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A Family Affair: Constitutional and Prudential Interests Implicated When Homosexuals Seek to Preserve or Create Parent-Child Relationships

BY KIF SKIDMORE*

INTRODUCTION

Establishing a home and raising a family are among the most deeply rooted values of our society.1 Despite an almost universal recognition that family is fundamental to happiness, for homosexual persons, creating and preserving their own families can be elusive. This is an examination of the legal treatment of homosexual persons who seek to create a family through adoption or preserve their family relationship in the context of a custody or visitation dispute.

Part I addresses the constitutional issues implicated by such proceedings, focusing on how the existence of parents' fundamental liberty interests impacts the legal analysis of each category of dispute.2

Part II explores the approaches courts take when a couple has separated, one parent is homosexual, and a dispute over custody or visitation arises.3 Specifically, it compares cases in which courts employ a presumption of detrimental impact on a child caused by the homosexual conduct of a parent, with an approach that places such conduct among factors relevant to the consideration only upon an evidentiary showing of

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2 See infra notes 11-68 and accompanying text.

3 See infra notes 69-217 and accompanying text.
detrimental impact. The comparison identifies how each approach implicates constitutionally protected liberties.  

Part III probes the issue of adoption by homosexuals, examining the policies which guide legislators and courts. This Part also examines how courts construe statutory provisions in the context of adoption by a de facto parent.  

While courts cite the best interests of the child as the "polestar" for determination of custody and adoption proceedings, the element of homosexuality infuses such cases with highly controversial moral and social issues. The legal positions of homosexual persons differ depending upon the nature of the proceeding, and the analytical framework hinges upon whether there is a cognizable constitutional interest at stake. Because the range of issues involved is broad, the thesis of this note is threefold. First, when resolving custody and visitation disputes, the court must guard the liberty interests of parents against unjustified state interference with an approach that places weight upon the homosexual conduct of a parent only upon an evidentiary showing that the conduct impacts the child's interests. Second, constitutional challenges to denial of adoption privileges based on sexual orientation are likely to fail, thus it is up to citizens, through their legislators, to define the terms by which the privilege to adopt may be granted. Finally, in the context of an adoption case involving a child and adult who have already established the child-parent bond, prudential interests advise courts to construe adoption statutes broadly to confer upon the child advantages that inhere in a legal relationship.  

I. CONSTITUTIONAL ISSUES  

Although members of society may hold common notions about the morality of homosexuality, the legal framework that shapes familial rights...
of homosexuals differs greatly depending upon the context of the proceeding. The challenges a homosexual confronts in seeking to preserve an existing, legally recognized parent-child relationship differ from those faced by a homosexual seeking to establish such a relationship through means of adoption. Interference with an existing parent-child relationship implicates fundamental rights inherent in parenthood. In contrast, adoption is a purely statutory privilege, and members of state legislatures hold broad discretion in defining the terms by which such privilege is granted. Although various attitudes toward homosexuality may generally influence treatment of homosexuals in custody, visitation, and adoption proceedings, the rules that guide courts in their resolutions shape significantly different analyses.

A. The Fundamental Liberty Interest Implicated in Custody and Visitation Disputes

When a judge must resolve a dispute between parents unable to agree on a custody or visitation arrangement for their child, it is inevitable that there will be some limitation of the parent-child relationship for at least one of the parents involved. The judge may choose to remove or deny custody to one parent, or limit visitation against a parent’s desires. Although it is parents who place the court in a position of resolving such disputes, denial of custody or limitation of visitation privileges ultimately results in

and homosexual acts does not seem particularly relevant.”). In cases in which a parent’s homosexuality is a factor relevant to child custody, a court will often refer to the parent’s decision to engage in “sexual conduct” rather than to the parent’s status as a homosexual. See, e.g., Pulliam v. Smith, 501 S.E.2d 898, 904 (N.C. 1998).


13 Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993); In re Jacob, 660 N.E.2d 397, 399 (N.Y. 1995); see In re Adoption of Baby Z., 724 A.2d 1035, 1047 (Conn. 1999).

14 In re Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (“In foster care and adoption cases, the State by law has either the exclusive, or highly significant, responsibility to choose what is best for the child.”).

15 See infra notes 76-78 and accompanying text.

16 See infra notes 173-76 and accompanying text.
interference with the parental role. Recently, in *Troxel v. Granville*, the United States Supreme Court explicitly recognized that the parent-child relationship is entitled to heightened constitutional protection, characterizing "the interest of parents in the care, custody and control of their children—as perhaps the oldest of fundamental liberty interests recognized by this Court." In that case, the Court invalidated a Washington statute, which conferred broad discretion upon courts to grant visitation privileges to any person based on a finding that such privileges would be in the best interests of the child. The Court emphasized its long history of protecting the liberties that inhere in parenthood, and stated "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." The Court emphasized the presumption that fit parents act in the best interests of their children, disapproved the lower court's approach of substituting its own judgment for that of the fit parent. This enunciation of interests underscores the

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17 While a court called upon to resolve such a dispute generally "interferes" only upon the initiation of one or both of the parents, this does not mean that in doing so, parents must sacrifice their rights and subsequently relieve the court from a duty to protect their interests. We entrust courts with the authority to adjudicate controversies in order to arrive at resolutions which most effectively protect the rights which we have embraced through our laws and constitutions.


19 *Id.* at 65; *see also* *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (finding natural parents' fundamental liberty interest exists even after losing custody of children temporarily); *Stanley v. Illinois*, 405 U.S. 645, 657 (1972) (sustaining father's challenge to a state policy which deprived unwed fathers of custody of children upon the death of their mother despite failure to establish father's lack of fitness); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right . . . to recognize and prepare him for additional obligations."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the "liberty" protected by the Due Process Clause includes rights of parents in establishing a home and making decisions in educating their children).

20 *Troxel*, 530 U.S. at 75.

21 *See id.* at 67 ("[The language of the statute] effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review.").

22 *Id.* at 65-66.

23 *Id.* at 66.

24 *See id.* at 68.

25 *Id.* at 72-73. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.*
deliberation with which judges must act in order to guard against unjustified interference of fundamental parental liberties.

To adequately protect the due process interests implicated, interference with parental rights must be justified by a "powerful countervailing [state] interest." Courts have characterized the best interests of the child as the "polestar" which guides the determination in such cases. Indeed, states do have both a powerful interest and a duty to guard the welfare of children. Furthermore, when resolving a custody or visitation dispute, a court must allocate parental rights and duties between persons who both possess fundamental liberty interests. Because any resolution reached will inevitably interfere with at least one of the parents' rights, a court should employ an analytical framework that most effectively promotes the interest relied upon to justify such interference, the interests of the child. Otherwise, proffered justifications become pretexts, and courts fail to sufficiently guard against unwarranted interference with the parent's fundamental liberty interest.

In child custody or visitation disputes, courts must make determinations based upon highly individualized factual settings to promote the interests of the individual child involved. For this reason, it is inappropriate to begin the analysis with the presumption that homosexual conduct of a parent has a detrimental impact upon the child. If a court must make a determination based upon the needs of a particular child, employing a

26 See supra note 1 and accompanying text. This interest might also be characterized as a fundamental right in the context of an equal protection claim. For purposes of the custody and visitation disputes, however, this analysis is limited to the due process concerns raised. Action by courts in individual cases is more accurately characterized as interference of such interests rather than classification which triggers equal protection concerns.

27 Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.").

28 See infra note 71 and accompanying text.

29 See Stanley, 405 U.S. at 652; see also Parham v. J.R., 442 U.S. 584, 603 (1979) (recognizing that the state may have control over parental discretion when child's welfare is endangered); Quilloin v. Walcott, 434 U.S. 246, 254-56 (1978) (holding that father's due process and equal protection rights were adequately protected by the "best interests of the child" standard); In re Goshkarian, 148 A. 379, 381 (Conn. 1930) (asserting that the right of a parent in the control and custody of her child gives way to the paramount concern of the child's welfare).

30 See infra notes 74-144 and accompanying text.

31 See infra notes 74-184 and accompanying text.
presumption before evaluating the individual circumstances is inherently inconsistent with the "best interests of the child" standard. This precludes an individualized examination of the well-being of the particular child involved, and thus, the presumption obstructs the goal of reaching a result which best serves the needs of the child.

The problem created by employing such a presumption is illustrated in Stanley v. Illinois. The Supreme Court held unconstitutional an Illinois law when it deprived Peter Stanley of custody of his children after the death of the children's mother, to whom he was never married. The state asserted that unwed fathers were presumptively unfit. While the Court acknowledged that most unwed fathers may be "unsuitable and neglectful parents," it nevertheless rejected the approach of employing such a presumption. In reversing the decision, the Court observed that by employing a presumption, the state failed to meet its stated interest of protecting children when it separated them from fit parents. Likewise, when a court employs a presumption of detrimental impact based on the homosexual conduct of a parent, the court "spites its own articulated goals" when, in fact, there is no such detrimental impact. Because the welfare of the child is precisely the interest that justifies interference with the fundamental liberty interest held by a parent, an approach that fails to promote that interest risks violating the constitutional rights of the parent. The better approach places the homosexual conduct of a parent among factors to be considered upon a evidentiary showing of impact on the child because it is most likely to promote the best interests of the child involved, and thus remain within the constitutional boundaries imposed when fundamental parental liberties are implicated.

B. The Constitutional Issues Raised in the Adoption Context

A homosexual seeking to adopt does not enjoy the same constitutional protection as a natural parent. At the outset, there is not a legally recog-

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32 See Stanley, 405 U.S. at 645.

33 Id. at 646. The cases in which courts employ a presumption generally do not go so far as to hold homosexual parents as presumptively unfit, rather they presume detrimental impact upon the child. See infra notes 74-144 and accompanying text. The cases are sufficiently analogous, however, because this presumption of impact precludes individual assessment of the particular child's interests.

34 Stanley, 405 U.S at 654.

35 See id. at 654-55.

36 Id. at 652-53.

37 Id. at 653.
nized parent-child relationship at stake. Instead, the analysis begins with a purely state-created privilege. Examination of the legal treatment of a homosexual seeking to adopt a child involves an inquiry of whether the state may deny that privilege based upon the applicant's sexual orientation. It is instructive to approach the question from the perspective of a homosexual person or couple seeking to adopt an unrelated child. This establishes the respective positions of the state and the prospective adoptive parent, and presents the perspectives of courts that have addressed the constitutional questions raised. A more complicated situation arises when the person seeking to adopt has already established a parent-child relationship with the prospective adoptee. While some courts have construed adoption statutes broadly to allow two homosexuals to join in adopting a child, such decisions have been based upon prudential considerations rather than recognition of a constitutional right to adopt. Generally, case law reveals that there is no constitutional right to adopt, and homosexuals' desire to create legally recognized relationships with biologically unrelated children depends upon state legislatures' enactment and courts' interpretation of adoption laws.

Florida law leaves no room for interpretation, as homosexuals are categorically ineligible to adopt. Most other adoption laws are silent on the issue of sexual orientation, and in those states, the person seeking to adopt must rely upon a court's construction of the applicable statute and determination as to whether the adoption should be granted. A person who

38 See supra note 13 and accompanying text.
39 See infra notes 224-51 and accompanying text.
40 See infra notes 252-77 and accompanying text.
41 See infra notes 269-77 and accompanying text.
42 See infra notes 252-77 and accompanying text.
44 FLA. STAT. ANN. § 63.042(3) (West 1997) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").
45 E.g., VT. STAT. ANN. tit. 15A, § 1-102 (Supp. 2000); but see N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (WESTLAW through Nov. 2000). "Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children." Id. (emphasis added).
46 See In re Adoption of Charles B., 552 N.E.2d 884, 886 (Ohio 1990) ("[T]he right to adopt is not absolute. . . . [the statute] preserves the right of a trial court to grant or deny a petition for adoption based upon the evidence germane to each case.").
challenges a statute or a court’s refusal to grant an adoption based on sexual orientation, alleging violations of substantive due process or equal protection, is armed with virtually no precedential support.

1. Substantive Due Process

The privilege to adopt is not a fundamental liberty interest. Adoption is a relatively recent creation of state legislatures and cannot accurately be characterized as “implicit in the concept of ordered liberty” or “deeply rooted in this Nation’s history and tradition.” Likewise, a person’s choice to engage in homosexual sodomy is not protected as a fundamental liberty interest. Courts have, therefore, refused to sustain due process challenges asserting that denying an adoption based on homosexuality interferes with a fundamental liberty interest.

Sometimes, the person seeking to adopt has developed a relationship with the child in question, and wishes to legally formalize the relationship through adoption proceedings. In such cases, one might argue that refusal to grant the adoption constitutes interference with fundamental liberty interests that arise out of the de facto parental role. Even courts willing to construe adoption statutes broadly to allow unmarried, homosexual persons to join in an adoption have been unwilling to recognize as legitimate the rights of de facto parents.

In light of such precedent, it is unlikely that a


50 See Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (denying that homosexuals have a fundamental right to engage in sodomy).


52 See infra notes 252-77 and accompanying text.

53 Cf. In re Alison D. v. Virginia M., 572 N.E.2d 27, 28-29 (N.Y. 1991) (excluding a biological mother’s former partner from the statutory class “parent,” where both mother and partner had previously agreed to jointly share all rights and responsibilities of childrearing).

54 See id. at 29 (refusing to grant visitation privileges to de facto parent despite established parental relationship with the child). But see In re Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (refusing to adopt literal construction of adoption statute which would deprive children of legal relationship with de facto parent).
court would agree that a denial of the privilege to adopt interferes with fundamental liberties when the parent-child relationship in question is not otherwise legally recognized. 55

2. Equal Protection

Generally, courts do not categorize homosexuals as a suspect class,56 thus, they are not afforded heightened protection from laws that classify based on sexual orientation.57 Courts analyze the constitutionality of a

55 This does not, however, foreclose the possibility that a child involved in such circumstances could succeed in a constitutional challenge to such a denial. The Court has expanded the protection accorded to families beyond the parental role. Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (Powell, J., plurality) (invalidating restrictive city ordinance found to interfere with grandmother’s choice to live with her son and two grandsons); see Lofton v. Butterworth, 93 F. Supp. 2d 1343, 1348 (S.D. Fla. 2000) (upholding standing of a foster child and his foster parent to challenge, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, Florida statute prohibiting homosexual adoption). In Lofton, plaintiff child, eight years old at the time of the proceeding, was placed with the plaintiff foster father from the time of his infancy. Lofton, 93 F. Supp. 2d at 1344. In light of an existing relationship, and the widespread recognition of the advantages that inhere in adoption, the state’s proffered interest in promoting the “best interest of the child” is defeated by its refusal to grant legal recognition to the existing family relationship. Cf Stanley v. Illinois, 405 U.S. 645, 652-53 (1972) (“Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.”). Accordingly, it seems that a child could succeed in a challenge to a state’s refusal to allow adoption in such a circumstance. See Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (“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.”).

56 See, e.g., In re Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987); see also State v. Cox, 627 So. 2d. 1210, 1219 (Fla. Dist. Ct. App. 1993), quashed on other grounds sub nom. Cox v. Fla. Dep’t of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995). But see Commonwealth v. Wasson, 842 S.W.2d 487, 500 (Ky. 1993) (“[Homosexuals] are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution.”).

57 See, e.g., In re Opinion of the Justices, 530 A.2d at 24 (“[S]ince no suspect or quasi-suspect class . . . is involved, the proper test to apply in determining the bill’s constitutionality for federal equal protection purposes is whether the legislation is ‘rationally related to a legitimate governmental purpose.’” (quoting
state's denial of adoptive privileges employing a rational basis standard.\textsuperscript{58} This standard is satisfied if the denial is "rationally related to a legitimate governmental purpose."\textsuperscript{59} The state's interest in promoting the interests of children is often advanced as the guiding purpose of an adoption statute.\textsuperscript{60} This has been recognized as a legitimate state interest.\textsuperscript{61} Since laws subjected to a rational basis standard are accorded a presumption of constitutionality,\textsuperscript{62} appellate courts reviewing a denial of adoption are unlikely to question legislative classifications to determine whether the denial truly promotes the child's best interests in a particular case.\textsuperscript{63}

\textit{C. Comment}

The existence of cognizable constitutional claims significantly influences the analysis required in various proceedings. A custody or visitation dispute involving a homosexual parent calls for an analytical framework that adequately protects the fundamental liberty interest at stake. The welfare of the child is a powerful state interest that can justify interference with the liberty interest of a parent,\textsuperscript{64} but a court must do more than simply cite the child's interests as the guiding principle. A court should promote that interest by closely scrutinizing the factual basis upon which it determines what is in a child's best interests rather than employing a presumption against the parent.\textsuperscript{65} In addition, a court should be careful to

\textsuperscript{58} See, e.g., \textit{id}.
\textsuperscript{59} \textit{Id} (quoting \textit{Cleburne}, 473 U.S. at 446).
\textsuperscript{60} See, e.g., \textit{In re Adoption of Charles B.}, 552 N.E.2d 884, 886 (Ohio 1990).
\textsuperscript{61} \textit{See} \textit{Stanley v. Illinois}, 405 U.S. 645, 652 (1972) ("Illinois has declared that the aim of the ... [a]ct is to protect 'the moral, emotional, mental, and physical welfare of the minor ... These are legitimate interests, well within the power of the State to implement.").
\textsuperscript{62} \textit{See generally} \textit{Lindsley v. Natural Carbonic Gas Co.}, 220 U.S. 61, 78-79 (1911) ("When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.").
\textsuperscript{63} \textit{See id}.
\textsuperscript{64} \textit{Stanley}, 405 U.S. at 652.
avoid substituting its judgment for that of the parent when there is no evidence that the parent’s judgment effects a detriment on the child.\textsuperscript{66}

In contrast, the lack of a recognized constitutional interest in the privilege to adopt requires a less guarded approach in the context of adoption proceedings. The state has broad power to determine eligibility to adopt,\textsuperscript{67} and courts have discretion to implement adoption policies through the approval or denial of adoption applications.\textsuperscript{68} While circumstances might suggest that courts should employ a fact-based analysis rather than a presumptive approach, a court is on more solid constitutional ground when it substitutes its judgment for that of a prospective adoptive parent.

II. HOMOSEXUALITY OF PARENTS IN CUSTODY OR VISITATION DISPUTES

Homosexuality of a parent plays a significant role in the resolution of a child custody or visitation dispute. While the severity of disapproval each homosexual parent faces in such a context varies, a review of case law reveals two general patterns of treatment. Some courts presume that homosexual conduct has a detrimental impact on the child.\textsuperscript{69} Others require evidence that the conduct has had or will have a detrimental impact on the child before they consider it relevant to the determination.\textsuperscript{70} In every case, unfitness solely because it is more convenient to presume than to prove . . . . \textemdash that advantage is insufficient to justify refusing a father a hearing . . . .\textsuperscript{71}.

\textsuperscript{66} Cf. Troxel, 530 U.S. at 68 ("[T]he Troxels did not allege . . . that Granville was an unfit parent. That . . . is important, for there is a presumption that fit parents act in the best interests of their children."); Stanley, 405 U.S. at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children.").

\textsuperscript{67} See In re Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987).

\textsuperscript{68} See In re Adoption of Charles B., 552 N.E.2d 884, 886 (Ohio 1990).

\textsuperscript{69} See Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (presuming that illicit sexual conduct on the part of a parent is detrimental to the child); Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (asserting that primary custody by homosexual parent who openly resides with a partner would rarely be in the best interest of the child); J.P. v. P.W., 772 S.W.2d 786, 793 (Mo. Ct. App. 1989) ("[C]ircumstances have been consistently found to require that a child not be placed or remain in the custody of a homosexual parent and that visitation of a homosexual parent be restricted or terminated . . . . Living with a homosexual lover provides the basis for a change of custody.").

\textsuperscript{70} See S.N.E. v. R.L.B., 699 P.2d 875, 880 (Alaska 1985) (asserting that conduct of a parent is relevant to a modification of a custody order only when the evidence supports a finding that the conduct has or will have an adverse impact on the child); In re Marriage of Birdsall, 243 Cal. Rptr. 287, 290 (Ct. App. 1988)
the standard cited by courts is the "best interests of the child." Even with such a prominently established "single" standard, however, the approach employed with regard to a parent's homosexual conduct bears a noticeable impact on the analysis of both the parents' rights and the child's interests. Infringement upon fundamental parental rights is justified by the state interest in protecting the child, but an approach that employs a presumption precludes a fact-based assessment of the needs of the child. And, thus, the justification necessary to constitutionally infringe upon such rights is absent.

A. The Presumptive Approach

Courts are generally faced with refereeing child care disputes between parents in one of three contexts: marriage dissolution, custody modifications, and visitation privileges. In a marriage dissolution, if parents cannot agree on the custody or visitation arrangement, the court must make an initial allocation. Courts have the most discretion at this point, as there are the fewest presumptions as to who would be the most appropriate parent to receive primary custody. At a later point, one parent may request a modification of the custody arrangement, which requires evidence of a change in circumstances warranting the modification, due to the disruption of the child's life caused by such a change. A court may also be called upon to allocate visitation privileges, which are generally provided to a

(requiring "an affirmative showing of harm or likely harm to the child ... in order to restrict parental custody or visitation"); In re Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) (en banc) (asserting that "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation").


See supra notes 15-36 and accompanying text.


See, e.g., id. §§ 21.1, 22.3.


E.g., id. ("[W]hen one party seeks a change in custody, a court must consider whether there are changed circumstances which justify modifying a prior custody order.")
parent on a reasonable basis, in order to foster the relationship between the child and the non-custodial parent.\textsuperscript{78}

In a modification of a custody arrangement, the parent seeking modification bears the burden of proving that the benefits of such modification outweighs the inherently disruptive effects of changing custody.\textsuperscript{79} In \textit{Ex parte J.M.F.},\textsuperscript{80} the Supreme Court of Alabama held that a mother’s establishment of an openly lesbian relationship and a father’s remarriage constituted changes that supported a modification in the custody arrangement.\textsuperscript{81} The court of appeals had reversed the decision of the trial court to grant the change of custody.\textsuperscript{82} In doing so, it applied Alabama’s rule that a parent’s heterosexual misconduct cannot support a change of custody absent a finding of detrimental effect upon the child to homosexual conduct of a parent.\textsuperscript{83} The Supreme Court of Alabama reversed the lower court, and rejected the proposition that there must be evidence of detrimental impact.\textsuperscript{84} The supreme court concluded that the court of appeals applied the wrong standard, as the father did not seek a change of custody based \textit{solely} upon the mother’s homosexual conduct, but also on his own establishment of a heterosexual marriage.\textsuperscript{85} By considering the father’s heterosexual marriage in addition to the mother’s homosexual conduct, the court avoided determining whether the standard applicable in a change of custody arising from heterosexual conduct is also applicable to a case involving homosexual conduct.\textsuperscript{86} The court did not explicitly conclude that

\textsuperscript{78} E.g., Boswell v. Boswell, 701 A.2d 1153, 1163 (Md. Ct. Spec. App. 1997) (stating that a parent has a right of access to his/her child at reasonable times when child is in the custody of another), aff'd, 721 A.2d 662 (Md. 1998).

\textsuperscript{79} \textit{Ex parte} Johnson, 673 So. 2d 410, 413 (Ala. 1994); see also S.N.E., 699 P.2d at 878 ("[W]e have repeatedly stated our concern with maintaining continuity of care and avoiding disturbing and upsetting the child with repeated custody changes."); Montgomery v. Marcantel, 591 So. 2d 1272, 1273 (La. Ct. App. 1991).

\textsuperscript{80} \textit{Ex parte} J.M.F., 730 So. 2d 1190 (Ala. 1998).

\textsuperscript{81} \textit{Id.} at 1196.

\textsuperscript{82} \textit{See id.} at 1194.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{See id.} at 1194, 1196.

\textsuperscript{85} \textit{Id.} at 1194 (stating that the applicable rule required the father must only show that the change in custody would materially promote the child’s best interests and the positive effects brought about by this change would “more than offset the inherently disruptive effect of uprooting the child”).

\textsuperscript{86} \textit{See id.} at 1194 n.2 ("Because the standard applicable in a change-of-custody case arising from heterosexual misconduct does not apply in this case, the Court of Civil Appeals’ ‘adoption’ of that standard for cases involving homosexual
homosexual conduct of the parent is presumptively detrimental to the child. It did note, however, that “[w]hile the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is ‘neither legal in this state, nor moral in the eyes of most of its citizens.’” The court also asserted that there was sufficient evidence of potential harm to the child from homosexual conduct to support a change in custody.

This emphasis on the mother’s homosexuality, despite recognition that she provided good care for her child, reveals a presumptive approach. The presumption in this case undermined the “best interests of the child” and simultaneously implicated the fundamental parental rights of the mother.

Weigand v. Houghton also involved a father’s request for a modification of custody. In this case, the father was in a homosexual relationship of eight years, and the mother was in a heterosexual marriage. The father sought to obtain custody because he was concerned that his son was being exposed to mental and emotional abuse due to the stepfather’s physical abuse of the boy’s mother. The chancellor analyzed several factors.

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87 See id. at 1194.
88 Id. at 1196 (citing Ex parte D.W.W., 717 So. 2d 793, 796 (Ala. 1998)). In Ex parte D.W.W., 717 So. 2d at 793, the Supreme Court of Alabama, in affirming a trial court’s restrictions on visitation, stated that even without evidence of adverse impact by mother’s lesbian relationship, the trial court would be justified in restricting visitation to limit exposure to the lesbian lifestyle. Id. at 796. The court seemed to use the presumptive approach rejected in Stanley v. Illinois, 405 U.S. 645 (1971). See supra notes 15-37 and accompanying text.
89 Ex parte J.M.F., 730 So. 2d at 1196.
91 Id. at 584.
92 Id.
93 Id. Weigand’s concern arose after two incidents of violence between the boy’s mother and stepfather. The first resulted in a conviction for simple assault, and the second in a conviction for public drunkenness and malicious mischief. Id.
94 See id. at 586-87 (citing as factors for consideration in decisions regarding custody: age of the child; health, and sex of the child; a determination of the parent who has the continuity of care prior to separation; which parent has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent; physical and mental health and age of the parents; emotional ties of the parent and child; moral fitness of the parents; the home, school, and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent; and other factors relevant to the parent-child
Although the chancellor found that the father could offer a more stable home,\textsuperscript{95} he placed the most emphasis on the factor of moral fitness and refused to grant the custody modification.\textsuperscript{96} The Supreme Court of Mississippi upheld the chancellor's ruling.\textsuperscript{97} The dissent expressed concern that seven of the chancellor's twelve pages of custody analysis were dedicated to the issue of the father’s homosexuality.\textsuperscript{98} This, the dissent argued, indicated that the chancellor and the majority were so "blinded"\textsuperscript{99} by the father's homosexuality, that they were willing to leave the boy in a home with a felony-convicted, physically abusive, unemployed stepfather who also served as primary caregiver due to the mother's demanding work schedule.\textsuperscript{100} While the supreme court did not explicitly recognize a presumption that homosexual conduct detrimentally impacts a child, it deferred to the chancellor's finding that the moral concern raised by the father's homosexual conduct outweighed other factors in his favor, without evidence that the father’s homosexual relationship had detrimentally impacted his son.\textsuperscript{101}

In \textit{Weigand}, the presumption of homosexual conduct's detrimental effect is more difficult to identify than in other cases employing such a presumption. This is because the court’s decision consisted of a carefully articulated analysis of the factors considered to be relevant in a custody modification case.\textsuperscript{102} The presumption is revealed, however, by the courts' disproportionate focus on the element of moral fitness and the surprising lack of attention given to the violent home environment provided by the custodial parent.\textsuperscript{103}

In \textit{Thigpen v. Carpenter},\textsuperscript{104} a homosexual mother appealed a trial court's modification of a joint custody arrangement to an award of sole relationship.\textsuperscript{105}

\textsuperscript{95} \textit{Id.} at 586.
\textsuperscript{96} \textit{Id.} at 590 (McRae, J., dissenting) (quoting Chancellor Lynchard's petition denial) ("Moral fitness of the parents: It is this factor above all others which causes the greatest concern with the Court.").
\textsuperscript{97} \textit{Id.} at 587-88.
\textsuperscript{98} \textit{Id.} at 589 (McRae, J., dissenting).
\textsuperscript{99} \textit{Id.} at 588 (McRae, J., dissenting).
\textsuperscript{100} \textit{Id.} (McRae, J., dissenting).
\textsuperscript{101} \textit{Id.} at 586-87.
\textsuperscript{102} \textit{Id.} at 586 ("[T]he chancellor addressed and analyzed each of the Albright factors before determining that it was in the best interest of Paul to remain in the custody of his mother . . . .").
\textsuperscript{103} See \textit{Id.} at 589 (McRae, J., dissenting).
custody to the father.\textsuperscript{105} The Court of Appeals of Arkansas affirmed the decision and pointed to evidence of the mother’s emotional instability as support for the trial court’s ruling.\textsuperscript{106} In addressing her homosexual relationship, the court posited that “it has never been necessary to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children. Arkansas courts have presumed that it is.”\textsuperscript{107} The court did address the appellant’s parental rights, as she challenged the custody modification and visitation restrictions on the grounds that the trial court’s ruling violated her constitutional rights.\textsuperscript{108} While the court acknowledged the existence of basic rights which attach to parenthood, it rejected the appellant’s claim that due process requires that there be a nexus between the parent’s activity and the harm to the child.\textsuperscript{109} The court’s ultimate decision in this case was justified by evidence of the mother’s emotional instability,\textsuperscript{110} but its analysis could have yielded the same result even if other justifications were absent.\textsuperscript{111} The court equated the mother’s homosexuality itself with “illicit sexual conduct.”\textsuperscript{112} Furthermore, the court explicitly recognized a presumption that illicit sexual conduct has a detrimental impact upon the child.\textsuperscript{113} By equating homosexuality with illicit sexual conduct, and utilizing a presumption of detrimental impact, the court engaged in an analysis which placed minimal attention on the interests of the particular children involved.

In \textit{Scott v. Scott},\textsuperscript{114} a mother in a homosexual relationship appealed a trial court’s decision to designate the father as the domiciliary parent in the joint custody arrangement.\textsuperscript{115} The Court of Appeals of Louisiana affirmed the ruling of the trial court, holding that the mother’s decision to live with

\begin{footnotes}
\item[105] Id. at 511.
\item[106] Id. at 512 (reporting that the appellant’s mother testified regarding her daughter’s history of instability and stated that the appellant “had a sudden turnaround to everything she had always believed in”).
\item[107] Id. at 513. The presumption has been applied to heterosexual promiscuous conduct as well as homosexual conduct. See Digby v. Digby, 567 S.W.2d 290, 292-93 (Ark. 1978); Walker v. Walker, 559 S.W.2d 716, 720 (Ark. 1978).
\item[108] Thigpen, 730 S.W.2d at 513.
\item[109] Id.
\item[110] Id. at 512, 513-14 (noting that the father testified that the mother had previously attempted suicide and was suicidal at the time of their separation).
\item[111] See id. at 514.
\item[112] See \textit{id}. at 513.
\item[113] Id.
\item[115] See \textit{id}. at 762.
\end{footnotes}
the children and her partner in the same residence was a change of
circumstance that materially affected the welfare of the children and
supported the court's modification of the original custody arrangement. The mother cited Lundin v. Lundin, and urged the court to recognize that
because she maintained a discreet relationship with her partner, her
children's interests were not detrimentally affected. In Lundin, the court
stated that the "mere fact of homosexuality may not require a determination
of moral unfitness so as to deprive the homosexual parent of joint
custody." The court affirmed the holding of Lundin with regard to a
determination of joint custody. The presumption against homosexual
parents in general was, however, made apparent by the court's dicta
regarding the issue of whether a homosexual parent who openly resides
with his or her partner would be entitled to primary custody of the minor
children: "It is the opinion of this court that under such facts, primary
custody with the homosexual parent would rarely be held to be in the best
interests of the child." In J.A.D. v. F.J.D., the Supreme Court of Missouri upheld a trial
court's award of custody to a father based in part on the mother's
history of homosexual relationships. The presumption that homosexual
conduct has a detrimental impact on the interests of the children was
apparent from the trial court's treatment of the mother. Not only was she
denied custody, but broad visitation restrictions were imposed. She was
also ordered to engage in a session in which she was to tell her children of
her homosexual conduct. While the supreme court denied that any
Missouri case had ever held that a homosexual parent was ipso facto unfit
for custody of his or her child, it affirmed the decision of the trial

116 Id. at 765.
118 See Scott, 655 So. 2d at 766.
119 Lundin, 563 So. 2d at 1277.
120 Scott, 655 So. 2d at 766.
121 Id.
122 J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo. 1998) (en banc).
123 See id. at 339-40.
124 See id. at 340 (prohibiting the children from being in the presence of any
person known by the mother to be a lesbian or one who engages in lesbian activity).
125 Id. at 338.
("[C]ircumstances have been consistently found to require that a child not be
placed or remain in the custody of a homosexual parent and that visitation of a
homosexual parent be restricted or terminated."); S.E.G. v. R.A.G., 735 S.W.2d
court, which appeared to presume detrimental impact on the children as a result of the mother's homosexual conduct.

In addressing the factor of homosexuality, the supreme court asserted that a court may consider the impact upon children in making the custody determination, but it did not require a connection between harm to the child and the parent's homosexual conduct to be found before such conduct is considered relevant to the determination. The practical implication of the ruling was that courts may presume detrimental impact, as the court refused to adopt the nexus test proposed by the court of appeals in its consideration of the case.

Comparing the supreme court's treatment of this case to that of the court of appeals illustrates the tension between the presumptive approach and that which requires an evidentiary basis of finding detrimental impact. In its analysis, the court of appeals began by recognizing the liberty interests of parents in maintaining a relationship with their child. It then reviewed Missouri cases in which homosexuality was a factor in a custody or visitation dispute and found that courts had applied a per se rule, presuming homosexual conduct of a parent rendered them unfit. The court of appeals adopted the nexus test, which requires "a connection, or nexus, between the parent's sexual conduct, homosexual or heterosexual, and harm to the child must be established before the parent's sexual conduct is considered relevant to the custody determination." The court of appeals concluded that the trial court erred in awarding custody and restricting visitation based on the mother's homosexual conduct absent evidence of its impact on the children, and reversed and remanded the case for consideration of all relevant factors. The supreme court, in affirming

164, 167 (Mo. Ct. App. 1987) ("In the few cases in our state dealing directly with the problem of a homosexual parent seeking primary custody, all courts have awarded custody to the non-homosexual parent, and restricted the homosexual parent's visitation rights, again relying on the impact upon the child.").

127 See J.A.D., 978 S.W.2d at 339-40.
129 J.A.D., 978 S.W.2d at 339-40.
130 See id.
132 Id. at *3-4.
133 Id. at *6-11.
134 Id. at *11.
135 Id. at *12.
the trial court, simply asserted that there was substantial evidence in the
record to support the custody determination. The decision by the supreme
court implicitly rejected the adoption of the nexus test by the court of
appeals. Holding that homosexual parents are not ipso facto unfit did not
affect the approach taken by the court, as it failed to articulate how the
impact of homosexual conduct of a parent on a child must be established.
Thus, the presumption against a homosexual parents was left essentially
untouched.

In Pulliam v. Smith, the Supreme Court of North Carolina approved
the decision of a trial court to grant a change in custody from a homosexual
father to the mother. The court found that the father’s homosexual
activities supported the trial court’s finding of “‘improper influences’
which are ‘detrimental to the best interest and welfare of the two minor
children.’” This decision was not based upon the father’s homosexuality
alone, as the court clearly articulated several examples of conduct by the
father and his partner that it considered improper such as:

- the regular commission of sexual acts in the home by unmarried people,
- failing and refusing to counsel the children against such conduct while
  acknowledging this conduct to them, allowing the children to see
  unmarried persons known by the children to be sexual partners in bed
together, keeping admittedly improper sexual material in the home and
  Mr. Tipton’s taking the children out of the home without their father’s
  knowledge of their whereabouts support the trial court’s findings of
  “improper influences” which are “detrimental to the best interest and
  welfare of the two minor children.”

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136 J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998) (en banc). The court did,
however, reverse the trial court’s visitation restrictions limiting conduct with “any
... female, unrelated by blood or marriage, with whom J.A.D. may be living,” and
remanded with directions to limit the condition to apply only to those whose
conduct would be contrary to the best interests of the children. Id.
137 Id. at 339-40.
138 But see Heidi C. Doerhoff, Note, Assessing the Best Interests of the Child:
Missouri Declares that a Homosexual Parent is Not Ipso Facto Unfit for Custody,
64 MO. L. REV. 949, 985 (1999) (asserting that by holding that homosexual parents
are not ipso facto unfit for custody of their children, the Missouri Supreme Court
appeared to be sending a signal to judges who may have viewed such parents as per
se unfit).
140 Id. at 899.
141 Id. at 904.
142 Id.
Rather, the presumption of the court was grounded in the conclusion that such conduct is detrimental, without substantial attention focused upon a connection between the conduct and its effect on the children. The dissent expressed the concern that the majority relied on its own moral disapproval of the father’s conduct, and noted that the only evidence that the children suffered as a result of the father’s homosexual conduct was insufficient to support a change of custody.

B. Homosexuality Relevant Only Upon Evidence of Detrimental Impact

In S.N.E. v. R.L.B., the Alaska Supreme Court applied the nexus test in an action brought by a father seeking to change custody of the child from the mother to himself. The father sought custody on the grounds that the mother was a lesbian with radical political views. He claimed the mother was emotionally unstable, and that he was the child’s primary parent. The trial court granted the father custody. The supreme court reversed, holding that “consideration of a parent’s conduct is appropriate only when the evidence supports a finding that a parent’s conduct has or reasonably will have an adverse impact on the child and his best interests.” Furthermore, the court ignored consideration of the stigma attached to a parent’s status as a homosexual in a custody decision. Because the record contained no evidence that the homosexual conduct of the mother had or was likely to affect the child adversely, the court reversed and remanded the case.

This approach represents a dramatic departure from a presumption of detrimental impact. The most significant distinction is the movement of a court’s focus away from the parent and to the particular child involved in the dispute, with the central inquiry being what evidence supports a change in custody. Such a shift in focus indicates that the court is not motivated

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143 Id. at 905.
144 Id.
146 See id. at 878.
147 Id. at 877.
148 Id.
149 Id. at 879.
150 Id.
151 Id.
152 See supra notes 74-151 and accompanying text.
153 See S.N.E., 699 P.2d at 878 (“When a court determines the best interests of the child under the changed circumstances doctrine, the scope of judicial inquiry is limited to facts directly affecting the child’s well-being.”).
by the parent’s sexual orientation and validates the proffered interest of promoting the welfare of the child.

In *Rowsey v. Rowsey*, the trial court granted a father’s request for a change in custody because, in violation of the divorce decree, the mother associated herself and her children with a woman found by the trial court to be a lesbian. The Supreme Court of West Virginia reversed. While the court acknowledged that the mother violated the terms of the custody arrangement, it held that the mother’s association with a reputed lesbian was not grounds for changing custody to the noncustodial parent. The court found no evidence of adverse impact on the children caused by the association with the mother’s friend, and asserted that “[a] change in custody based on a speculative notion of potential harm is an impermissible exercise of discretion.” It is worth noting that the court did not explicitly examine whether the mother herself was homosexual, and thus the court’s conclusion differs from others discussed because it does not directly deal with the mother’s sexuality, but rather, her relationship with another person known to be a homosexual. The general principle announced by the decision, however, reflects the view that custody decisions should be based upon evidentiary findings of impact, rather than presumptions unsupported by the facts on record.

In *Guinan v. Guinan*, a father appealed the family court’s award of joint custody with primary physical custody to the mother. The appeals court pointed to the factors in the mother’s favor: the children had been residing with their mother; she was able to provide more personal time to raising the children than the father; and two of the children had expressed desire to continue living with her. There was also conflicting evidence as to whether the mother had engaged in homosexual relationships. With regard to this question, the court stated that “[a] parent’s sexual indiscretions should be a consideration in a custody dispute only if they are shown

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155 See id. at 59-60.
156 Id. at 62.
157 Id. at 60.
158 Id. at 60.
159 Id. at 61.
160 See id. at 61.
162 See id. at 830.
163 Id. at 831.
164 Id. (“Conflicting evidence was introduced by the parties regarding whether defendant had engaged in sexual relations with other women, thus creating a question of fact as to this issue.”).
to adversely affect the child’s welfare.” This decision implicitly refused to distinguish between homosexual and heterosexual conduct, and applied the same standard to both in order to determine the circumstances under which consideration of such conduct is appropriate to make custody determinations.

In Stroman v. Williams, the Court of Appeals of South Carolina affirmed the decision of the family court, which had denied the father’s request for a change in custody based on his contention that the mother’s homosexuality rendered her unfit as a matter of law. The appeals court rejected the father’s argument, and stated: “[a] parent’s morality, while a proper factor for consideration, ‘is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child.’” The court then emphasized the significance of an evidentiary showing of impact on the child, and pointed to the record, which was devoid of evidence of adverse effect to the daughter’s welfare caused by the mother’s homosexuality. The court also placed weight in the fact that the record reflected no detrimental impact on an older daughter, who was “heterosexual, intelligent, and well-mannered after having lived with the mother and the other woman for a five-year period.” The court seemed careful not to lend approval to the mother’s status as a homosexual, yet refused to interfere with the parental relationship absent an evidentiary basis for doing so.

In Birdsall v. Birdsall (In re Marriage of Birdsall), the court addressed the effect of homosexuality of a parent in the context of a

165 *Id.; see also* Di Stefano v. Di Stefano, 401 N.Y.S.2d 636, 637 (App. Div. 1978) (“While the sexual life style [sic] of a parent may properly be considered in determining what is best for the children, its consideration must be limited to its present or reasonably predictable effect upon the children’s welfare.”).


167 *Id.* at 705.

168 *Id.* (citing Davenport v. Davenport, 220 S.E.2d 228, 230 (S.C. 1975) (affirming a decision granting custody to the mother despite her adulterous relationship)).

169 *Id.* (“Our own examination of the record did not uncover any evidence that... [the daughter’s] welfare was being adversely affected in any substantial way.”).

170 *Id.* at 706.

171 *Id.* at 705-06. In fact, one could conclude that the court implicitly disapproved of the mother’s homosexual status, as when it referred to the lack of her daughter’s exposure to sexual conduct, it used the language “deviant sexual acts.” *Id.* at 705.

visitation dispute. The father challenged a court order prohibiting "overnight visitation . . . in the presence of any third person known to be a homosexual." The father lived with two other homosexual men, neither of whom had ever engaged in sexual relations with the father. Thus, the father would have been forced to leave his home to exercise visitation with his child according to the court order. The appeals court vacated the order, and held that while a court may consider homosexuality as a factor, along with other evidence, "an affirmative showing of harm or likely harm to the child is necessary in order to restrict parental custody or visitation." The court asserted that a parent's homosexuality, "without link to detriment to the child, is insufficient to constitute harm."

_In re Marriage of Cabalquinto_ also involved the visitation rights of a homosexual father. The father appealed a decision that denied his request for an order to allow visitation with his son in his state of residence, California. The Supreme Court of Washington was unable to determine a basis for the trial court's ruling, and remanded the case after the court emphasized the rule that homosexuality is not a bar to custody or reasonable rights of visitation.

The cases that reject a presumption of detrimental impact present a different analytical approach than those that employ such a presumption. They demand an assessment of the facts underlying the court's decision about the interests of the individual child, by pointing to the evidence, or lack thereof, which directly relates to the welfare of the child. While the ultimate result in each case may be susceptible to criticism, a close assessment of such facts necessarily places emphasis on the goal of promoting the interests of the child.

\[^{173}Id. \text{ at 287.}\]
\[^{174}Id.\]
\[^{175}Id. \text{ at 288.}\]
\[^{176}See id.\]
\[^{177}Id. \text{ at 289.}\]
\[^{178}Id. \text{ at 290.}\]
\[^{179}Id. \text{ at 291.}\]
\[^{180}In re Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983) (en banc).\]
\[^{181}Id. \text{ at 887.}\]
\[^{182}See id.\]
\[^{183}Id. \text{ at 888.}\]
\[^{184}See, e.g., S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) ("Consideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests." (emphasis added)).\]
C. Comment

The tension between the presumptive approach and that which requires an evidentiary showing of detrimental impact hinges on the fundamental belief that a conventional, heterosexual family environment is simply better for a child. Such an approach is understandable. The decision maker in a custody or visitation dispute is often faced with children who have been subjected to a painful conflict between the two most significant figures in their lives. Society's general condemnation of homosexuality, which manifests itself in the form of legal, as well as social, disadvantages, creates a valid concern for courts seeking to provide the most healthy and stable solution for the children. Therefore, it is important to emphasize that criticism of the presumptive approach does not necessarily constitute a criticism of the results reached by courts that have employed such a presumption. In fact, as noted in the analysis of Thigpen v. Carpenter, the evidentiary basis may reveal sufficient reason, independent of the homosexuality of a parent, to justify interference with parental rights. The interests of children are, however, most effectively promoted by an analytical framework that places the homosexual conduct of a parent among the factors to be considered only upon the proper evidentiary showing. Such an approach most closely adheres to the guiding principle of the "best interest of the child," which is espoused by courts to be the proper standard in child custody or visitation disputes. The evidentiary approach provides a more balanced treatment of an issue that necessarily implicates a comparative analysis. By requiring a link between the homosexual conduct of a parent and detrimental impact to the child,

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185 See J.P. v. P.W., 772 S.W.2d 786, 793 (Mo. Ct. App. 1989) (noting that "there are sufficient social, moral, and legal distinctions between the traditional heterosexual family relationship and illicit homosexual relationship to raise the presumption of regularity in favor of the licit, when established, shifting to the illicit, the burden of disproving detriment to the children" (alteration in original)) (citing Constant A. v. Paul C. A., 344 496 A.2d 1, 10 (Pa. Super. Ct. 1985)).
186 See supra note 110 and accompanying text.
187 See supra note 71 and accompanying text.
188 See In re Parsons, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995).
189 In some states, homosexual conduct in itself is misconduct, as sodomy is illegal. See, e.g., Weigand v. Houghton, 730 So. 2d 581, 590 (Miss. 1999) (McRae, J., dissenting). This Note takes the position that regardless of the viewpoint held by the state as to the morality of such conduct, it is relevant only to the extent that there is an evidentiary basis for a finding of impact on the child.
courts are less likely to trample on the fundamental rights that inhere in parenthood. 190

1. The Best Interests of the Child

One virtue of the “best interest of the child” standard is that it provides courts with the flexibility to evaluate the circumstances of each case, and render solutions based on the specific needs of the individual child. 191 The trial court has the opportunity to personally observe the people involved in a custody dispute, and assess the family situation first-hand. Thus, trial courts are generally accorded broad deference by appeals courts. 192 When a court employs a presumption of detrimental impact, a close assessment of the needs of the specific child, the advantages offered by each parent, and other factors relevant to the consideration is necessarily truncated. A non-presumptive approach treats each child as an individual, and based on the particular circumstances, asks the critical question of what is best for that child.

Perhaps the approach employed is most significant in an action for custody modification. In this context, a presumption that the homosexual conduct of a parent detrimentally impacts the welfare of the child immediately displaces the interest of continuity of care, a crucial interest in such a case. 193 In addition, the burden of showing that the advantages to the child will outweigh the disruptive effect of a change is on the parent seeking modification. 194 When the custodial parent is homosexual, a presumption of detrimental impact essentially shifts the burden of proof from the parent seeking the modification to the parent currently in custody of the child. 195

190 See generally Troxel v. Granville, 530 U.S. 57, 65 (2000) (“The liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).
192 See generally Ex parte J.M.F., 730 So. 2d 1190, 1195 (Ala. 1998). See also Davenport v. Davenport, 220 S.E.2d 228, 230 (S.C. 1975) (asserting that the “totality of circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed”).
194 See supra note 79 and accompanying text.
195 See supra notes 74-144 and accompanying text.
Therefore, in order to maintain continuity of care and avoid potentially harmful disruption of the child’s situation, the custodial parent must affirmatively prove that his or her conduct has not and will not have a detrimental impact on the child. This is a heavy burden that may be impossible to satisfy, depending upon the court’s view of homosexuality. While it may not be difficult to show that a child is currently well-adjusted and unaffected by such conduct, it is harder for a parent to prove to the court that there will be no detrimental impact in the future, even with expert opinion and studies indicating support for such a proposition. This is especially true when one realizes that the courts employing such a presumption are also the courts most concerned with the effect of homosexual conduct on the child’s moral development. Therefore, the practical implication of such a switch in the burden of proof is a result which ignores the interest of maintaining continuity of care and avoiding disruption in the child’s life, which are basic to the best interests of a child.

When a court is faced with a child custody dispute, it is placed in the position of comparing the relative strengths and weaknesses of the parents and allocating custody accordingly. When the court presumes detrimental impact caused by homosexual conduct of one parent without evidence to support such a finding, it is more likely to overlook factors that would normally bear a significant influence on the court’s analysis. For example, in Weigand, the trial court was presented evidence that the boy’s primary caretaker, his stepfather, was a convicted felon, had two convictions arising out of domestic disputes, suffered from depression, and had abused alcohol. Despite such facts, the trial court focused the majority of its analysis upon the morality of the father’s homosexual lifestyle, which raised greater concern than the fact that the child was exposed to the

196 See Ex parte J.M.F., 730 So. 2d 1190, 1193 (Ala. 1998). The homosexual mother’s own expert witness and the court-appointed psychologist both testified that the studies they reviewed revealed no adverse impact as a result of a child being raised in a household with a homosexual parent. Id. The guardian ad litem did point to studies which reached the opposite conclusion. Id.

197 Id. at 1195 (expressing that the mother had established an environment where she presented homosexuality as the moral equivalent of a heterosexual marriage).

198 See generally S.N.E., 699 P.2d at 877 & n.2 (emphasizing that modification requires some change in circumstances to justify moving the child).

199 Cf. Ex parte J.M.F., 730 So. 2d at 1194 (holding that heterosexual father’s remarriage in combination with mother’s more open homosexuality warranted custody modification).

200 See Weigand v. Houghton, 730 So. 2d 581, 584 (Miss. 1999).
violence and threats of his step-father. In G.A. v. D.A., the dissenting opinion expressed concern that the majority’s custody decision was based solely on the sexual orientation of the mother, and therefore the majority ignored evidence the home environment offered by the father was inferior. In Ex parte D.W.W., the Supreme Court of Alabama affirmed visitation restrictions which required the homosexual mother to exercise her visitation only at the maternal grandparent’s home. In doing so, the court dismissed evidence that the father of the children, their custodial parent, had a history of alcohol and domestic abuse, and asserted that this information was relevant only to the custody decision, which was not raised on appeal. The court failed, however, to consider that a comparative analysis is appropriate to the determination of visitation privileges, just as it is relevant to the custody determination.

Visitation restrictions, especially those that require the parent to exercise visitation in a place other than her own home, place a burden upon the parent that will likely inhibit visitation. The less contact a non-custodial parent has with a child, the greater the influence of a custodial parent. A comparative analysis is, therefore, appropriate, and the evidence of a father’s faults become relevant even in the visitation context. These examples illustrate that the “best interests of the child” standard demands evaluation of the relative strengths and weaknesses of parents on either side of the dispute. A presumption against one parent, absent evidence supporting such presumption, creates an undue imbalance in the court’s analysis.

An additional factor raised by the presumption approach that detracts from the principle of the best interests of the child is the punitive nature of decisions which deny custody or visitation based on the court’s moral judgment of homosexual conduct. This is clearly demonstrated in the case of J.A.D., in which the trial court denied custody to the mother, severely limited her visitation privileges, and ordered her to participate in a “telling

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201 See id. at 586-87 (“[T]he morality of David’s lifestyle was one important factor to consider in the eyes of the chancellor . . . .”).
203 See id. at 729 (Lowenstein, J., dissenting) (“The mother provides the child with his own room in a well kept house, enrolls him in pre-school, has a steady nursing job . . . . The father has a limited education, an income of $6500 and lives in basically a one room cabin containing a toilet surrounded by a curtain . . . .”).
204 Ex parte D.W.W., 717 So. 2d 793 (Ala. 1998).
205 See id. at 795.
206 See id. at 795 n.1; id. at 797 (Kennedy, J., dissenting).
The order to participate in a “telling session” was particularly indicative of the punitive nature of the decision, especially in light of the fact that the trial court also ordered the mother not to expose her children to aspects of her homosexual lifestyle during visitation. The order placed the mother in a position of simultaneously revealing and hiding herself from her children, implying that her orientation is shameful. Regardless of the motive for ordering such a session, the ultimate effect is punitive. The presence of a punitive element in a decision regarding a custody dispute raises the concern that the court has inappropriately shifted its focus from the best interests of the child to an inquiry of what a parent morally deserves.

2. The Constitutional Issue

"[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that... warrants deference and absent a powerful countervailing interest, protection." While the interests of the child in a custody or visitation dispute always override other interests, the fundamental liberty interest inherent in parenthood is implicated in such cases. Therefore, courts should employ an analytical framework that is most likely to promote the interests of the child while remaining cognizant of parental rights. Of course, in the context of a custody dispute, a court is also faced with a contest between two parents, each of whom have rights to be considered. Therefore, simultaneously balancing parental rights and reaching a solution that is best for the child creates a difficult task.

Courts justifiably place parental rights in a position subordinate to the ultimate concern of the best interests of the child. When, however, a court...

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207 See J.A.D. v. F.J.D., 978 S.W.2d 336, 338 (Mo. 1998) (en banc). At the point of appeal, the “telling session” had already occurred, thus the issue was moot. Id. at 340.
209 See J.A.D., 978 S.W.2d at 338 (“The Court recognizes the benefit to the daughters of their mother telling them herself so that they will have first hand knowledge...”).
212 See supra notes 15-37 and accompanying text.
employs a presumption, precluding an analysis tailored to the needs of the particular child at issue, it risks failing to promote that child’s interests while also violating parental rights. This is especially true in the context of a dispute over the visitation privileges of the non-custodial parent.

While visitation between a non-custodial parent and a child is not an absolute right, the parent does have a right of access to the child at reasonable times. Generally, such restrictions involve a limitation on the child’s contact with homosexual partners of the parent or prohibiting overnight visitors during visitation. Such restrictions may apply to non-custodial parents in heterosexual relationships as well. From the perspective of a parent in a longstanding, monogamous relationship, in a state where homosexual sodomy is legal, however, such restrictions may be unconstitutional. The parent must make arrangements that involve considerable inconvenience and expense in order to foster a relationship with the child. More importantly, the parent is forced to present his or her lifestyle as something that should be hidden, which interferes with the prerogative of a parent to make decisions about the basic social beliefs and values when raising a child. When a court places heavy restrictions on visitation based on the presumption that the homosexual conduct of a parent is detrimental to the child, with the attendant lack of evidence of detrimental effect on the child, it places an undue burden on the non-custodial parent in maintaining a relationship with that child. This burden "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of [their] children," an interest guaranteed by the Fourteenth Amendment Due Process Clause.

III. THE ADOPTION PRIVILEGE

Adoption is purely statutory, and whether a homosexual person is granted the privilege to adopt turns upon interpretation of adoption laws and the discretion conferred upon judges who determine whether an

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214 See, e.g., Ex parte D.W.W., 717 So. 2d 793, 794 (Ala. 1998).
215 See id. at 796 n.2. ("We . . . note that the restriction against all overnight adult guests . . . applies equally to both parents. The trial court made no distinction between homosexual and heterosexual relationships.").
217 See id. at 533-34.
218 See supra note 13 and accompanying text.
adoption is in the best interests of the child.\textsuperscript{219} Since constitutional challenges to denial of adoption based on sexual orientation will fail in the vast majority of cases,\textsuperscript{220} this section focuses on the policies underlying decisions to grant or deny an adoption to a homosexual person. As an initial matter, it is instructive to examine the attitudes and beliefs that shape the laws and influence how courts exercise discretion when presiding over adoptions.\textsuperscript{221} This section then reviews cases in which courts were called upon to interpret statutes in order to illustrate how such perspectives facilitate or obstruct a homosexual person's attempt to adopt a child.\textsuperscript{222}

\textbf{A. General Considerations of Legislatures and Courts in Determining Whether a Homosexual is Eligible to Adopt}

\textit{1. The Legality of Homosexual Conduct}

While courts almost universally cite the interest of the child as the overriding purpose of adoption statutes, several considerations influence the best interests of the child when the person seeking to adopt is a homosexual. Perhaps the most powerful argument against homosexual adoption is found in states where the people, through their elected representatives, have made homosexual sodomy illegal.\textsuperscript{225} To permanently place a child in the home of a person who openly practices illegal conduct is to subordinate that child's interests to the interests of those seeking to adopt.\textsuperscript{224} This argument was articulated by \textit{In re Appeal Juvenile Action B-10489},\textsuperscript{226} where the appellate court affirmed the lower court's certification of a bisexual man as unacceptable to adopt children.\textsuperscript{227} The court noted that the interests of the child must control the determination,\textsuperscript{228} and asserted "[i]t would be anomalous for the state on the one hand to declare homosexual conduct unlawful and on the other create a parent after that proscribed...

\textsuperscript{219} \textit{See In re Opinion of the Justices}, 530 A.2d 21, 25 (N.H. 1987) ("In foster care and adoption cases the State by law has either the exclusive, or a highly significant, responsibility to choose what is best for the child.").
\textsuperscript{220} \textit{See supra} notes 38-63 and accompanying text.
\textsuperscript{221} \textit{See infra} notes 224-51 and accompanying text.
\textsuperscript{222} \textit{See infra} notes 252-77 and accompanying text.
\textsuperscript{224} \textit{See id.}
\textsuperscript{225} \textit{Id. at} 830.
\textsuperscript{226} \textit{Id. at} 835.
\textsuperscript{227} \textit{Id. at} 833-34.
model, in effect approving that standard . . . as the head of a state-created family."

This is a valid argument when there is no existing parent-child relationship in question. When a de facto parent has already established a parental bond with the child, however, the state's denial of adoption undermines the interests of the child in question by depriving that child of the inherent advantages of a legally recognized relationship.

The advantages of a legally recognized parent-child relationship include the obligation of support, inheritance rights, health insurance and other benefits through the parent's employment, and familial ties that would protect the child's legal relationship with the de facto parent in case of the death of the natural parent. Where a child has become dependent on an adult as a parental figure, either due to state action, or because the adult is in a long-term relationship with the child's legal parent, there is no valid state interest in denying the legitimacy to a relationship that already exists. Instead, the state deprives the child the benefits of a legal relationship, and as a result, undermines his or her interests.

2. The Role Model Approach

An additional consideration motivating denial of adoption based upon sexual orientation involves the state's interest in providing children with strong role models. Parents serve as the primary role models in a child's life. In recognition of this factor, one concern raised in adoptions is

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228 Id. at 835.
229 This is not to say that all criminals forfeit their parental rights, but sexuality is a morally charged issue, and in the context of developing laws regarding family, it is a relevant consideration.
230 See, e.g., Adoption of Tammy, 619 N.E.2d 315, 320 (Mass. 1993) (noting that allowing an adoption would entitle the child involved to significant financial protection and benefits that are not otherwise available).
231 Id.; see also Elizabeth Zuckerman, Comment, Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother, 19 U.C. Davis L. Rev. 729, 741-43 (1986) (explaining the necessity of second parent adoption to provide children of lesbian partners with the advantages of a legal parent).
233 See infra notes 265-77 and accompanying text.
whether the prospective adoptive parent is an acceptable role model. There seem to be two separate ideas underlying this concern. First, can a homosexual parent serve the "modeling" needs of a child who will grow up to be a heterosexual adult? Second, is the sexuality of a child influenced by the sexuality of his or her parent?

The first aspect of this concern was explained by the court in State v. Cox. In response to an equal protection challenge to a law that denied homosexuals eligibility to adopt, the state posited that a high percentage of adoptive children will be heterosexual. As such: "[i]t is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood." The state's concern was underscored by its finding that many children available for adoption have developmental problems that create a special need for a "stable heterosexual household." The court found that the state's interest in providing heterosexual role models was sufficient to support the constitutionality of the statute. On review, the Florida Supreme Court affirmed the lower court's reasoning.

On its face, the reasoning of Cox has some merit, due to the broad deference courts usually grant to the judgment of legislators under a rational basis standard. The state's argument in this case is, however,

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235 See State v. Cox, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993), quashed on other grounds sub nom. Cox v. Fla. Dep't of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995) (approving the use of rational basis review, but remanding for factual completion of the record to support the validity of the law in questions); In re Opinion of the Justices, 530 A.2d at 25.

236 See Cox, 627 So. 2d at 1220 (articulating the state's interest in providing role models who can provide education and guidance for adoptive children concerning relationships and sex).


238 See Cox, 627 So. 2d at 1220.

239 Id.

240 Id.

241 Id.

242 Id. at 1220 n.10 ("This reason may not be the only rational reason in support of this statute, but it is a sufficient reason to support the constitutionality of the statute in this case.").

243 Cox v. Fla. Dep't of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995) (affirming the lower court's reasoning, but remanding for a completion of the factual record to determine if the statute satisfied rational basis review under equal protection analysis).

244 See supra notes 38-63 and accompanying text.
vulnerable to criticism in view of the fact that the state has not barred homosexuals from serving as foster parents. To bar homosexuals from adopting children, while allowing them to serve as foster parents undermines the argument that the state seeks to promote the interest of children by providing appropriate role models. In either case, the adult is acting as a parent, and thus serves as a role model for the child in their care.

The second aspect of the role model approach involves the concern that the homosexuality of a parent may influence the sexual development of the child. The validity of this concern turns upon the unsettled question whether sexual orientation is a product of biology or environmental factors. Courts are not satisfied that this question has been sufficiently resolved to justify dismissing it as a rationale for excluding homosexuals from adoption privileges. In In re Opinion of the Justices, the New Hampshire Supreme Court considered the constitutionality of a proposed law that would bar homosexuals from eligibility to adopt, provide foster care, or certification of day care. Under its equal protection analysis, the court held that the state’s interest in providing appropriate role models was rationally related to the exclusion of homosexuals from foster parentage and adoption based on concerns about the development of sexual identity. “[T]he source of sexual orientation is still inadequately understood and is thought to be a combination of genetic and environmental influences. Given the reasonable possibility of environmental influences, we believe that the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity.” Until there is agreement about the source of homosexuality, states are within their power to raise this factor as a concern that justifies denying homosexuals adoption privileges on the ground that the development of sexual identity directly affects the interests of the child.

3. Social Stigma Attached to Homosexuality

A final justification for denying a homosexual person the privilege to adopt arises from society’s general disdain for homosexuality, and concern

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245 See Matthew v. Weinberg, 645 So. 2d 487, 489 (Fla. Dist. Ct. App. 1994) (“The legislature... has not disabled homosexuals... from consideration as foster parents.”).
247 Id. at 22 (citations omitted).
248 Id. at 25.
249 Id. (citing Steve Susoeff, Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. REV. 852, 883 n.194 (1985)).
for how that disdain might affect the child of a homosexual. The Supreme Court has rejected this as a reason for legal classification of persons, as "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."250 Similarly, the rationale is rejected as insufficient to support a law excluding homosexuals from eligibility to adopt.251 While mindful of the pain a child may experience when ostracized by peers or subjected to cruel teasing, this perspective reflects a wise refusal to validate prejudice by avoiding relationships that some find objectionable.

B. Interpreting Adoption Statutes: Legally Formalizing Existing Parent-Child Relationships

Statutes that define who may adopt do not generally consider the situation in which an unmarried couple wishes to adopt, or when one partner in a relationship legally joins in the parenthood of the biological child of the other partner.252 For this reason, courts are called upon to construe statutes to either permit or deny the adoption. While this issue could affect any unmarried couple wishing to adopt, it is an especially prominent issue for homosexual couples, who are uniformly denied the right to marry.253 Courts construing statutes focus on the purpose of the statute, the language, and the implications of a particular construction. In this context, there is surprisingly little discussion of the sexual orientation of the prospective adoptive parent.254 Case law reveals that results are often favorable for the person seeking to adopt.255

251 State v. Cox, 627 So. 2d 1210, 1220 n.10 (Fla. Dist. Ct. App. 1993) ("We are not overlooking the pressures and stresses that peer groups might place on an adopted child because of the adoptive parent's homosexual activity. We are simply not convinced that such 'private biases' are a permissible rationale basis to support this statute."); quashed on other grounds sub nom. Cox v. Fla. Dep't of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995).
253 E.g., Dean v. District of Columbia, 653 A.2d 307, 310 (D.C. 1995) (holding that it is impossible for two persons of the same sex to marry based on the nature of marriage).
254 But see In re Caitlin, 622 N.Y.2d 835, 840 (Fam. Ct. 1994) (requiring a showing of negative impact to sustain any objection to adoptions by same sex partners); In re Adoption of Evan, 583 N.Y.2d 997, 1001-02 (Sur. Ct. 1992) (asserting sexual orientation or practices presumptively irrelevant in adoption agency evaluations unless shown to adversely affect child's welfare).
255 See, e.g., Adoption of B.L. V.B., 628 A.2d 1271, 1276 (Vt. 1993) (construing adoption statute to allow same-sex partner to adopt without terminating right of biological parent).
1. The Purpose of Adoption Statutes

The overriding purpose of adoption is to serve the interests of the adoptive child. The court is generally faced with a situation in which the person seeking to adopt has already served as the child's de facto parent for a significant period of time. Therefore, in addition to the tangible advantages that inhere in adoption, the court must also consider that the child involved has formed a parent-child bond with the adult. Courts generally tend to recognize that the purpose of the adoption statute would be undermined by denying the adoption in such cases. Not all courts, however, are so willing to broadly construe statutes to effectuate their stated purpose. The Supreme Court of Wisconsin asserted that "the fact that an adoption . . . is in the child's best interests, by itself, does not authorize a court to grant the adoption." Similarly, the Supreme Court of Connecticut refused to depart from a strict literal construction of the state's adoption statute. The court held that Connecticut law did not allow the lesbian partner of a biological mother to adopt the natural mother's child. The court acknowledged that a provision in a general statute directed liberal construction of adoption statutes to promote the interests of the child in question, yet the court held that "the best interests of a child cannot transcend statutorily defined jurisdictional boundaries." The court concluded that a biological mother's lesbian partner could not adopt the child without terminating the parental rights of the sole legal parent as provided in the language of the adoption statute.

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256 E.g., id. at 1273 ("[W]e are mindful that the state's primary concern is to promote the welfare of children. . . .")
257 See, e.g., id. at 1272.
258 See supra notes 230-31 and accompanying text.
259 See Adoption of B.L.V.B., 628 A.2d at 1276 ("To deny legal protection of [the parent-child] relationship . . . is inconsistent with . . . the public policy of this state, as expressed in our statutes affecting children.").
261 See In re Adoption of Baby Z., 724 A.2d 1035, 1048 (Conn. 1999).
262 See id. at 1050-60.
263 Id. at 1048.
264 Id. at 1060; see CONN. GEN. STAT. ANN. § 45a-725 (West Supp. 2000) (defining when a child may be free for adoption).
2. Termination of the Natural Parent's Rights
When Unmarried Life-Partner Seeks to Adopt

Adoption statutes provide for the termination of parental rights upon
the court granting an adoption. Therefore, courts must determine the
applicability of such provisions when the couple does not intend to
terminate the natural parent's rights, but desires to share equally in parental
responsibilities. In In re Adoption of Evan, the life partner of a six-year-
old child's biological mother sought to legally adopt the child they had
raised together since his birth. The court had to determine whether the
adoption would have the effect of terminating the biological mother's legal
rights as indicated by the domestic relations law. Recognizing the
tangible and intangible benefits the child stood to gain from the adoption,
the court concluded that the adoption would be in his best interests. The
court held that "where the adoptive and biological parents are in fact co-
parents... New York law does not require a destructive choice between the
two parents." Two years later, the Court of Appeals of New York
reached a similar conclusion, asserting that while the adoption statute must
be strictly construed, it must be strictly construed according to the
"legislative purpose as well as [the] legislative language." The court
noted that the statute was not entirely reconcilable, and concluded that the law "does not invariably require termination in the situation where the
biological parent... has agreed to retain parental rights and to raise the
child together with the second parent."
Some courts address the problem posed by termination provisions by fitting the homosexual partner into the stepparent exception sometimes provided in adoption statutes. The Supreme Court of Vermont took this approach in Adoption of B.L.V.B. The court noted that the purpose of the provision was "to clarify and protect the legal rights of the adopted person at the time the adoption is complete, not to proscribe adoptions by certain combinations of individuals." Courts in New Jersey and the District of Columbia followed suit.

C. Comment

Since courts generally refuse to recognize constitutional challenges by homosexuals denied adoption privileges, those seeking to adopt must rely upon the enactment and interpretation of favorable adoption laws. For the person seeking to adopt an unrelated child with whom there is no prior relationship, the state's position as the exclusive authority for defining eligibility to adopt is justified. Unlike the situation in which there is an existing parent-child relationship, whether natural or de facto, the state's denial of eligibility based on sexuality is not an interference with an existing liberty or right. In such a case, it is the state that stands in the parental role for those children who do not have parents. In the context of an adoption proceeding in which there is an established parent-child bond, however, the state interferes by refusing to grant legitimacy to the relationship. When a court refuses to construe an adoption statute to allow such an adoption, the child is denied significant tangible and intangible benefits. This contravenes the purpose of adoption statutes, and thus, should render the law vulnerable to attack even under rational basis constitutional review as applied to the child.

CONCLUSION

The existence of constitutional rights or lack thereof shapes the analysis in custody, visitation, or adoption proceedings. Natural parents

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275 See Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).
276 Id. at 1274.
277 See In re Adoption of Two Children by H.N.R., 666 A.2d 535, 539 (N.J. Super. Ct. App. Div. 1995) ("Our conclusion that the stepparent exception should be broadly construed to enable this adoption to proceed is consistent with the views of other states. . .") (citing Adoption of B.L.V.B., 628 A.2d at 1271); In re M.M.D., 662 A.2d 837, 860 (D.C. 1995) (citing Adoption of B.L.V.B., 628 A.2d at 1272).
279 See supra notes 55, 230-31 and accompanying text.
possess fundamental liberty interests that must be protected by a vigilant promotion of the countervailing state interest: the welfare of the child involved. A presumption of detriment precludes the fact-based inquiry necessary in highly individualized controversies in which the circumstances and the needs of the particular child are likely to vary broadly. In the adoption context, the state has broad discretion and need not consider balancing the interest of the child against a fundamental liberty interest protected by the constitution when defining who is eligible to adopt. The courts are, however, faced with a more difficult question when the child and adult have developed a familial bond. Here, the courts should interpret statutes to effectuate the policy of serving the child’s best interests.