Colorado,[1] where residents were embroiled in an intense and divisive campaign

---

* As this issue goes to print, trial begins in a Colorado district court challenging the constitutionality of Amendment 2. Dirk Johnson, *Trial is Set on Colorado Law Against Gay Rights*, N.Y. TIMES, Oct. 12, 1993, at A21. The injunction preventing Amendment 2 from taking effect continues. Plaintiffs will argue that Amendment 2 violates the Equal Protection Clause of the U.S. Constitution because it serves no compelling state interest. The State will defend Amendment 2 by arguing that it serves the compelling state interest of promoting "family values," and also that gay rights laws dilute civil rights measures for other minorities. *Id. See also, Supreme Court Refuses to Intervene in Colorado Battle over Gay Rights*, U.S.L.W. (Daily Ed. Nov. 2, 1993). [*-Ed.*]

[1] Voters in other localities, such as Oregon, Tampa, Florida and Portland, Maine also considered anti-gay rights measures, which would repeal local gay rights ordinances banning discrimination on the basis of sexual orientation in housing and employment. For example, Oregon's initiative, known as Measure 9, was more draconian than any of the other ballot initiatives. In addition to repealing local ordinances, it

over an anti-gay ballot initiative known as Amendment 2.[2] Supporters of the proposed amendment contended that homosexuals were "an abomination," morally repugnant, and as such, should not be entitled to "special rights."[3] Opponents of Amendment 2 argued that gays and lesbians sought a basic civil right - the right to be free from discrimination.

On election day, however, the supporters of Amendment 2 prevailed. The voters of Colorado passed the initiative by a margin of 53.4% to 46.6%.[4] In one swift blow Amendment 2 repealed gay rights ordinances in Denver, Aspen, and Boulder; these ordinances had protected gays, lesbians and bisexuals from discrimination in housing, employment and public accommodations. Moreover, Amendment 2 prohibited the state and its political subdivisions from enacting any laws banning discrimination on the basis of sexual orientation. Colorado, in other words, had legalized discrimination against gays, lesbians and bisexuals.

---

also sought to repeal the governor's executive order banning discrimination in employment in state government. Furthermore, it explicitly declared that homosexuality was "abnormal, wrong, unnatural and perverse and . . . to be discouraged and avoided." No public property or money could be used to "encourage" or "facilitate" homosexuality. Consequently, civil libertarians feared such diverse consequences as the denial of liquor licenses to operators of gay bars, or the termination of gays and lesbians employed by the state. As it happened, the initiatives in Oregon and Portland, Maine failed, but Tampa's succeeded. *See* Donna Minkowitz, *Outlawing Gays*, THE NATION, Oct. 19, 1992, at 420.

[2] An "initiative" is either a statute or constitutional amendment proposed by the electorate and placed on the ballot once the requisite number of signatures are collected. It differs from a "referendum" which originates with the legislature. Colorado's initiative, known as Amendment 2, provided:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its political branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination.

Evans v. Romer, 854 P.2d 1270, 1272 (Colo. 1993) (quoting Amendment 2).

[3] The most vocal proponents of Amendment 2 were Colorado for Family Values, an affiliate of Reverend Lou Sheldon's California-based Traditional Values Coalition, and Reverend Pat Robertson's Christian Coalition, which boasts a membership of 350,000 evangelical Christians and conservative Catholics. Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. TIMES, Nov. 8, 1992, at A38; Conor O'Clery, *All-Out Effort By Religious Right to Re-Elect Bush*, IRISH TIMES, Nov. 2, 1992, at 6; Minkowitz, *supra* note 1.

[4] *Evans*, 854 P.2d at 1272. The vote count was 813,966 to 710,151.

II. PROCEDURAL HISTORY

On November 12, 1993, Evans and fourteen other plaintiffs[5] filed suit in Denver District Court to enjoin the enforcement of Amendment 2. After the court denied their plea for an expedited hearing on the merits, plaintiffs requested a preliminary injunction.[6] In their motion, plaintiffs contended that Amendment 2 violated the First and Fourteenth Amendments of the United States Constitution. Plaintiffs claimed it violated the First Amendment by depriving them of any means by which to seek redress against discrimination, and by permitting discrimination against gays, lesbians and bisexuals on the basis of their inherently expressive conduct.[7] It violated the Fourteenth Amendment by failing to rationally advance a legitimate governmental interest and by placing unique burdens on plaintiffs' ability to participate equally in the political process.[8] The district court agreed with plaintiffs, and enjoined enforcement of Amendment 2. It reasoned that Amendment 2 burdened plaintiffs' fundamental right "not to have the State endorse and give effect to private biases,"[9] and accordingly, that the amendment would not survive strict scrutiny review at a trial on the merits.

The defendants appealed, arguing that the district court "did not base its decision on any direct precedent," but rather "extrapolated from several federal court decisions" the right identified and allegedly infringed by Amendment 2.[10] On appeal, plaintiffs advanced the same arguments they had advanced before the trial court, but they urged the Supreme Court of Colorado not to base its decision on the precise right identified and relied on by the district court.[11] Instead, they argued that the right identified by the district court "is best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation."[12] Because the appeal raised questions of law, the court was not constrained by deference to the district court's judgment. Instead, it reviewed *de novo* the question of whether Amendment 2 violated plaintiffs' constitutional rights.

On July 19, 1993, the Supreme Court of Colorado decided in plaintiffs' favor. In *Evans v. Romer*,[13] it upheld a preliminary injunction against Amendment 2's enforcement. In establishing the standard of review for a trial on the

---

[5] Evans was joined by eight other individual plaintiffs, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen. *Evans*, 854 P.2d at 1272.

[6] *Id.* at 1273.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 1274 & n.5 (quoting the district court relying on Palmore v. Sidoti, 466 U.S. 429 (1984)).

[10] *Id.* at 1274.

[11] *Id.*

[12] *Id.*

[13] 854 P.2d 1270 (Colo. 1993), *cert. denied, Romer v. Evans*, 62 U.S.L.W. 16 d55 (U.S. Nov. 2, 1993).

merits, the court declared that Amendment 2 violated gays' and lesbians' fundamental right to participate equally in the political process.[14] Accordingly, the amendment would survive only if the state could proffer a compelling interest and show that the measure was narrowly drawn to achieve that interest in the least restrictive manner possible.[15] In so holding, the Supreme Court of Colorado offered a novel and coherent explanation of why this amendment, and others beyond its borders, are unconstitutional.[16]

III. ANALYSIS: PRECEDENT

As a preliminary matter, the court determined which standard of review to apply, and whether under that standard Amendment 2 could be shown, "to a reasonable degree of probability,"[17] to violate the Equal Protection Clause. The court recognized that gays, lesbians and bisexuals did not constitute a suspect or quasi-suspect class.[18] As such, plaintiffs could not invoke strict scrutiny or intermediate review of Amendment 2. Nevertheless, the court stressed that the Equal Protection Clause "applies to all citizens, and not simply those who are members of traditionally 'suspect' classes."[19]

Ordinarily, a law affecting gays and lesbians as a class is subject to rational basis review. But because the plaintiffs here alleged that Amendment 2 abrogated a fundamental right, the court embarked on an analysis which sounded in equal protection and due process. This analytical construct traces its antecedents to *Skinner v. Oklahoma*.[20] If the court determined that the plaintiffs' right to participate equally in the political process was "fundamental," Amendment 2 would become subject to strict scrutiny review and the state would probably fail to meet its burden.

The court began its analysis with a reference to John Hart Ely's *Democracy and Distrust*. It proclaimed, "The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time."[21] Nearly half of all constitutional amendments adopted after 1791, it observed, evidenced a concern with voting rights and election procedures.[22] The court also referred to a stream of precedents in which the United States Supreme Court had zealously protected a citizen's ability to participate in the political process. Of all these

---

[14] *Evans*, 854 P.2d at 1285.

[15] *Id.* at 1275.

[16] Steve Friedman, *Colorado's Amendment 2 Blocked*, A.B.A. J., Oct. 1993, at 48-49 (quoting Ruth Harlow, an attorney with the ACLU's Lesbian and Gay Rights Project).

[17] *Evans*, 854 P.2d at 1276.

[18] *Id.* at 1275 (citing High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990)).

[19] *Id.* at 1275.

[20] 316 U.S. 535 (1942) (not cited in *Evans*).

[21] *Evans*, 854 P.2d at 1276.

[22] *Id.* at 1276 n.8.

cases, however, the Supreme Court of Colorado placed its primary reliance on *Hunter v. Erickson.*[23]

Early on, and without explicit attribution, the court traced *Hunter*'s footsteps, drawing on many of the same cases relied on by the United States Supreme Court in that decision. For example, both *Evans* and *Hunter* cite *Reynolds v. Sims,*[24] a reapportionment case. *Reynolds* had concluded that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, an alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[25] The court also cited cases involving minority party rights and direct restrictions on the franchise, specifically *Kramer v. Union Free School District No. 15*[26] which declared, "[s]tatutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in governmental affairs which substantially affect their lives."[27] Although it admitted that these cases were not dispositive or directly controlling of its decision,[28] the *Evans* court distilled from them a common principle: "laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest."[29]

The court then turned its attention to *Hunter v. Erickson, Washington v. Seattle School District No. 1,*[30] and *Gordon v. Lance,*[31] drawing on *Gordon* and *Seattle School District* to demonstrate the continued vitality of *Hunter.* Each of these cases, the court noted, involved legislation which "prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters."[32]

In *Hunter v. Erickson,* the United States Supreme Court invalidated a charter amendment enacted by the voters of Akron, Ohio. The charter amendment required that fair housing ordinances be approved by the electorate, whereas all other ordinances could be enacted by city council alone.[33] The Court held that the charter amendment "place[d] special burdens on racial minorities within the governmental process."[34] Akron had segregated from the normal political process legislation that would benefit these groups.

While the Supreme Court of Colorado acknowledged that *Hunter* involved

---

[23] 393 U.S. 385 (1969).

[24] 377 U.S. 533 (1964).

[25] *Evans,* 854 P.2d at 1277 (citing Reynolds v. Sims, 377 U.S. at 562).

[26] 395 U.S. 621 (1969).

[27] *Evans,* 854 P.2d at 1277 (citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. at 626-27).

[28] *Id.* at 1278.

[29] *Id.* at 1279.

[30] 458 U.S. 457 (1982).

[31] 403 U.S. 1 (1971).

[32] *Evans,* 854 P.2d at 1279.

[33] *Id.* at 1279 (citing *Hunter,* 393 U.S. 385).

[34] *Evans,* 854 P.2d at 1279 & n.14 (quoting *Hunter,* 393 U.S. at 391).

racial, and therefore suspect, classifications, it asserted that *Hunter* "speaks to concerns which are broader than the repugnancy of racial discrimination alone."[35] In support of this answer, the court cited a passage from *Hunter* in which Justice White, writing for the majority, "concluded that Akron could 'no more disadvantage *any particular group* by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.' "[36] More significantly, the Supreme Court of Colorado observed that *Hunter* "did not rely on any precedent dealing with racial minorities in the context of voting but instead, cited *Reynolds v. Sims* and *Avery v. Midland County*, neither of which had anything to do with discrimination against racial or any other traditionally suspect class of persons."[37] *Reynolds*, said the Court, concerned "participatory effectiveness, i.e., the right to have one's vote be as meaningful as the votes of others."[38]

Before leaving *Hunter*, the Supreme Court of Colorado commented on Justice Harlan's concurrence, which offered an alternative rationale for striking down Akron's charter amendment. Harlan stated that the charter amendment failed "to allocate governmental power on the basis of any general [neutral] principle."[39] Indeed, its purpose was to make it "more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest."[40]

According to the *Evans* court, *Washington v. Seattle School District No. 1* "present[ed] another situation in which an issue important to a minority group was removed from consideration via the normal political process."[41] There, the Supreme Court invalidated an initiative "which attempted to prohibit local school districts from utilizing mandatory busing as a means of achieving desegregation."[42] In doing so, the Court in *Washington* relied upon both the majority and concurring opinions in *Hunter*. Like the Akron charter amendment at issue in *Hunter*, the initiative in *Washington* lacked a neutral principle by which to guide the allocation of governmental power.[43] Indeed, *Wash-*

---

[35] *Id.* at 1279.

[36] *Id.* (emphasis added) (quoting *Hunter*, 393 U.S. at 393).

[37] *Id.* at 1279-80 (citing Reynolds v. Sims, 377 U.S. 533 (1964); Avery v. Midland County, 390 U.S. 474 (1968)).

[38] *Id.* at 1278.

[39] *Id.* at 1281 (quoting *Hunter*, 393 U.S. at 395) (Harlan, J., concurring)).

[40] *Id.* at 1281 (alteration in original). The rationale advanced in Harlan's concurrence could also be labeled "impermissible purpose review." This standard of review is closely identified with United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), which invalidated a statute intended to prevent "hippies" from participating in the foodstamp program. *Moreno* held that the electorate's bare desire "to harm a politically unpopular group cannot constitute a *legitimate* government interest." *Id.* at 534. Hippies, of course, were not a suspect class.

[41] *Evans*, 854 P.2d at 1280.

[42] *Id.*

[43] *Id.* at 1280-81 (citing *Washington*, 458 U.S. at 469, 470).

ington went so far as to characterize this as the " 'simple but central principle' underlying the majority opinion in *Hunter*."[44] The *Evans* court interpreted *Washington* as holding that the "Fourteenth Amendment reaches political structures that 'distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.'"[45]

The last case on which the *Evans* court focused was *Gordon v. Lance,* in which the Supreme Court "upheld a West Virginia statute that required approval by a 60% majority of any proposed increase in bond indebtedness or state tax rates."[46] According to the Supreme Court, *Gordon* could be distinguished from *Hunter* because the statute in *Gordon* did not disadvantage any "independently identifiable group."[47] It merely disadvantaged a group "created by the statute itself."[48] The Supreme Court of Colorado reiterated the constitutional standard articulated in *Gordon:* "We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause."[49]

In closing its analysis on the standard of review, the Supreme Court of Colorado concluded:

> [T]he Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and . . . any legislation or state constitutional amendment which infringes on this right by "fencing out" an independently identifiable class of persons must be subject to strict judicial scrutiny.[50]

The court rejected the defendants' contention that *Hunter* and *Washington* applied only to racial minorities and other suspect classifications. The court dismissed the defendants' reliance on *James v. Valtiera.*[51] In that case, the Supreme Court upheld a mandatory referendum procedure which arguably disadvantaged the poor, an "identifiable" group. The Colorado court grudgingly admitted that "[i]n reaching this conclusion, the [Supreme] Court declined to 'extend' *Hunter* to a provision which was not 'aimed at a racial

---

[44] *Id.* at 1280 (quoting *Washington*, 458 U.S. at 469).

[45] *Id.* (quoting *Washington*, 458 U.S. at 467).

[46] *Id.* at 1280 (citing Gordon v. Lance, 403 U.S. 1 (1971)).

[47] *Id.* at 1282 (citing *Gordon,* 403 U.S. at 5).

[48] *Id.* at 1282. Later, the court acknowledged that various amendments to the Colorado Constitution "create some barriers to those who might seek governmental action in conflict with [its] provisions." *Id.* at 1284. The court claimed that these barriers did not burden any "independently identifiable group." *Id.* However, one could argue that Article XVIII, Section 9, which permitted gaming only in Central City, Blackhawk, and Cripple Creek, burdened an "independently identifiable group": hunters. The court never defined the term "independently identifiable group," but perhaps it could best be understood as "independently identifiable [status] group."

[49] *Id.* at 1282 (quoting *Gordon,* 403 U.S. at 7).

[50] *Id.* at 1282.

[51] 402 U.S. 137 (1971).

minority."'[52] Nevertheless, the court buried discussion of this case in a footnote.[53] Throughout its opinion, the court had rejected race as the controlling issue in either *Washington* or *Hunter*. On the contrary, "it would be erroneous to conclude that the 'neutral principle' precept is applicable only in the context of racial discrimination . . . . [S]uch a reading . . . would be antithetical to the neutral principle itself, for the requirement of neutrality would in fact only be a requirement of nondiscrimination with respect to racial minorities."[54] The court reasoned, "if the cases referred to above were decided solely on the basis of the 'suspect' nature of the classes involved, there would have been no need for the [Supreme] Court to consistently express the paramount importance of political participation."[55] The Supreme Court could have summarily decided those cases by noting that the legislation at issue impermissibly drew upon inherently suspect classifications.

IV. Analysis: Application of Law to the Facts

At this juncture, the court applied strict scrutiny review to the facts of Amendment 2 — the amendment's purpose, effect, and context.[56] It noted that the immediate purpose of Amendment 2 was to repeal existing laws and regulations that prohibited discrimination on the basis of sexual orientation.[57] It also operated as a bar on any future governmental law or regulation that sought to ban such discrimination.[58] In singling out one form of discrimination and removing the means for its redress from normal political processes, Amendment 2 uniquely burdened gay men, lesbians and bisexuals.[59] Unless they secured the consent of a majority of the electorate via constitutional amendment,[60] they would not be able to pass protective legislation. Amendment 2 denied them an "effective voice in the governmental affairs which substantially affect their lives."[61] In doing so, it violated their right to participate

---

[52] *Evans*, 854 P.2d at 1282 (citing James v. Valtierra, 402 U.S. 137, 141 (1971)).

[53] *Id.* at 1282 n.21.

[54] *Id.* at 1281. The court cited Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 (Ct. App. 1991) (invalidating a ballot initiative "whereunder persons seeking protective legislation against discrimination based on sexual orientation or AIDS must attempt to persuade a majority of the voters that such an ordinance is desirable"), another case which had interpreted federal precedent in the same manner as the *Evans* court. *Evans*, 854 P.2d at 1281 n.18.

[55] *Evans*, 854 P.2d at 1283.

[56] *Id.* at 1284.

[57] *Id.*

[58] *Id.* at 1285.

[59] *Id.*

[60] *Id.* The court here made a questionable assertion. It said that gays, and gays alone, must amend the constitution. *Id.* Whether gays and lesbians constitute 1% or 10% of the population, they could not be so politically insulated since they were able to build upon their base and capture 46.6% of the vote.

[61] *Id.* at 1285 (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627

equally in the political process.[62]

The court rejected the defendants' assertion that "plaintiffs continue to have the ability to participate fully" in the political process, although they do not have a right to "successful" participation.[63] Unlike other groups, whose success or failure to achieve desired legislation depends on a tally of votes, gays and lesbians were prevented from ever submitting legislation to the electorate for a vote. In closing, the court proclaimed, "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[64]

V. THE DISSENT

The lone dissenting opinion disagreed with the holdings of both the district court and the Supreme Court of Colorado. Its opinion can be reduced to three principal arguments. First, the dissent invoked *Bowers v. Hardwick*.[65] Citing several treatises, the dissent recharacterized the majority's fundamental rights analysis as substantive due process review. In *Bowers*, the Supreme Court expressed disdain for discovering "new" fundamental rights in the Constitution,[66] especially as applied to gays and lesbians. Second, gays and lesbians, although an identifiable group, were neither a suspect nor a quasi-suspect class; as such, they were not entitled to strict scrutiny review.[67] The Supreme Court in *Bowers* also upheld Georgia's proscription on sodomy even though it criminalized behavior that defined them as a class.[68]

Third, the cases on which the majority relied should properly be construed as cases involving race, not political participation.[69] In support, the dissent discussed the Supreme Court's decision in *James v. Valtierra*.[70] In that case, the poor, who constituted an identifiable group, advanced the rationale of *Hunter v. Erikson*[71] to argue that a mandatory referendum procedure denied them equal participation in the political process. The Supreme Court refused to extend the rationale of *Hunter* to non-suspect groups, and in so holding, revealed that the controlling issue in *Hunter* was race, not political participation. Here, the dissent argued, a state court declared as a matter of federal constitutional law that Amendment 2 violated a non-suspect group's right to participate equally in the political process. In so doing, the Supreme Court of

---

(1969)).

[62] *Id.*

[63] *Id.* at 1285 n.28.

[64] *Id.* at 1286 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (alteration in original)).

[65] 478 U.S. 186 (1986). *See Evans*, 854 P.2d at 1287, 1291-92.

[66] *Evans*, 854 P.2d at 1292.

[67] *Id.* at 1287-88 n.3.

[68] *Id.* at 1287 n.3.

[69] *Id.* at 1296-1300.

[70] *Id.* (discussion of James v. Valtiera, 402 U.S. 137 (1971)).

[71] 478 U.S. 186 (1986).

Colorado did what the U.S. Supreme Court had specifically refrained from doing. Therefore, according to the dissent, the court's decision in *Evans* was erroneous and lacked legitimacy.

VI. CONCLUSION

In the aftermath of Amendment 2's passage, the National Gay and Lesbian Task Force predicted that the "Religious Right"[72] would attempt to export Colorado-style initiatives to other states.[73] Indeed, as many as 12 states in 1994 anticipate anti-gay ballot initiatives.[74] In light of Congressional opposition to lifting the ban on gays in the military and the frosty reception accorded the 1993 Gay and Lesbian March on Washington, D.C., Amendment 2's success has prompted the gay rights movement to reevaluate its political strategy.[75] In the meantime, they have placed their hope in the courts.

Brendan F. Crowe

Wisconsin v. Mitchell, 113 S. Ct. 2194 (June 11, 1993). PENALTY ENHANCING STATUTE FOR BIAS-MOTIVATED CRIMES DOES NOT VIOLATE THE FIRST AMENDMENT.

I. INTRODUCTION

Many states have passed bias crime or bias speech statutes which increase penalties where crimes are bias-motivated or punish various forms of hate speech, such as cross burning.[1] Most of the case law addressing these statutes has arisen in the context of a criminal defendant challenging the constitutionality of the statute on First Amendment grounds. To date, these cases have

---

[72] *See* O'Clery, *supra* note 3.

[73] Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. TIMES, Nov. 8, 1992, at A38.

[74] Those states include Arizona, California, Florida, Idaho, Michigan, Missouri, Maine, Oregon, Ohio, and Washington. Brad Knickerbocker, *Spotlight on Gay Rights Intensifies Across Nation*, CHRISTIAN SCIENCE MONITOR, Sept. 28, 1993, at 2. *See also*, Chris Cornog, *Fight the Right*, NEW ENG. PRIDE GUIDE 1993; John Gallagher, *Bracing for Battle*, ADVOC. (Summer 1993); Minkowitz, *supra* note 1.

[75] For example, the failure to lift the ban does not bode well for passage of a federal gay and lesbian civil rights law. On the other hand, it must confront the Religious Right, which has spearheaded anti-gay rights initiatives in numerous states and cities. J. Jennings Moss, *Gay-rights Movement Regrouping, Activist Says*, WASH. TIMES, Sept. 8, 1993 at A3; Donna Minkowitz, *Why Is This Year Different from All Other Years?* NEW ENG. PRIDE GUIDE 1993, at 10.

[1] *See, e.g.*, Washington v. Talley, 858 P.2d 217, 219 (Wash. 1993) (citing HATE CRIMES STATUTES: A STATUS REPORT (Anti Defamation League Legal Affairs Department, Civil Rights Division, 1991)).

involved defendants accused of committing a racially motivated crime, but they are significant to gay rights because many of the statutes challenged also penalize crime or speech directed against a victim based on sexual orientation. Development in the case law upholding or invalidating these statutes therefore has important consequences for states' ability to protect the public from bias-motivated violence against homosexuals.

Wisconsin v. Mitchell affirmed the validity of a penalty-enhancing statute which increases the maximum sentence for a crime where the defendant "intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, sex, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property."[2]

II. BACKGROUND

On October 7, 1989, a group of young black males, including Mitchell, the respondent, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the film *Mississippi Burning*, in which a white man beat a young black male who was praying. Mitchell asked the group if they felt "hyped up to move on some white people."[3] Shortly thereafter, a fourteen-year-old white male passed by the apartment complex. Mitchell asked the group, "You all want to fuck somebody up? There goes a white boy; go get him."[4] Mitchell pointed to the soon-to-be victim and counted to three. The group ran towards the boy, beat him unconscious, and stole his sneakers.

A jury convicted Todd Mitchell of aggravated battery, a felony carrying a maximum sentence of two years' imprisonment. But the jury also found that Mitchell had intentionally selected his victim because of his race, so the maximum sentence for Mitchell's offense was increased to seven years under the Wisconsin bias-crimes statute.[5] This statute increases the penalties for all crimes if the perpetrator intentionally selects the victim or targeted property "because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person or owner or occupant of that property."[6]

Mitchell argued that the penalty enhancement provision of the Wisconsin statute was unconstitutional.[7] Both the trial court and Wisconsin's intermedi-

---

[2] WIS. STAT. § 939.645(1)(b) (1989-90). Note that section 939.645 was amended in 1992, but these amendments were not at issue in this case.

[3] Wisconsin v. Mitchell, 113 S. Ct. 2194, 2196 (1993).

[4] *Id.*

[5] WIS. STAT. § 939.645 (1989-1990).

[6] WIS. STAT. § 939.645(1)(b) (1989-1990).

[7] *Mitchell*, 113 S. Ct. at 2197. Respondent Mitchell argued that the statue violated the First Amendment and the Fourteenth Amendment Equal Protection Clause, and that the statute was void for vagueness. *Id.* at 2198 n.2. The Supreme Court did not reach the latter two arguments because they were not addressed by the Wisconsin Supreme Court.

ate appellate court rejected this argument.[8] On appeal, however, the Wisconsin Supreme Court ruled that the sentencing enhancement provision violated the First Amendment.[9]

The Wisconsin Supreme Court's decision relied on the Supreme Court's controversial decision of *R.A.V. v. City of St. Paul*,[10] which invalidated a St. Paul ordinance prohibiting bias-speech.[11] The St. Paul ordinance had been upheld by the state court because it was construed to be limited to reaching unprotected "fighting words."[12] In an opinion written by Justice Scalia, the Court held that if the state wants to punish fighting words, the regulation must be content-neutral. But while a majority of the Court concurred in the *R.A.V.* judgment, Justices White, Blackmun, and Stevens each wrote separate opinions conflicting with Scalia's, leaving the validity of bias speech and bias crime laws unsettled.

III. ANALYSIS

Mitchell argued before the Court that the Wisconsin statute punishes bigoted thought and not conduct.[13] The Court determined that this argument implied that the perpetrator's choice of victim was a constitutionally protected means of expression. The Court focused on the violence of the assault, rather than the words preceding it, and concluded that violence is not a constitutionally protected means of expression.[14]

Mitchell argued further that the Wisconsin penalty-enhancement statute was invalid because it punished the defendant's discriminatory motive, or reason for acting. The Court compared the role of motive under the Wisconsin statute with the role of motive under other state and federal anti-discrimination statutes that have formerly been upheld against constitutional challenge, and decided the statute was a permissible regulation of conduct.[15]

---

[8] State v. Mitchell, 473 N.W.2d 1 (Wis. Ct. App. 1991).

[9] State v. Mitchell, 485 N.W.2d 807 (Wis. 1992).

[10] 112 S. Ct. 2538 (1992).

[11] R.A.V. was charged under St. Paul's Bias Motivated Crime Ordinance, which prohibits the display of a burning cross, swastika, or other symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. State v. Mitchell, 485 N.W.2d 8807, 814-15 (Wis. 1992) (discussing *R.A.V.*, 112 S. Ct. 2583 (1992) and ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

[12] State v. Mitchell, 485 N.W.2d 807, 814-15 (Wis. 1992) (discussing *R.A.V.*, 112 S. Ct. 2538).

[13] *Mitchell*, 113 S. Ct. at 2198.

[14] *Id.* at 2199 (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

[15] *Id.* at 2199-2201. The Court cited Title VII, 42 U.S.C. § 2000e-(2)(a)(1) (1993), among others, as a similar motive-punishing statute. *Id.* at 2200. Title VII provides that it shall be unlawful for an employer to discriminate against an employee "because of such individuals' race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-

Furthermore, the Court explained that sentencing judges have traditionally considered the defendant's motive for committing the offense when setting the defendant's sentence.[16] In *Barclay v. Florida*,[17] the Court held that it was permissible for the sentencing judge to consider the defendant's racial animus towards his victim in determining whether the defendant should be sentenced to death.

Mitchell argued that the Wisconsin statute was overbroad because evidence of the defendant's prior speech or associations could be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the statute chilled free expression of bias because it subjected persons to enhanced sentences based on any earlier expressions of bias. The Court dismissed this argument as speculative, and unsupported by precedent. The Court explained that the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.[18]

The Court distinguished *R.A.V. v. City of St. Paul*, on which the Wisconsin Supreme Court had relied, from the Wisconsin case. It explained that the St. Paul regulation in *R.A.V.* was explicitly directed at expression, whereas the Wisconsin statute is directed at unprotected conduct.[19]

The Court acknowledged the state's interests in deterring bias related incidents because the state had found that bias related conduct was more likely to inflict greater individual and societal harm. According to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict emotional harms on their victims, and incite community unrest.[20]

IV. CONCLUSION

Wisconsin v. Mitchell limits the Court's prior holding in *R.A.V.*; the decision strongly bolsters the argument for the validity of bias-crime laws, but refrains from addressing the constitutionality of bias-speech laws. The Court's decision relies on the distinction between regulating speech and conduct, and suggests that penalty-enhancing statutes, properly directed against the conduct of the perpetrator, will be upheld against a constitutional challenge.[21] The

---

2(a)(1) (1993).

[16] *Mitchell*, 113 S. Ct. at 2199.

[17] 463 U.S. 939 (1983).

[18] *Mitchell*, 113 S. Ct. at 2201-02 (citing Haupt v. United States, 330 U.S. 631 (1947) (where conversations which had taken place long before the indictment were used as evidence in a trial for the offense of treason); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (where the defendant's speech was used to evaluate a Title VII discrimination claim)).

[19] *Mitchell*, 113 S. Ct. at 2200-02.

[20] *Id.* at 2201.

[21] This distinction between speech and conduct is also raised in the recent Washington Supreme Court decision Washington v. Talley, 858 P.2d 217 (Wash. 1993). Citing the Supreme Court decision in *Mitchell* as precedent, the Washington court upheld

decision does not, however, clarify the proper standard of review to be used in evaluating the validity of content based restrictions on speech, which remains unsettled due to the four separate opinions of *R.A.V.*[22]

Rita L. Wecker

Dahl v. Secretary of the United States Navy, et al., 1993 U.S. Dist. LEXIS 12102 (E.D. Cal. Aug. 30, 1993). UNITED STATES NAVY HOMOSEXUAL EXCLUSION POLICY IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE AND THUS VIOLATES THE FIFTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAW.

I. BACKGROUND

Mel Dahl enlisted in the United States Navy on October 14, 1980. On March 10, 1981 he admitted, in an official interview, that he was homosexual. He denied, however, engaging in any homosexual activity since enlisting in the Navy.

Subsequent to this interview, the Navy informed Dahl that he was being considered for discharge as provided in SECNAVINST 1900.9D.[1] The Navy convened an administrative discharge board to consider whether Dahl would be separated from the service.

Even though Dahl received the support of his shipmates and superiors, the

---

part of a hate crimes statute addressing conduct and invalidated a section that it found to address speech.

[22] These standards of review include the "strict scrutiny," and the "content-neutrality" standards. While a discussion of First Amendment doctrine is beyond the scope of this note, the interested reader is referred to the following constitutional cases which address the standards of review. *See* United States v. O'Brien, 391 U.S. 367 (1968) (which upheld the government's prohibition against burning draft cards in public as a content-neutral statute aimed at regulating conduct rather than at suppressing expression); New York Times v. Sullivan, 376 U.S. 254 (1964) (where Justice Brennan divided First Amendment speech between the core and the periphery: at the core of First Amendment protection is political speech while obscenity and defamation fall at the periphery); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (where the Court classified speech in terms of a hierarchy: "high-value" speech, such as political speech was constitutionally protected, and "low-value" speech, such as obscenity, commercial advertising, and false statement of fact, could be constitutionally subjected to regulation).

[1] SECNAVINST 1900.9D was the Navy homosexual exclusion policy in effect during the period of Dahl's enlistment. This policy required a member of the Navy to be separated from the service upon a finding that the member is a stated homosexual or bisexual, unless the Navy finds that the member is not in fact a homosexual or bisexual. Dahl v. Secretary of the United States Navy, 1993 U.S. Dist. LEXIS 12102, *1 n.1 (E.D. Cal. 1993) (quoting SECNAVINST 1900.9D).

Board determined that Dahl should be discharged because he was "a stated homosexual."[2] Accordingly, Dahl was honorably discharged on January 13, 1982. He appealed his discharge to the Board for Correction of Naval Records. This appeal was denied on March 19, 1986.[3]

On March 13, 1989, Dahl filed suit against the Navy in the United States District Court for the Eastern District of California. He claimed that his discharge violated the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and Title X of the United States Code.[4] Dahl sought reinstatement, an order preventing the Navy from taking further action under the homosexual exclusion policy, a declaration that the policy is unconstitutional, and attorney's fees.[5]

Upon motion of the defendants the district court dismissed Dahl's complaint in July 1990. Dahl appealed to the Ninth Circuit Court of Appeals which reversed and remanded the case. On remand, Dahl abandoned his Fourth and Fourteenth Amendment claims and his Title X claim. Both parties then moved for summary judgment on the First Amendment free speech claim and the Fifth Amendment equal protection claim.

II. Analysis: Equal Protection — Determining the Standard of Review

The parties agreed that the Navy homosexual exclusion policy discriminated on the basis of sexual orientation.[6] Dahl claimed that this discrimination violated his right to equal protection because it was based on prejudice and bias against homosexuals.[7] The court first found that the policy was facially discriminatory.[8] Thereafter, the court proceeded to the second step, a determination of the proper standard of review.

Dahl's first contention was that homosexuality is a suspect characteristic or a fundamental right and, therefore, the court was required to apply strict scrutiny.[9] The defendants argued that the Navy policy was subject to only a rational basis review.[10]

Relying on Ninth Circuit precedent, the court determined that discrimination against homosexuals was not subject to strict scrutiny.[11] Groups qualify as a suspect class only upon a showing that they: "(1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minor-

---

[2] *Id.*
[3] *Id.* at *1-2.
[4] *Id.* at *3.
[5] *Id.*
[6] *Id.* at *8.
[7] *Id.*
[8] *Id.*
[9] *Id.* at *8-9.
[10] *Id.*
[11] *Id.* at *16-17.

ity or [are] politically powerless."[12]

Under the Ninth Circuit analysis, homosexuals are not a suspect class because homosexuality is behavioral and does not involve an immutable characteristic. This makes homosexuality "fundamentally different" from traits such as race or alienage. Further, homosexuals are not shut out of the political process and therefore, do not lack political power.

Dahl argued, however, that the Ninth Circuit analysis should not be applied in his case because of changed circumstances. Dahl maintained that significant recent research established that sexual orientation resulted from a combination of genetics, hormones, neurology and environment, and was pre-determined at birth.[13] Therefore, the Ninth Circuit holding that homosexuality was behavioral and not immutable was in error. Additionally, congressional opposition to the President's attempt to end the military's homosexual exclusion policy[14] indicated to Dahl that homosexuals were not politically powerful in the "relevant legislative body."[15] Therefore, he argued, the Ninth Circuit's holding to the contrary should be rejected.

The court, while recognizing that Dahl submitted sufficient evidence to establish a triable fact on whether homosexuality is an immutable characteristic, held that Dahl failed to provide evidence that homosexuals lacked political power. The proper test is not whether homosexuals obtain their desired legislative outcome, but whether they are able to "attract the attention of lawmakers."[16] The court concluded that the debate over the issue actually established that homosexuals could attract congressional attention. Therefore, Dahl could not show that homosexuals were a suspect class.

Dahl also argued that the court should apply strict scrutiny review because the Navy policy hampers the exercise of a fundamental right.[17] Because the Ninth Circuit previously considered and rejected this argument,[18] and because Dahl could cite no support for this proposition,[19] the court rejected this approach.

---

[12] *Id.* at *9 (quoting High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990)).

[13] *Id.* at *6. Plaintiff cited a 1988 study conducted by the Defense Personnel Security Research and Education Center in support of the biological basis for sexual orientation.

[14] *See, e.g.*, Tom Stoddard, *Nunn 2, Clinton 0*, N.Y. TIMES, Sept. 20, 1993, at A19; News Conference on Opposition to "Don't Ask, Don't Tell" Policy for Gays in the Military, Fed. News Serv. (July 16, 1993).

[15] *Dahl*, 1993 U.S. Dist. LEXIS 12102 at *12.

[16] *Id.* at *14 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985)).

[17] *Id.* at *15.

[18] High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[19] Dahl relied on Evans v. Romer, 854 P.2d 1270 (Colo. 1993), *cert. denied, Romer v. Evans*, 62 U.S.L.W. 16 d55 (U.S. Nov. 2, 1993). In *Evans* the Colorado Supreme Court applied strict scrutiny to review an amendment to the state constitution which

After refusing to apply strict scrutiny, the court considered the appropriate type of rational basis review to invoke. Relying on the Ninth Circuit's decision in *Pruitt v. Cheney*,[20] Dahl argued that "active rational basis" was the correct standard. In *Pruitt* the court held that rational basis was the correct standard of review but that a court must "actively review the record 'to see whether the government [has] established on the record a rational basis for the challenged discrimination.' "[21] Even under this lower standard of review, however, "a court may not simply accept the government's proffered justifications for its policy as presumptively valid, but must determine whether these justifications are motivated by constitutionally impermissible prejudice or bias against the class at issue."[22]

The defendants argued that the active rational basis was not the appropriate standard in light of recent Supreme Court and Ninth Circuit opinions.[23] Instead, they argued that the government need only present a justification for its policy, and that the court must find this justification sufficient as a matter of law.[24]

The court rejected the defendants' approach. Relying on *Pruitt*, the court held that it must examine the record to determine whether the justifications offered in support of the policy were based on impermissible prejudice.[25] If the evidence, construed in the light most favorable to the defendants, did not establish a rational basis, and the court could not supply one, then Dahl was entitled to summary judgment. Conversely, if the evidence construed in the light most favorable to the plaintiff established that a reasonably conceivable rational basis justifies the policy, then the defendants were entitled to summary judgment.[26]

---

denied homosexuals a protected status under state law. The court reasoned that strict scrutiny was applicable because the amendment infringed upon homosexuals' fundamental right to engage in the political process. *Id.* at 1282; *see supra* 3 B.U. PUB. INT. L.J. 379-88. Here, the district court distinguished the Navy policy because it did not deny homosexuals their fundamental right to engage in the political process.

[20] 963 F.2d 1160 (9th Cir. 1990), *cert. denied*, 113 S. Ct. 655 (1992).

[21] *Dahl*, 1993 U.S. Dist. LEXIS 12102 at *18 (quoting Pruitt v. Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991)).

[22] *Id.* at *18 (construing *Pruitt*, 963 F.2d at 1165-66).

[23] The defendants relied on Heller v. Doe, 113 S. Ct. 2637 (1993) and United States v. Harding, 971 F.2d 410 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1025 (1993), arguing that these cases establish that the government is not required to create an evidentiary record to show that the policy is rationally related to a legitimate government interest.

[24] *Dahl*, 1993 U.S. Dist. LEXIS 12102 at *21.

[25] *Id.* at *24-25. The district court interpreted *Heller* and *Harding* as modifying *Pruitt* only by placing a burden on the person challenging the governmental policy to negate any conceivable rational basis for the policy in the first instance. Where that burden is satisfied and the government actually offers justifications in support of the challenged policy, the court must examine the proffered justifications. *Id.* at *22-25.

[26] *Id.* at *26.

III. Analysis: The Navy Policy

"Application of the rational basis standard requires a two-step analysis."[27] The court must first determine whether the policy serves a legitimate governmental interest. If so, the court must then determine whether the policy is rationally related to accomplishing that legitimate governmental interest. Under this analysis a policy based on the prejudice of one group against another cannot further a legitimate governmental interest and is irrational as a matter of law.

The Navy sought to support the homosexual exclusion policy with a number of rationales.[28] First, the Navy argued that the policy was necessary to protect unit cohesion and the privacy rights of heterosexuals. Second, the policy serves to prevent homosexuals from undermining the chain of command. Third, the Navy claimed excluding homosexuals ensured continued acceptance of the service by the public, thus preventing difficulty recruiting heterosexuals.

The court held that all of the Navy's rationale were based on heterosexual animus toward homosexuals.[29] The court analogized the Navy's rationales to the illegitimate state goal of preventing social disapproval of interracial marriages which the Supreme Court struck down in *Palmore v. Sidoti*.[30]

The defendants made further attempts to justify the policy on security grounds, contending that homosexuals constituted security risks because they were subject to being blackmailed over their homosexual status.[31] The court rejected this argument because the defendants failed to provide any evidence in support of this contention.[32] Further, the court reasoned that absent a policy

---

[27] *Id.* at *30 (quoting Jackson Water Works v. Public Util. Comm'n., 793 F.2d 1090, 1094 (9th Cir. 1986), *cert. denied*, 449 U.S. 102 (1987)).

[28] *Id.* at *31-34. SECNAVINST 1900.9D states:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission by adversely affecting the ability of the Navy and the Marine Corps to maintain discipline, good order and morale, to foster mutual trust and confidence among servicemembers, to insure the integrity of the system of rank and command, to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy, to recruit and maintain members of the naval service, to maintain the public acceptability of service in the Navy and Marine Corps and to prevent breaches of security.

Id. at *30-32 (quoting SECNAVINST 1900.9D).

[29] *Id.* at *41-42.

[30] 466 U.S. 429 (1984). In *Palmore* the Supreme Court analyzed a state court order denying a mother custody of her child because of her interracial marriage under a rational basis standard of review. The Court held that it was unconstitutional to give effect to private bias against interracial marriages. *See Dahl*, 1993 U.S. Dist. LEXIS 12102 at *41.

[31] *Dahl*, 1993 U.S. Dist. LEXIS 12102 at *31.

[32] *Id.* at *46.

excluding homosexuals there would be no reason to believe that service members could be blackmailed about their undeclared status.[33]

The defendants also made a narrower argument that the policy was designed to accomplish the legitimate governmental purpose of preventing homosexual conduct.[34] The exclusion of all homosexuals was allowable because the Navy does not have to take the risk that a declared homosexual will refrain from homosexual acts. The court, however, reasoned that this rationale was undermined by the fact that undeclared homosexuals were not reached by the policy.[35] Because undeclared homosexuals and any homosexual acts in which they may engage were not subject to SECNAVINST 1900.9D, the court reasoned that the policy could only be construed as singling out service members on the basis of their status as declared homosexuals.[36] The court found this distinction illogical.[37]

The Navy's rationales were further weakened by other provisions of the policy. The court cited a provision stating that a servicemember who engages in homosexual conduct will not be discharged upon a finding that the conduct "is a departure from the member's usual and customary behavior" and "is unlikely to recur."[38] The court reasoned that this exception indicated that the Navy wasn't concerned with homosexual conduct at all. The Navy was willing to take the risk that a servicemember, whom they knew had engaged in homosexual conduct, would not do so again. Yet the Navy was unprepared to accept the risk that a declared homosexual, whether or not he or she had ever engaged in homosexual conduct, would refrain from future homosexual conduct.[39]

The court concluded that the evidence the Navy offered in support of the policy's underlying rationale actually undermined its own claims and instead supported Dahl's contention that the policy served no legitimate governmental interest.[40] Additionally, the court was unable to supply its own legitimate basis for the policy.[41]

Finally, the court held that the principle of deference to the military could not outweigh the Fifth Amendment guarantee of equal protection to all citizens.[42] Absent a finding that the policy met constitutional requirements, the court could not invoke military deference.[43]

---

[33] *Id.*
[34] *Id.* at *50-51.
[35] *Id.* at *52.
[36] *Id.* at *54-55.
[37] *Id.*
[38] *Id.* at *53 (quoting SECNAVINST 1900.9D).
[39] *Id.* at *53.
[40] *Id.* at *56.
[41] *Id.*
[42] *Id.* at *62.
[43] *Id.*

IV. ANALYSIS: THE FIRST AMENDMENT

In his First Amendment claim, Dahl contended that the Navy policy punished homosexuals for their status alone by punishing homosexual thoughts, feelings, emotions and desires. The court held that there was no support for this claim and denied plaintiff's summary judgment motion.[44] Although the First Amendment free speech clause generally protects a person's thoughts, feelings and desires, Dahl could not provide any authority to justify an expansion of these general protections to apply to homosexual status.[45]

V. CONCLUSION

The significance of this case lies in the court's analysis of the homosexual exclusion policy and its rationale. While the policy stated in SECNAVINST 1900.9D will have to be modified in order to comport with the Department of Defense's (DOD) new "don't ask, don't tell" policy,[46] the core of the court's criticism centered on the DOD's justifications for the exclusion. The court found that the homosexual exclusion policy had no rational basis.[47] In the absence of a rational basis, an attempt by the DOD to change only the administration of the exclusionary policy by not affirmatively seeking out homosexuals, still violates the equal protection clause under the court's reasoning.[48] Until DOD develops facts which are sufficient to provide a rational basis for excluding homosexuals it is unlikely that the new policy will survive the type of judicial reasoning applied by the court.

Patrick Otto Bomberg

Baehr v. Lewin, 852 P.2d 44 (Haw. May 5, 1993). STATUTE RESTRICTING MARRIAGE TO HETEROSEXUALS MUST SURVIVE STRICT SCRUTINY TO BE VALID UNDER THE HAWAII CONSTITUTION.

The Supreme Court of Hawaii recently decided *Baehr v. Lewin* holding that

---

[44] *Id.* at *64-65.

[45] *Id.*

[46] *See, e.g.*, Bettina Boxall & Melissa Healy, *Military Ban on Gays Suspended Temporarily*, L.A. TIMES, Oct. 8, 1993, at A3.

[47] *Dahl*, 1993 U.S. Dist. LEXIS 12102 at *63.

[48] In a case involving a similar attack on the homosexual exclusion policy, a district court judge issued an order that the new DOD policy was also unconstitutional under rational basis review because it was not supported by a factual showing that status as a homosexual interferes with the military mission of the Armed Forces. *See* Boxall, *supra* note 46. This order was later suspended by the Supreme Court. United States Dept. of Defense v. Meinhold, 62 U.S.L.W. 16 d116 (U.S. Oct. 28, 1993). *See* Linda Greenhouse, *High Court Lets Pentagon Put Gay Policy into Effect*, N.Y. TIMES, Oct. 30, 1993, at A6.

a statute restricting marriage to heterosexual couples establishes a sex-based classification which must survive strict scrutiny analysis to be valid under Hawaii's Constitution.

I. BACKGROUND

In this challenge to the denial of their marriage license applications, three homosexual couples were successful in overturning the circuit court's order granting the motion of the defendant (John Lewin, in his official capacity as Director of the Department of Health, State of Hawaii) for judgment on the pleadings.

II. ANALYSIS

The Hawaii Supreme Court first found error in the lower court's order granting the defendant's motion for judgment on the pleadings. The circuit court had dismissed the plaintiff's action with prejudice for failure to state a claim for which relief could be granted.[1] Justice Levinson, writing for the majority, emphasized that under Hawaii law, a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief."[2] Viewing the alleged facts in the light most favorable to plaintiffs, Justice Levinson found that the circuit court had erroneously dismissed the complaint.

Justice Levinson noted that the circuit court's order contained several findings of fact which were improper given that the court was deciding a motion on the pleadings and should have based its conclusion solely on the contents of the pleadings. If a claim requires findings of fact to be resolved, then it cannot properly be dismissed on a Hawaii Rule of Civil Procedure 12(c) motion for judgment on the pleadings.[3]

The Hawaii Supreme Court next held that the Hawaii Constitution's privacy guarantee[4] does not give rise to a fundamental right of persons of the same sex to marry.[5] The court relied on *State v. Mueller*,[6] in which the court attempted to circumscribe the scope of Hawaii's constitutional privacy guarantee. While the court acknowledged that such precedents as *Skinner v. Oklahoma*[7] and *Griswold v. Connecticut*[8] found *traditional* marriage to be a fundamental right, it distinguished same-sex marriage and analyzed it using

---

[1] HAW. R. CIV. P. 12(c).

[2] Baehr v. Lewin, 852 P.2d 44, 52 (Haw. 1993).

[3] *Id.* at 53.

[4] "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6 (1978).

[5] *Baehr*, 852 P.2d at 55.

[6] 671 P.2d 1351 (Haw. 1983).

[7] 316 U.S. 535 (1942).

[8] 381 U.S. 479 (1965).

the standard identified by the U.S. Supreme Court in *Griswold*. In *Griswold*, Justice Goldberg stated that to determine which rights are fundamental, courts should look "not to 'personal and private notions,' but to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted . . . as to be ranked as fundamental.' "[9] Applying this standard, the Hawaii Court concluded that "a right to same-sex marriage is [not] so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of our civil and political institutions."[10]

Turning next to the plaintiffs' challenge under the Equal Protection Clause of the Hawaii Constitution, the court found that the statute, which was interpreted by state officials to prohibit same-sex marriages, was subject to strict scrutiny analysis. The Equal Protection Clause in the Hawaii Constitution is not identical to the Fourteenth Amendment to the U.S. Constitution. Unlike the Fourteenth Amendment's Equal Protection Clause, the Hawaii Constitution makes it clearly unlawful for any person to be denied equal protection of the laws because of sex.[11] While this important distinction had been addressed by the Hawaii court in earlier cases, it had never been completely resolved. In *Holdman v. Olim*[12] the Hawaii Supreme Court first addressed a sex-based classification. The court looked to the U.S. Supreme Court for guidance on this issue, particularly the holding in *Frontiero v. Richardson*[13] and subsequent cases. These cases established gender as a suspect classification which gives rise to a standard "intermediate between rational basis and strict scrutiny."[14] *Holdman* stopped short of establishing a state standard which differed from that of the Fourteenth Amendment. The case was decided without reaching the issue because the court held that the statute in question could survive the compelling state interest portion of the test under both heightened and strict scrutiny.[15]

In *Baehr*, Justice Levinson decided that it was "time to resolve once and for all the question left dangling in *Holdman*."[16] He noted that Justice Powell, in his concurring opinion in *Frontiero*, had suggested that passage of the Equal Rights Amendment (ERA) to the U.S. Constitution would justify the application of strict scrutiny analysis to gender-based classifications. The Hawaii court inferred from this that language similar to the ERA in the state consti-

---

[9] *Baehr*, 852 P.2d at 57 (quoting Griswold v. Connecticut, 381 U.S. at 493 (Goldberg, J., concurring)).

[10] *Id.*

[11] "No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5 (1978).

[12] 581 P.2d 1164 (Haw. 1978).

[13] 411 U.S. 677 (1973).

[14] *Baehr*, 852 P.2d at 65.

[15] *Id.*

[16] *Id.* at 67.

tution could produce the same result at the state level. By this reasoning, sex is a suspect category for equal protection analysis under article I, section 5 of the Hawaii Constitution, and the state marriage statute must withstand the strict scrutiny test to be upheld.[17]

The court acknowledged that "marriage is a state-conferred legal partnership status, [giving] rise to rights and benefits reserved exclusively to that particular relation[]."[18] Justice Levinson pointed out that the state's nonrecognition of common-law marriages has resulted in a state "monopoly on the business of marriage creation."[19] The court agreed with the plaintiffs that without marital status, rights and benefits such as income tax advantages, public assistance, division of property, inheritance, child custody, post-divorce rights, spousal privilege, and the right to bring a wrongful death action, among others, were denied to the plaintiffs.[20] Justice Levinson emphasized that same-sex and homosexual marriages are not synonymous, and that it was possible to have a heterosexual, same-sex marriage.[21]

The court then found that on its face, HRS s. 572-1 (the Hawaii marriage license statute) discriminates on the basis of sex and thereby implicates the Equal Protection Clause of art. I, section 5 of the Hawaii Constitution and triggers the need for "strict scrutiny" analysis of the law.[22] Under strict scrutiny analysis, the burden falls on the state to overcome the presumption that the statute is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.[23]

Prior to *Baehr*, the constitutionality of denying marriage rights to homosexuals had been litigated in other jurisdictions. The court did not find it difficult to distinguish analogous cases decided in other jurisdictions, mainly because the other cases did not involve the same claim brought under the same circumstances.[24]

In a concurring opinion, James Burns, Intermediate Court of Appeals Chief Judge, discussed the meaning of the word "sex" in the Hawaii Constitution, bringing to bear recent scientific evidence on the role of genes in determining

---

[17] *Id.*

[18] *Id.* at 58.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 51 n.11.

[22] *Id.* at 59.

[23] *Id.* at 74.

[24] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973) (did not involve an equal protection challenge); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (raising only federal constitutional questions); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984) (involving the issue of whether common law same-sex marriage existed in the state); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974), *review denied*, 84 Wash.2d 1008 (1974) (the court was willing to apply a strict scrutiny analysis, but did not find that the statute discriminated on the basis of sex).

homosexuality. Citing several newspaper articles that discussed controversial findings of researchers at the Salk Institute in San Diego, that anatomical differences exist between homosexual and heterosexual men in parts of the brain, Burns maintained that if homosexuality were proven to be "biologically fated," then the Hawaii Constitution probably bars the State from discriminating based on sexual orientation.[25]

In a dissenting opinion, Judge Walter Heen argued that Hawaii's marriage statute does not establish a suspect classification because all males and females are treated alike.[26] He also contended that plaintiffs, as homosexuals, were not entitled to treatment as a suspect class.[27] He proposed that plaintiffs' claims of discrimination were best addressed by the legislature.[28]

III. CONCLUSION

It is yet too early for homosexual couples to claim a complete victory in *Baehr* because the case was remanded to the lower court to decide under the strict scrutiny analysis. Even so, the court's invocation of strict scrutiny analysis is significant and could potentially be a turning point in the struggle for legal recognition of same-sex marriages.

Jan K. Gray

Adoption of Tammy, 619 N.E.2d 315 (Mass. Sept. 10, 1993). JOINT ADOPTION OF CHILD BY ITS NATURAL MOTHER AND HER PARTNER APPROVED.

The Supreme Judicial Court of Massachusetts recently approved the joint petition of two women in a lesbian relationship to adopt the biological daughter of one of the women. The court affirmed a probate court decision allowing the joint adoption on the grounds that it was in the best interests of the child. The court concluded that there was nothing in the Massachusetts adoption statutes which would preclude this adoption.

I. BACKGROUND

Two unmarried women, Susan and Helen, filed a joint petition in probate court to adopt Tammy, Susan's biological daughter. The women had lived together in a committed relationship for over ten years. They went through considerable efforts to have a child that was biologically related to both.[1]

---

[25] *Baehr*, 852 P.2d at 69 (Burns, C.J., Intermediate Court of Appeals, concurring).

[26] *Id.* at 71 (Heen, J., dissenting).

[27] *Id.* at 72 (Heen, J., dissenting) (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), *reh'g denied*, 411 U.S. 959 (1973)).

[28] *Id.* at 70.

[1] Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993).

Susan conceived through artificial insemination by Helen's cousin Francis and gave birth to Tammy. Helen and Susan participated equally in raising Tammy. Tammy regarded both women as her mothers, addressing Helen as "Mama" and Susan as "Mommy." Francis, the biological father, supported the petition and signed an adoption surrender.[2] Helen and Susan filed the joint petition because they knew that Massachusetts law would not recognize their marriage, but they wanted Tammy to have the protection of legal recognition of her identical emotional relationship to both women.[3]

The probate court found that it was in Tammy's best interests to grant the joint petition. It recognized that both Helen and Susan were functioning as custodial and psychological parents.[4] The probate court also found persuasive Susan's testimony that she was willing to let Helen adopt Tammy, even though it would not necessarily be in her own long-term interests to do so, as she would be forced to share custody if she and Helen separated. Susan also testified that the joint adoption was important to Tammy's emotional security, to gain certain practical benefits which recognition of the legal relationship would provide Tammy, and to secure future benefits such as potential inheritance rights.[5]

The petition was supported by several members of the community. Teachers, neighbors, relatives, a priest, a nun, and the Department of Social Services all testified in favor of the adoption.[6] In addition, both the guardian ad litem and the attorney appointed to represent Tammy's interests favored the joint petition to adopt.[7]

The probate judge granted the joint petition and reported the case for review by the Appeals Division to prevent the decree from future attack on jurisdictional issues.[8] The Supreme Judicial Court then transferred the case on its own motion.

II. ANALYSIS

The Supreme Judicial Court focused on whether Massachusetts General Law chapter 210 allowed a joint adoption by two unmarried cohabitants. The court found that there was nothing on the face of the statute which precluded

---

[2] *Id.* at 316.

[3] *Id.*

[4] *Id.*

[5] Helen and her issue are the beneficiaries of three irrevocable family trusts. Helen would have to adopt Tammy in order for Tammy to be a beneficiary. *Id.* at 317.

[6] *Id.*

[7] *Id.*

[8] In addition to granting the petition to adopt, the probate judge also provided an alternative ruling: Helen could adopt Tammy, but permit Susan to retain post-adoptive parental rights of custody and visitation. The Supreme Judicial Court never reached this issue because it upheld the adoption. *Id.* at 316 n.1. In a dissenting opinion, Justice Lynch suggested that the probate judge's alternative ruling may have been the best way to resolve the situation. *Id.* at 322 (Lynch, J., dissenting).

such an adoption.[9] The court also focused on the best interest of the child and found that the adoption would not create any significant change in Tammy's life and could only benefit her in the future.[10] Finally, the court also concluded that there was no need to terminate Susan's legal relationship to Tammy if the adoption proceeded.[11]

In its analysis the court first addressed whether the language of the Massachusetts adoption statute would prohibit the joint adoption. The court concluded that the statute's only requirement was that a spouse join the petition to adopt.[12] Other than that, no joinder was either expressly required or prohibited.

Second, the court interpreted the statutory language in light of the legislative intent to promote the best interests of the child.[13] The court noted that the statute allowed "a person of full age"[14] to adopt a child. Furthermore, it held that the word "person" can mean "persons" in light of the legislative intent, because construing the word as plural enhances the purpose of the statute.[15] By the court's reasoning, if allowing a single person to adopt a child promotes the legislature's intent, allowing two unmarried persons to do so could be no worse.[16]

Next, the court noted that the legislature defined the individuals and combinations of people which it sought to prevent from adopting children as a matter of public policy, and lesbian couples were not included in this category.[17] The court also stated that both Helen and Susan individually satisfied the identity requirements of Massachusetts General Law chapter 210 section 1.[18]

Finally, the court observed that homosexuality was not a bar to custody of a child.[19] It referred to several Massachusetts cases which allowed adoptions into non-traditional families when it was in the best interests of the child.[20] Based on these four rationales, the court concluded that the probate court had jurisdiction to entertain Susan and Helen's joint petition to adopt.[21] Next, the

---

[9] Adoption of Tammy, 619 N.E.2d at 318.

[10] *Id.* at 320.

[11] *Id.* at 321.

[12] *Id.* at 319 n.3.

[13] *Id.* at 318-19.

[14] *Id.* at 318 (citing MASS. GEN. L. ch. 210, § 1).

[15] *Id.* at 319.

[16] *Id.*

[17] *Id.* at 319 n.2. The court contrasted this situation with statutes in Florida and New Hampshire which expressly prohibit adoptions by homosexuals.

[18] *Id.*

[19] *Id.* at 319.

[20] *Id.* at 320 n.4 (citing Merrill v. Berlin, 54 N.E.2d 674 (Mass. 1944) (adoption of two orphans by their aunt allowed despite the "wholly feminine" nature of the household); *In re* Curran, 49 N.E.2d 432 (Mass. 1943) (child born out of wedlock adopted by unmarried natural mother); Delano v. Bruerton, 20 N.E. 308 (Mass. 1889) (grandfather adopted grandson, child of his deceased son)).

[21] *Id.* at 321.

court turned to the facts of Tammy's case and concluded that adoption was in Tammy's best interests. The adoption would not significantly affect Tammy's daily life, but it would provide Tammy with a significant legal relationship which could benefit her in the future.[22] It would allow Tammy to inherit from Helen, to receive support from Helen, to be covered under Helen's health insurance plan and to receive Social Security benefits through Helen.[23]

The adoption would also allow Tammy to preserve her ties to Helen if Helen and Susan separated or if Susan predeceased Helen. The court found this in particular to be a significant benefit since there have been several cases of courts denying children access to a functioning parent because the legal relationship was not defined.[24] Adoption would clarify Helen and Tammy's legal relationship so that any future custodial and support issues could be easily resolved within the existing law.[25]

The Supreme Judicial Court also concluded that Helen's adoption of Tammy would not preclude Susan's legal relationship. The court found it obvious that the legislature did not intend to preclude the natural parent's right when that parent joined in the adoption petition. In support it cited Massachusetts case law recognizing the rights of biological parents who join in their spouse's petitions to adopt their children and biological mothers who adopt their children born out of wedlock.[26]

III. THE DISSENT

Three justices dissented from the majority opinion in *Adoption of Tammy*. Justice Lynch, joined by Justice O'Connor, dissented because he found the court's interpretation of the statute to be inconsistent with the language. The claim that the adoption was in Tammy's best interests was, he felt, not sufficient to overcome the principle that statutes should be strictly construed.[27] He found nothing in the statute allowing two unmarried persons to adopt.[28] Justice Lynch suggested that the best interests of Tammy could be met by allowing Helen to adopt Tammy while allowing Susan to retain all of her parental rights.[29] This would resolve any questions about legal ties without "invading the prerogatives of the Legislature and giving legal status to a relationship by judicial fiat that our elected representatives and the general public

---

[22] *Id.* at 320.

[23] *Id.*

[24] *Id.* at 321 n.9 (citing Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 & n.8 (Cal. App. 1991); *In re* Pearlman, 15 Fam. L. Rep. (BNA) 1355 (Fla. Cir. Ct. 1989); *In re* Z.J.H., 471 N.W.2d 202, 215 (Wis. 1991)).

[25] *Id.* at 320-21 (citing Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993), discussed *infra* at 3 B.U. PUB. INT. L.J. 406-09 (1993)).

[26] *Id.* at 321.

[27] *Id.* (Lynch, J., dissenting).

[28] *Id.* at 322 (Lynch, J., dissenting).

[29] *Id.* (Lynch, J., dissenting) (noting that the probate court judge provided this solution as an alternative resolution of the case).

have, as yet, failed to endorse."[30]

Justice Nolan wrote a brief dissent agreeing with Justice Lynch's dissent except for his statements that petitioner's sexual orientation should not play a role in adoption decisions.[31]

IV. CONCLUSION

This decision is clearly important in so far as it allows a lesbian couple to jointly adopt the biological children of one partner. Its ultimate significance, however, may depend upon how future courts interpret its language. The court's decision allowed the probate court to entertain joint petitions for adoption brought by "two unmarried cohabitants in the petitioner's circumstances."[32] This could mean that two people in a homosexual relationship can adopt the biological child of one of the partners. Alternatively, it could mean that two people whose marriage would not be legally recognized can adopt a child, even if that child is not biologically related to either partner. A third possible interpretation is that two people, in a committed heterosexual or homosexual relationship, could adopt a child. While courts will probably consider granting an adoption in any situation which is in the best interest of an adoptive child, courts' evaluations of what is in the best interest of the child may be influenced by the nature of the prospective parents' relationship.

Carolyn J. Campbell

Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. June 18, 1993). ADOPTION OF CHILDREN BY NATURAL MOTHER'S LESBIAN PARTNER APPROVED.

The Vermont Supreme Court recently ruled that a lesbian woman could adopt the children of her partner without terminating the natural mother's rights, because the adoption was in the best interests of the children. The decision in *Adoptions of B.L.V.B. and E.L.V.B.* reversed a probate court's decision denying the adoptions because the proposed adoptive mother did not meet the statutory prerequisites for adoption.

I. BACKGROUND

The appellants, Jane and Deborah, have lived together in a committed monogamous relationship since 1986. They decided to have children, and in 1988, Jane gave birth to a son, B.L.V.B., conceived through artificial insemination. In 1992, Jane gave birth to another son, E.L.V.B., also conceived through artificial insemination. Deborah assisted at both births and has been

---

[30] *Id.* (Lynch, J., dissenting).

[31] *Id.* at 321 (Nolan, J., dissenting).

[32] *Id.* at 318.

equally responsible for all parenting duties since the children were born.[1]

Jane and Deborah sought to legalize their status as co-parents and petitioned the probate court to allow Deborah to legally adopt the boys without disturbing Jane's parental rights. The petitions were uncontested and the Vermont Department of Social and Rehabilitation Services recommended the adoptions as being in the best interests of the children. A psychologist recommended the adoptions because it was essential for the children "to be assured of a continuing relationship with Deborah."[2]

Despite all this support, the probate court denied the adoptions on the ground that the Vermont statutes governing adoptions did not allow an unmarried couple to adopt together.[3] According to the probate court's interpretation of Vermont Statutes Annotated title 15, sections 431 and 448, single persons may adopt, but they terminate the rights of the natural parents by doing so. The only exception provided is the "step-parenting exception," which allows the spouse of the natural parent to adopt the children without terminating the rights of the natural parent.[4] In order to adopt under this provision, the couple must be married.[5] Since Deborah and Jane were not married, Deborah could not adopt Jane's children without terminating Jane's rights as their natural mother.

II. ANALYSIS

The Vermont Supreme Court granted appellants' plea to allow Deborah to adopt the children and reversed the probate court's decision. The court cited three of appellants' arguments in support of its decision to allow Deborah to adopt the children: (1) the statutory language did not prohibit the adoptions; (2) enforcing the termination of Jane's rights as the birth mother would lead to an absurd result; and (3) this result was inconsistent with the best interests of the children and public policy in general.[6]

The court found no statutory language that would prohibit adoptions by same-sex partners.[7] Further, the court concluded from the statutory intent of Vermont's adoption statute that the primary goal of the statute is to promote the general welfare of children, not to prevent certain types of people from adopting.[8] The court inferred from the legislative history of the adoption statutes, that their primary intent was to protect the welfare of the adoptive children, rather than to protect adoptive children as chattel of their natural parents.[9] The court also noted that many other revisions to the adoption chapter

---

[1] Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993).
[2] *Id.*
[3] *Id.*
[4] *See* VT. STAT. ANN. tit. 15, § 448 (1989).
[5] Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d at 1272-73.
[6] *Id.* at 1273.
[7] *Id.*
[8] *Id.* at 1274.
[9] *Id.* at 1273 n.1.

were designed to benefit the children, such as statutes requiring an investigation of the adoptive home and trial periods for placement.[10] The court noted that the statute terminates the natural parents' rights, but explained that this provision anticipates that the child would be removed from the natural parents' custody.[11] The step-parent exception was considered further proof of this legislative intent. The legislature considered it ridiculous to terminate the biological parents' rights in favor of a non-biological parent, when the biological parent would continue to raise the child.[12]

The Vermont Supreme Court concluded that the adoptions of B.L.V.B. and E.L.V.B. were consistent with this intent. The court defined the policy behind the statute as intending "to protect the security of family units by defining the legal rights and responsibilities of children who find themselves in circumstances that do not include two biological parents."[13] Although the court recognized that it was doubtful that the Vermont legislature conceived of this precise situation when enacting the adoption statute in 1947,[14] the court also realized that statutes must be interpreted in a way to allow for changing social mores.[15] Preventing Deborah from adopting B.L.V.B and E.L.V.B. would be inconsistent with this policy. The court stated that "to deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest."[16]

The court seriously considered the changing reality of children's lives and family composition in deciding that these adoptions were in the best interests of the children. It recognized that courts are increasingly pressed to define and protect children's rights in non-traditional families, and that these issues typically arise under traumatic circumstances such as the dissolution of families.[17] As a result, children may often be left in limbo for years pending the outcome of litigation to resolve the domestic conflict. The Vermont Supreme Court considered it to be in the best interests of both the children and the state to determine the legal rights of the parties immediately, in order to facilitate resolution of future disputes under traditional domestic relations law.[18]

---

[10] Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d at 1273 n.1.

[11] *Id.* at 1274.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1275.

[16] *Id.*

[17] *Id.* at 1276. Note that the adoptions of B.L.V.B. and E.L.V.B. did not present issues of first impression. *See In re* Adoption of R.C., No. 9088 slip op. at 5-7 (Vt. P. Ct. Addison County Dec. 9, 1991) (allowing an adoption upon holding that the termination of rights in Vt. Stat. Ann. tit. 15, § 448 should be read as directory rather than as mandatory); *In re* L.S. and V.L., No. A-269-90 and A-270-90, slip op. at 5 (D.C. Super. Ct. Fam. Div. Aug. 30, 1991) (allowing an adoption by the natural mother's partner was in the child's best interests, despite a "step-parent exception" similar to Vermont's).

[18] Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d at 1276.

III. CONCLUSION

In approving Deborah's petition to adopt the children, the Vermont Supreme Court focused on the best interests of the children rather than on the sexual orientation of the petitioner. The court considered that any child receiving proper food, shelter and schooling was fortunate, and a child that received the love of one parent was blessed.[19] Where a child, as here, has two adults dedicated to his welfare, the court found "no reason in law, logic or social philosophy to obstruct such a favorable situation."[20]

Carolyn J. Campbell

Thomas S. v. Robin Y., 599 N.Y.S.2d 377 (Fam. Ct. N.Y., N.Y. County, April 13, 1993). NATURAL FATHER DENIED ORDER OF FILIATION AND VISITATION FOR CHILD BEING RAISED BY THE NATURAL MOTHER AND HER PARTNER.

In April 1993, the Family Court for New York City rendered a decision in the case of *Thomas S. v. Robin Y.* denying a request by a natural father for an order of filiation and visitation concerning a child in the custody of its natural mother and her lesbian partner.

I. BACKGROUND[1]

Robin Y. began a relationship with Sandra R. in 1979. Early in their relationship they planned to have children, which the couple accomplished by means of artificial insemination.

Sandra's child was the first born. The sperm donor for Sandra, a gay man named Jack K., was only allowed to act as a donor after he agreed to a number of restrictions. Jack agreed that Sandra and Robin would raise the child as co-parents, and that he would have no parental rights or obligations toward the child. Jack further agreed that he would make himself known to the child when the child wanted to meet its biological father.

In 1980 Sandra gave birth to a girl, whom they named Cade. Cade shared the last names of her co-mothers to illustrate the fact that she was considered by both women as their daughter.

Robin then planned to have her own child. She enlisted the help of Thomas S., also a gay man, as the sperm donor. He agreed to the same terms as Jack with respect to parental rights and obligations.

During the summer of 1981, Robin, Sandra, and Cade moved to San Francisco, Thomas's home. Even so, he had little contact with the family. Robin's

---

[19] *Id.* at 1275.

[20] *Id.*

[1] Thomas S. v. Robin Y., 599 N.Y.S.2d 377, 377-80 (Fam. Ct. N.Y., N.Y. County 1993).

child, a girl whom they named Ry, was born in November 1981. She was also given the last names of both mothers. Robin and Sandra raised Ry without any help (financial or otherwise) from Thomas, as per their agreement.

In July of 1982, Robin, Sandra, and the girls moved back to New York City. They had little contact with Thomas until 1985. It was then that Cade began inquiring about her father's identity. At that time, Robin and Sandra decided to introduce both daughters to their biological fathers. To this end, all parties vacationed together in California, a positive experience which initiated a continuing relationship with the fathers.

Later that year, Robin and Sandra discovered that Jack had a drinking problem and was unable to devote sufficient attention to Cade. In light of this development, Robin and Sandra reiterated to Thomas that they expected him to treat them as co-mothers to both girls and to treat Cade as Ry's sister. Thomas reaffirmed his original agreement and promised to treat the girls equally.

Thomas visited the family a number of times a year, each time at the discretion of Robin and Sandra. Over time, Thomas became unhappy with this arrangement. He wanted to meet with Ry outside of the mothers' presence and introduce Ry to his biological relatives without including Robin and Sandra. Furthermore, Thomas was unable to set biology aside and treat Cade and Ry as equals and sisters. Realizing that a request to meet only with Ry would be rejected, he requested to have both girls visit him without maternal supervision. When Robin and Sandra refused, he brought suit seeking an order of filiation and visitation.

II. ANALYSIS

The family court first looked at the day-to-day operation of the family.[2] Cade and Ry both attended the same school, where they performed very well. While they did undergo some teasing due to their family situation, they recognized their home situation as a family and coped with the teasing. Both girls called Robin and Sandra "Mommy," and each considered the other her sister. They recognized that their family was different from traditional families but accepted that difference and had no problems living in the family as created by Robin and Sandra.

The family severed all contact with Thomas on institution of his suit. Pursuant to the court order, Ry was interviewed by a psychiatrist in Thomas's presence.[3] Ry refused to stay in the interview room with Thomas for more than a few minutes. She stated in the interview that she understood her family didn't meet the traditional definition of a family, but she accepted Robin and Sandra as her mothers and Cade as her sister. In no way did Ry consider Thomas a parent. She considered a parent someone a child depends on to fulfill her needs, something which Thomas never did. The interview ended with Ry

---

[2] *Id.* at 379.

[3] *Id.* at 380.

expressing her feeling that Thomas's legal actions were threatening, and her fears that he would break up her family. The psychiatrist testified that Ry would strongly resist any visit with Thomas, and that visitation would do nothing to repair their relationship.

Paternity was proven using a genetic marker test and supported by the testimony of all involved parties. Thomas then argued that, at this stage in the legal proceedings, the court was obligated to declare filiation under New York law. He argued that section 542 of the Family Court Act required this declaration, as the Act provides that "[i]f the court finds the male party is the father of the child, it shall make an order of filiation, declaring paternity."[4] Both Robin and the legal guardian for the children argued that Thomas was equitably estopped from a declaration of paternity. The court noted that prior case law on this section did not cover cases where equitable estoppel was applied.[5]

The court then defined equitable estoppel as "where the action or inaction of one party induces reliance by another to his or her detriment, or where the failure of a party to assert a right promptly has created circumstances rendering it inequitable to permit exercise of the right after a lapse of time."[6] The court cited examples of child illegitimacy and lack of proof of paternity as instances when equitable estoppel is properly invoked in family law issues.[7]

The court also noted a growing number of cases where equitable estoppel was used to prevent a finding of paternity.[8] While Thomas argued that use of the doctrine in this manner would create a stigma of illegitimacy, the court noted that the primary goal of the proceeding was to "zealously safeguard the welfare, stability, and best interests of the child."[9] The court included in its reasons for rejecting paternity those occasions where an attempt to establish paternity would damage the psychological well-being of the child.

The court deemed this an appropriate situation to invoke equitable estoppel

---

[4] *Id.* at 381 (quoting N.Y. FAM. CT. ACT § 542 (McKinney 1983)).

[5] *Id.*

[6] *Id.*

[7] *Id. See In re* Boyles v. Boyles, 466 N.Y.S.2d 762 (N.Y. App. Div. 1983) (court rejects use of equitable estoppel to establish paternity due to development of father-child relationship and the harm that such bastardization would have on the child); New York *ex. rel.* H. v. P., 457 N.Y.S.2d 488 (N.Y. App. Div. 1982) (mother equitably estopped from proving lack of paternity where she held husband out as father of child, allowed father-child relationship to fully develop); *In re* Montelone v. Antia, 400 N.Y.S.2d 129 (N.Y. App. Div. 1977) (respondent father equitably estopped from compelling blood grouping tests to prove lack of paternity where respondent accepted children as his own for approximately 15 years); Hill v. Hill, 249 N.Y.S.2d 751 (N.Y. App. Div. 1964) (equitable estoppel used as a defense to prevent the mother from claiming custody by proving child's illegitimacy).

[8] *See, e.g.*, Purificati v. Patricos, 545 N.Y.S.2d 837 (N.Y. App. Div. 1989); *In re* Ettore I. v. Angela D., 513 N.Y.S.2d 733 (N.Y. App. Div. 1987).

[9] *Thomas S.*, 599 N.Y.S.2d at 381 (quoting *In re* Ettore I. v. Angela D., 513 N.Y.S.2d 733 (N.Y. App. Div. 1987)).

to block Thomas's attempt at filiation. The court noted that by the time Thomas began to seek filiation, he could not do so without causing serious harm to Ry's mental well-being. Ry had already developed her sense of family, and Thomas's attempt to establish paternity threatened her well-being. The lapse of time, coupled with the serious threat of harm, made any attempt at filiation too dangerous to Ry.

III. CONCLUSION

Thomas S. v. Robin Y. illustrates the importance courts place on a strong family unit when deciding how to award custody even where a family unit does not meet traditional definitions of the family. Just as in heterosexual parenting situations, the court's primary consideration will be the child's well-being. In *Thomas S.*, the child's well-being was particularly important to the decision, as the child suffered upon even the thought of visitation.

Mark J. Coen

Johnson v. Schlotman, 502 N.W.2d 831 (N.D. July 1, 1993). WELL-BEING OF CHILDREN REQUIRED DENIAL OF NATURAL MOTHER'S REQUEST TO MODIFY CUSTODY RIGHTS FOR HER CHILDREN BY FORMER MARRIAGE, BUT UNSUPERVISED OVERNIGHT VISITATION RIGHTS ALLOWED.

I. BACKGROUND[1]

The appellant, Dianne Schlotman, was formerly married to the appellee, Jon Johnson. Their marriage produced two children, a boy and a girl. The couple divorced in 1985 after Dianne told Jon that she was a lesbian. The children remained with Jon and Dianne moved to a different city where she lived with her partner.

Initially, the children were not told about their mother's sexual orientation. They visited her regularly and enjoyed their time together. In 1989, Dianne introduced the children to her partner, and informed her daughter of her sexual orientation. Sometime later she also informed her son.

After learning of their mother's sexual orientation, the children began to have problems sleeping and became depressed. The root of their problems became the center of contention between Jon and Dianne. Jon felt that the children were suffering from discrimination at school and in general due to their mother's sexual preference. Dianne maintained that Jon caused the problems by "poisoning the children's minds" with his negative views on homosexuality.

Dianne began to feel that Jon was tampering with her visitation rights. In 1990, she filed a motion for a modification of visitation to form a more precise

[1] Johnson v. Schlotman, 502 N.W.2d 831, 832-33 (N.D. 1993).

and regular schedule. Jon's reply sought rescission of all of Dianne's visitation rights unless Dianne stopped living with her partner and ceased discussing her sexual preference with the children. Both filed similar motions again in 1991.

In February of 1991, the trial court assigned a guardian ad litem for visitation. The court order prohibited the guardian from bringing the children to visit Dianne at her residence while her partner lived there, prohibited the children from having any contact with Dianne's partner, and prohibited either woman from discussing her sexual orientation with the children.

After a series of hearings in March and April 1991, the trial court issued an amended judgment temporarily discontinuing Dianne's visitation rights. Dianne appealed and moved for a new trial based on evidence that one of Jon's expert witnesses was disciplined for his work in this case.

In February of 1992, the trial court issued an order for temporary visitation by Dianne. The order allowed unsupervised visits at certain and specific times. The trial court rejected Dianne's motion for a new trial, and issued another visitation order almost exactly like the previous order. Dianne appealed the denial of her motion, leading to the hearing before the North Dakota Supreme Court.

II. ANALYSIS

The first issue the court addressed was the trial court's decision to modify custody. The court examined the arguments of Dianne and Jon, but focused primarily on the reasons for keeping the children with Jon.[2] Jon and Dianne's daughter had testified that Dianne did not attend to her needs, and that she was anxious about her mother's sexuality and possible displays of affection between her mother and partner. The children testified that they enjoyed living with Jon and his new wife and preferred not to live with Dianne. Both children also expressed their wish to remain in the local school system which they had attended all their lives. While the court stated that some of these wishes were likely fueled by Jon's well-known feelings about homosexuality, evidence suggested that other factors contributed to their discomfort with Dianne.[3]

The court then examined what issues the trial court had to determine when dealing with a motion for change of custody. They named two: whether or not there has been a significant change in the circumstances since the original divorce decree and custody award; and if so, whether or not those changed circumstances compelled or required a change in custody to foster the best interests of the child.[4] Because she sought the change in custody, Dianne had the burden of proof to show the changed circumstance and that the change injured the well-being of the children.[5]

---

[2] *Id.* at 833-34.
[3] *Id.* at 834.
[4] *Id.*
[5] *Id.*

The court held that several circumstances had changed: Jon had remarried and Dianne had informed her children of her sexual preference.[6] Looking at the evidence as a whole, the court here did not find any changed circumstance so deleterious to the well-being of the children so as to require changing custody. The court presented the stability of Jon's domestic situation as an important factor in this decision.[7]

The court then addressed Dianne's argument that Jon pushed his bigotry against homosexuals on the children, and "poisoned their minds" against her. The court noted that the custodial parent is obligated to not "poison the well" by turning the children against the non-custodial parent.[8] Even though Jon had expressed his opinion to the children that homosexuality is deviant, his intolerance was not the sole reason for the children's desire to remain with him.[9] Accordingly, the court held that the denial of Dianne's motion to modify custody was not clearly erroneous and affirmed the decision that the children should remain with Jon.

According to North Dakota law, a court's denial to modify a visitation order is subject to review under a clear error standard.[10] Like a court deciding child custody rights, a court reviewing a motion to modify visitation rights must focus on the best interests of the child.[11] But unlike custody, which is a parental right, visitation is characterized as the right of the child, and courts are more reluctant to terminate it. The non-custodial parent is generally only deprived of visitation when the child's mental or physical health is endangered.[12]

In this case, the court found that the trial court had overstepped its bounds in denying Dianne visitation.[13] Harm to the children cannot be assumed, but must be shown by a preponderance of the evidence. Here, the evidence did not reflect a level of harm to the children which would require termination of visitation rights.

The court did not enter a separate ruling on the visitation issue because it set a regular schedule for visitation. It did affirm the terms of the order allowing Dianne unsupervised, overnight visitation with her children. The court noted that such contact is important to foster a normal parent-child relationship and was apparently concerned that the family improve their relationship.

In a concurring opinion, Justice Levine pointed out the unlikelihood of a non-custodial parent prevailing in a change of custody proceeding.[14] Courts

---

[6] *Johnson*, 502 N.W.2d at 834.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 835 (citing Vande Hoven v. Vande Hoven, 399 N.W.2d 855 (N.D. 1987)).
[11] *Id.*
[12] *Id.* at 835.
[13] *Id.*
[14] *Id.* at 836.

hesitate to modify custody and interrupt the child's relation with the custodial parent. Justice Levine also seemed more willing than the majority to accept Dianne's version of the facts. He observed that a custodial parent who "taught" his or her child to hate and disrespect the non-custodial parent should lose custody because "it is so contrary to children's best interests to learn from their parents hatred, intolerance, and prejudice for the other parent."[15] Levine further stated that, if he had been in the position of fact finder, he might have found that Jon did indeed "poison the well" by impressing his feelings on the children to the point where they had adopted those feelings as their own.[16] Unable to make such a finding of fact, however, Justice Levine sided with the majority denying modification of the custody rights.

III. CONCLUSION

The decision in *Johnson v. Schlotman* illustrates the importance courts place on children's well-being in deciding custody and visitation rights. In this respect, courts are treating homosexual parenting situations the same as heterosexual parenting cases. However, in *Johnson*, the heterosexual parent sucessfully argued that societal and other prejudices against homosexuals acted upon the children, causing their anxiety. The court's acceptance of this broad argument leaves room for the custodial parent to hide personal efforts to "poison the well" against a homosexual parent and defeat requests for custody.

Mark J. Coen

---

[15] *Id.* at 838.
[16] *Id.* at 837.