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Cox v. Department of Health and Rehabilitative Services: A Challenge to Florida's Homosexual Adoption Ban

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CASE NOTES

Cox v. Department of Health and Rehabilitative Services: A Challenge to Florida's Homosexual Adoption Ban

I. INTRODUCTION

In 1977, Florida became the first state to enact a statutory ban on adoptions by gay or lesbian adults.[1] The statute provides that "[n]o person eligible to adopt under this statute may adopt if that person is homosexual."[2] This blanket exclusion went unchallenged until 1991, when in *Seebol v. Farie* a circuit court ruled the statute unconstitutional under both the United States Constitution and the Florida Constitution.[3] Two years later, however, the Second District Court of Appeal ruled that the statute was constitutional.[4] The Supreme Court of Florida considered the constitutionality of the statute for the first time in the 1995 case of *Cox v. Department of Health and Rehabilitative Services*.[5]

In 1991, James W. Cox and Rodney M. Jackman, seeking to adopt a special needs child,[6] attempted to enroll in pre-adoption parenting

1. FLA. STAT. § 63.042(3) (1995).

2. *Id.* New Hampshire has a similar blanket exclusion which applies to both adoption and foster parenting. N.H. REV. STAT. ANN. § 170-B:4 (Supp. 1989).

3. *See* Seebol v. Farie, 16 Fla. L. Weekly C52 (16th Cir. Ct. 1991), *reprinted in* Dep't of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210 (Fla. 2d DCA 1993). The Department of Health and Rehabilitative Services did not appeal the decision, however, so the ruling applied in Monroe County only.

4. *See* Department of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210 (Fla. 2d DCA 1993). For an account of the Second District Court of Appeal's decision and an examination of the statutory ban's compatibility with the "best interests of the child" standard, see Matt Lepore, Note, *Department of Health and Rehabilitative Servs. v. Cox: Is Florida's Statute in the Child's Best Interests?*, 45 MERCER L. REV. 1415 (1994).

5. *See* Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995).

6. A special needs child is one considered difficult to place because of racial background, physical or mental disability, or age. 656 So. 2d at 902.

classes through the Florida Department of Health and Rehabilitative Services ("HRS") in Sarasota, Florida. In response to a question on the state adoption form, Cox and Jackman disclosed their homosexuality, and HRS immediately rejected their application based on Section 63.042(3).[7] Cox filed suit challenging the constitutionality of Section 63.042(3), alleging that the statute violated the right of privacy, equal protection and due process under the Florida Constitution.[8]

The trial court, relying heavily upon the 1991 *Seebol* decision, held the statute void for vagueness and violative of the right of privacy and equal protection and entered summary judgment in favor of Cox.[9] The Second District Court of Appeal reversed, holding that plaintiff's evidence was insufficient to support summary judgment, the statute was not unconstitutionally vague with respect to the term "homosexual," and that the statute did not violate constitutional guarantees of privacy, due process, or equal protection.[10] The Supreme Court of Florida approved the district court's decision that HRS was entitled to summary judgment on the issues of right of privacy and due process, and that the statute was not unconstitutionally vague, but remanded for further proceedings on the equal protection issue.[11]

This Casenote examines both the appellate court and supreme court decisions,[12] and addresses the legal and sociological issues presented in *Cox*. Part I provides background on adoption and the significance of the *Cox* decision. Part II discusses the legislative history of Florida's gay exclusion statute. Part III examines social science research regarding the effects of homosexual parenting on children, and the compatibility of Florida's blanket exclusion with the "best interests of the child" standard. Part IV analyzes the constitutional claims presented to the court.[13]

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7. *See id.* at 903.

8. *See* 656 So. 2d at 903; *see also* FLA. CONST. art. I, Section 23; art. I, Section 9; art. I, Section 2. While plaintiffs relied entirely on the Florida Constitution, the courts looked to the United States Constitution as well.

9. *See* Department of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1212 (Fla. 2d DCA 1993); Final Judgment, Cox v. Dep't of Health and Rehabilitative Servs., Case No. 91-3491 CA-01 (Fla. 12th Cir. Ct. 1991).

10. *See* 627 So. 2d at 1210.

11. *See* Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995).

12. The supreme court majority, while approving the appellate court's decision on all but the equal protection issue, engaged in no analysis from which to determine its reasoning. Rather, the majority seemingly adopted the reasoning of the appellate court.

13. For a discussion of the equal protection claims under the United States Constitution, see Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 U.C. DAVIS L. REV. 797 (1984); *see also supra* notes 109-23 and accompanying text.

II. PART I: BACKGROUND AND PERSPECTIVE

Historically, adoption served to provide otherwise homeless or unwanted children with a traditional family structure.[14] While "traditional" once meant married couples, over the years courts and agencies began permitting single persons to adopt. Courts usually perform a balancing of potentially competing purposes—protection of family integrity and protection of children.[15]

Adoptions of minor children by lesbian and gay adults fall into two major categories: (1) stranger adoptions in which the biological parents' rights are terminated, and (2) second parent or co-parent adoptions in which a second person becomes a legal parent without terminating the biological parents' rights.[16] Stranger adoptions, like the one sought by Cox, occur most often when biological parents are unable or unwilling to provide for a child and an adoptive parent intervenes to provide that child a home.[17] Second parent adoptions are most often pursued by couples who wish to raise a child together; one is already the legal or biological parent, and the couple seeks legal recognition of the other's relationship to the child.[18] A few courts in other jurisdictions have approved stranger and second parent adoptions by gay and lesbian adults.[19]

The purpose of the Florida Adoption Act is "to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide all children who can benefit by it a permanent family life."[20] The overriding question in *Cox* became whether this purpose was compatible with Florida's blanket exclusion of gay and lesbian adults from even being considered to adopt a child. The case presented significant issues of first impression to both the Second District Court of Appeal and the Supreme Court of Florida.

The case is significant because many gay and lesbian adults in Florida want to adopt and because of the growing number of children in HRS custody awaiting placement. Currently, HRS has 1,523 special-needs children available for adoption, with 1/3 of these in search of families and the others likely to be adopted by relatives, family friends or

14. *See, e.g., In re* Adoption of H.Y.T., 458 So. 2d 1127, 1128 (Fla. 1984).

15. *See* Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 64 (1995).

16. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (Spring 1995).

17. *See id.* at 195.

18. *See id.*

19. *See, e.g., In re* Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990); *In re* Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993).

20. FLA. STAT. § 63.022 (1995).

foster parents.[21] Special-needs children often come into the system after being abused, neglected or abandoned. Such children could certainly benefit from a "permanent family life,"[22] but the Florida Legislature has decided through Section 63.042(3) that gay and lesbian adults cannot adequately provide them this life.

III. PART II: LEGISLATIVE HISTORY OF SECTION 63.042(3)

In 1977, the Florida legislature enacted the gay exclusion statute.[23] During discussion of the proposed bill, one senator commented that the legislature lacked evidence of any problems presented by gay and lesbian adoptions, and that without such demonstrable evidence, legislators should question the wisdom of adopting the blanket exclusion.[24] Specifically, the senator noted that the bill proclaimed that there were legitimate reasons to exclude homosexuals, but failed to state those reasons or provide the support for them. In addition, the bill singled out only one group as being potentially dangerous to children.[25]

The senator pointed out that the adoption statute already provided numerous safeguards for screening applicants[26] and that the legislature should not "start discrimination."[27] The senator defined the issue as not whether homosexuality is normal, but as whether there was sufficient understanding of the behavior to justify legislatively-mandated stigmatization and discrimination.

Another senator described the bill as "ridiculous" and indicative of the "irrationality of the legislature."[28] The senator criticized the legislature for attempting to specifically categorize who should not adopt:

> [I]f you're going to say sexual deviants ought not to adopt then you've got to go through the statutes and include all acts of sexual deviation that have been singled out for criminal acts . . . . The first

21. *See* Marlene Sokol, *Case of Gay Adoption Unresolved*, ST. PETE. TIMES, April 28, 1995, at B4. While the plaintiffs in *Cox* sought to adopt a special-needs child, this Note's author does not mean to suggest that gay or lesbian adults cannot "parent" other children.

22. FLA. STAT. § 63.022 (1995).

23. One commentator asserts that the statute was the direct result of an anti-gay crusade in Miami characterized as a "save the children" movement, but does not explain the movement's impetus. Peter Freiberg, *Letter from Miami: Fighting Florida's Adoption Ban*, WASH. BLADE, March 19, 1993, at 5.

24. *See* FLA. S. JOUR., 1977 Org. Sess. at 370-71.

25. *See id.* (criticizing the legislature's attempt to "get in the business of discriminating").

26. *See, e.g.*, FLA. STAT. § 63.092 (1995) (mandating a preliminary study to determine suitability of the intended placement); FLA. STAT. § 63.125 (1995) (requiring a complete investigation of the proposed adoptive home after a petition to adopt is filed with the court); FLA. STAT. § 63.142 (1995) (granting courts permission to order additional "observation, investigation, or consideration" before ruling on a petition for adoption).

27. FLA. S. JOUR., 1977 Org. Sess. at 370-71.

28. *Id.*

> question you ought to ask yourself is why pick out just one form of sexual deviation and say that that particular person cannot adopt . . . . [T]he real ridiculousness of this type of statute is that we ought not be sitting up here as legislators and making . . . domestic decisions relating to the custody of [sic] welfare of children that ought to be decided on an individual case by case basis . . . . Otherwise, it's not a rational bill.[29]

Despite the lack of empirical studies or legislative fact-finding regarding the harms of adoption by gay or lesbian adults, the legislature enacted the blanket exclusion. As the senator observed, however, the bill appears to have had nothing to do with adoption and everything to do with discrimination against homosexuals.[30]

IV. PART III: SOCIAL SCIENCE RESEARCH AND THE "BEST INTERESTS OF THE CHILD" STANDARD

Since the early 1970s there has been a proliferation of social science research regarding parental (homo)sexuality and its affect on children. Such research is often used in gay rights cases[31] to address societal and judicial preconceptions. Such fears and misconceptions include: the greater risk of the homosexual parent molesting the child;[32] the child becoming homosexual;[33] the child suffering societal stigma;[34] the child contracting AIDS;[35] and the child suffering harm to his/her psychosocial development.[36]

There are three major areas of social science research regarding the impact on children of parental sexual orientation. The first examines the child's social relationships with peers and adults.[37] The second deals

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29. *Id.*

30. *See* FLA. S. JOUR., 1977 Org. Sess. at 370-71.

31. *See* Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 WAYNE L. REV. 1, 6 (1994) (demonstrating that a disproportionally large number of gay rights opinions cite or refer to social science research). In her article, Falk provides three reasons for this: (1) greater acceptance of social science information generally in modern legal culture, (2) courts' inclination to cite social science research for justificatory reasons, and (3) concerted efforts by groups and litigants to provide such information to the courts. *Id.* at 7. The article notes, however, that because of judicial homophobia, the rate of citation often depends on the litigants' ability to persuade the courts that existing myths about homosexuality are indeed false. *Id.* at 37.

32. *See* Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 207 (1990); Shaista-Parven Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009, 1013 (1989).

33. *See* Ali, *supra* note 32, at 1013; Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1029 (1992).

34. *See* Note, *supra* note 32, at 208; Ali, *supra* note 32, at 1013.

35. *See* Ali, *supra* note 32, at 1013.

36. *See* Note, *supra* note 32, at 209; Patterson, *supra* note 33, at 1029.

37. *See* Patterson, *supra* note 16, at 200. Judicial concern about children's social

with the child's personal or psychosocial development.[38] Finally, research on sexual identity broadly encompasses an individual's gender identity, gender-role behavior and sexual orientation.[39] Gender identity is the early-emerging concept of being male or female.[40] Gender-role behavior includes those behaviors traditionally considered masculine or feminine.[41] Sexual orientation is the later-emerging erotic preference for males, females or both.[42]

In *Cox*, HRS asserted that the state's interests in maintaining the homosexual exclusion were that adopted children have appropriate role models, and that children not become homosexual as a result of adoption.[43] After reviewing the social science evidence presented by both sides, the trial court judge granted summary judgment for the plaintiffs, determining that plaintiffs' "unrebutted and overwhelming" evidence proved that there was no potential danger to children from homosexual parenting which would justify the blanket exclusion.[44] The Second District Court of Appeal reversed the trial court, holding that the plaintiffs' evidence, consisting of research reports in magazines and journals and supplemented by law review articles,[45] was insufficient.[46]

The Second District Court of Appeal found that of the evidence in the record, there were only "two major scientific articles."[47] The court discounted one of these because the record contained no information regarding the author's credentials and the article focused on natural chil-

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relationships also relates to concern about the adopted children being teased by their peers due to their parents' sexual orientation. *Id.*

38. *See* Patterson, *supra* note 16, at 199. Such studies focus on things such as low self-esteem, adjustment problems, and psychiatric disorders. *Id.*

39. *See* Marc E. Elovitz, *Adoption by Lesbian and Gay Adults: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 212 (1995); Patterson, *supra* note 34, at 1030-31.

40. *See* Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978).

41. *See id.*

42. *See id.*

43. *See* Final Judgment, Cox v. Dep't of Health and Rehabilitative Servs., Case No. 91-3491 CA-01 (Fla. 12th Cir. Ct. 1991), at 7.

44. *Id.* at 3.

45. The evidence included: Marcia Barinaga, *Is Homosexuality Biological?*, SCIENCE, August 30, 1991, at 956; Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, March 1993, at 47; Mary B. Harris and Paulene J. Turner, *Gay and Lesbian Parents*, 12 J. HOMOSEXUALITY 101 (1985/86); Constance Holden, *Twin Study Links Genes to Homosexuality*, SCIENCE, January 3, 1992, at 33; Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, SCIENCE, August 30, 1991, at 1034; Patterson, *supra* note 33, at 1025; Michael Ruse, *Are There Gay Genes?*, 6 J. HOMOSEXUALITY 5 (1981).

46. *See* Department of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1212-13 (Fla. 2d DCA 1993).

47. *Id.* at 1213.

dren of homosexuals.[48] The other was rejected for various reasons, including that the article contained a sample of "only twenty-three homosexual parents and sixteen heterosexual parents," the homosexual households were located in New Mexico, there was no information on the expertise of the two professors who reported the study, and no information on the "professional reputation and objectivity" of the journal which published the survey.[49] The court discounted other articles because "[no] showing was made that these articles would be the type of data reasonably relied upon by experts . . . and no expert witnesses were called to discuss or explain these reports."[50] The court of appeals condemned this practice of "trial by photocopy," and concluded that the trial court lacked the training and expertise to evaluate and apply the scientific studies.[51]

However, both parties at the trial level waived an evidentiary hearing and had stipulated to this common practice for presenting evidence to the court. HRS raised no objection to any of plaintiffs' submissions. Further, contrary to the court's conclusion, the social science literature in the record was straightforward, relevant and compelling. While all of the studies cited by the parties focused on the natural children of homosexuals, a reasonable analogy can be drawn from this research to adopted children of homosexuals.

The first major scientific article reviewed 15 years of systematic research regarding the personal and social development of children with gay and lesbian parents, summarized the findings of these studies, and concluded that no evidence suggested that homosexual parents compromised the development of children in any respect.[52]

> Despite long-standing legal presumptions against gay and lesbian parents in many states, despite dire predictions about their children based on well-known theories of psychosocial development, and despite the accumulation of a substantial body of research investigating these issues, *not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of homosexual parents.* Indeed, the evidence to date sug-

48. *See id.*

49. *Id.*

50. *Id.*

51. *See id.* (stating there were mixed questions of law and fact, requiring an evidentiary hearing). Interestingly, the appellate court then proceeded to rule on the constitutional questions and examine the social science information, and even concluded that HRS was entitled to summary judgment. On appeal to the Supreme Court of Florida, Cox argued that the appellate court abused its authority and that the case should have been remanded for an evidentiary hearing. Initial Brief for Petitioner, Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995), at 45.

52. *See* Patterson, *supra* note 33, at 1025.

> gests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.[53]

The other scientific article criticized by the appellate court[54] was actually submitted by HRS. The study, while acknowledging the need for further research,[55] found no significant difference in the relationships of homosexual and heterosexual parents with their children.[56] It concluded that results "suggest that being gay is not incompatible with effective parenting."[57] This conclusion is consistent with a study submitted by plaintiffs which reported that children raised by homosexual parents "do not differ appreciably from children raised in more conventional family settings."[58] Plaintiffs also submitted a study on gays as role models that differentiated between myths and realities of gay role models by examining children's sexual identity formation.[59] The study concluded that "[p]arents' sexual preference appears to have no negative effect on children, and children of gays are no more likely than other children to have emotional problems, adopt opposite-sex-typed behaviors, or become gay themselves."[60]

In addition to the studies in the record, more current research supports the trial court's conclusion that homosexual parents per se are no more damaging to children, whether natural or adopted, than heterosexual parents.[61] In fact, no current research supports the view that homosexual parents threaten a child's well-being. Overall, existing research suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable psychological, emotional and social growth in children.

Social science research clearly does not support a *per se* exclusion

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53. *Id.* at 1036 (emphasis added).

54. *See* Harris & Turner, *supra* note 45.

55. *See id.* at 112.

56. *See id.* at 111.

57. *Id.* at 112.

58. *See* Green, *supra* note 40, at 696.

59. *See* Dorothy I. Riddle, *Relating to Children: Gays as Role Models*, 34 J. Soc. Issues 38, 39 (1978).

60. *Id.* at 49 (citation omitted).

61. *See, e.g.*, Patterson, *supra* note 16, at 198-99 (concluding that of twelve studies examining over 300 children of homosexual parents, not one provides evidence for concern); Elovitz, *supra* note 40, at 213 (concluding that the scientific consensus is that sexual orientation is not within social or parental control); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 18 J. Homosexuality 123, 134 (1989) (concluding that despite the studies' limited sample size, data suggests that growing up in a lesbian household does not in and of itself negatively impact an adolescent's self-esteem).

on the adoption of minor children by gay and lesbian adults.[62] Further, research supports the conclusion that such a blanket exclusion is incompatible with the standard for making determinations whether to allow an adoption—the best interests of the child.[63] The Florida Adoption Act mandates that the "best interests" test be used in any adoption proceeding.[64] Under this test, a court or agency considering an adoption petition is given broad discretion to determine what is in the child's best interests.[65] Such an approach seems consistent with the overall purpose of the Florida Adoption Act, yet contrary to Florida's blanket exclusion which removes an entire category of persons from the pool of prospective parents, even if they are fully eligible in all other respects.[66]

The central tenet of the "best interests" standard is case-by-case consideration of the individual circumstances relating to a particular child and its potential adoptive parent. Irrebuttable presumptions such as Florida's gay exclusion seem incompatible with this individualized approach.[67] Previously discussed research[68] supports the notion that case-by-case consideration of a homosexual potential adoptive parent's application to adopt is a better approach than a *per se* exclusion.

V. PART IV: CONSTITUTIONAL CLAIMS

Cox raised three issues under the Florida Constitution. The Second District Court of Appeal held that the statute did not violate constitutional guarantees of right of privacy, due process, or equal protection.[69] The Supreme Court of Florida agreed except as to equal protection and remanded on this issue alone.[70] This section examines the courts' reasoning on the constitutional claims.

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62. *See* Huggins, *supra* note 61, at 134 (stating that a parent's sexual orientation is not a valid criterion upon which to base child disposition questions).

63. *See* Note, *supra* note 32; Ali, *supra* note 32, at 1010.

64. *See* FLA. STAT. § 63.022(2)(l) (1995).

65. *See In re* Adoption of H.Y.T., 458 So. 2d 1127, 1128 (Fla. 1984) (holding constitutional a statute providing that all adoption proceeding hearings be held in closed court, partly because of the rationale that in adoption proceedings, the court's primary duty is to serve the best interests of the child) (citing *In re* Adoption of M.A.H., 411 So. 2d 1380 (Fla. 4th DCA 1982)).

66. *See* Initial Brief for Petitioner, Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995), at 45.

67. To increase the likelihood that individualized determinations are always made, some commentators have advocated use of a nexus test, which requires empirical evidence of an adverse effect on the child and which shifts the focus away from the prospective parents' sexual orientation and toward the needs of the child and the prospective parents' ability to meet those needs. *See, e.g.*, Ali, *supra* note 32, at 1038.

68. *See supra* notes 31-61 and accompanying text.

69. *See* Department of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1215-20 (Fla. 2d DCA 1993). The constitutional claims were extensively addressed in the 26-page ruling, both under the United States and Florida Constitutions.

70. *See* Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995).

A. *Right of Privacy*

In 1980, Florida became the fourth state to create an express privacy provision in its constitution.[71] The provision defines privacy as the right to be let alone,[72] and expresses the individual's power to define the boundaries of his/her private life.[73] It also establishes a correlative limitation on the state's power to encroach that boundary by attempting to standardize behavior or identity.[74] The provision was meant to protect against increasing collection, retention and use of information relating to all facets of an individual's personal life, providing broader protection than its implicit federal counterpart. However, commentators have questioned its effectiveness in protecting individual interests.[75]

The Supreme Court of Florida has repeatedly declared that Florida's right of privacy is a fundamental right and, once implicated, the challenged law will be reviewed under the compelling state interest or "strict scrutiny" standard.[76] In *Cox*, the Second District concluded that, although the Florida Constitution contains this explicit right of privacy, the homosexual exclusion provision "does not establish a governmental intrusion into a person's life."[77] The court stated that Cox "voluntarily admitted" to HRS that he was gay. The court reasoned that if plaintiffs voluntarily admitted their homosexuality, they could not claim a reasonable expectation of privacy; therefore, the right of privacy was not implicated.[78]

The court overlooked, however, that the disclosure was in response to a direct question on the adoption form. In fact, the parties stipulated that HRS asked plaintiffs their sexual orientation during the application process.[79] Cox challenged the constitutionality of asking the question,

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71. *See* FLA. CONST. art. I, § 23; *see also* David C. Hawkins, *Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990) (surveying Supreme Court of Florida decisions during the 1980s which construed the state Bill of Rights).

72. FLA. CONST. art. I, § 23.

73. Hawkins, *supra* note 71, at 828.

74. *See id.*

75. *See, e.g.*, John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow*, 18 NOVA L. REV. 775 (1994) (examining cases in Florida from 1980-1993 and concluding that, with the exception of the right to die, Florida's privacy amendment has made little dent in the law). *But see* Hawkins, *supra* note 71, at 858 (concluding that Florida Supreme Court decisions during the 1980s bode well in the 1990s for those looking to the Florida Constitution as a source of personal protection).

76. *See* City of North Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995); *In re* Matter of Patricia Dubreuil, 629 So. 2d 819, 822 (Fla. 1993); *In re* Guardianship of M. Browning, 568 So. 2d 4, 9 (Fla. 1990); Shaktman v. State, 553 So. 2d 148, 150-51 (Fla. 1989); Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg., 477 So. 2d 544, 547 (Fla. 1985).

77. 627 So. 2d at 1215.

78. *See id.* at 1216.

79. *See* Final Judgment, Cox v. Dep't of Health and Rehabilitative Servs., Case No. 91-3491 CA-01 (Fla. 12th Cir. Ct. 1991), at 3.

and then using the answer to prohibit all gays and lesbians from adopting. Arguing that Article I, Section 23 of the Florida Constitution protects citizens against "government intrusion into his or her private life," Cox maintained that asking the question was the "intrusion."[80]

The appellate court further stated that the right of privacy applies to "unwarranted governmental inquiry concerning private matters."[81] The court stated that Section 63.042(3) does not implicate this concern because it "does not mandate any specific inquiry concerning an applicant's background . . . [because] the state did not demand secret information; the plaintiffs voluntarily provided the information."[82]

With this overly technical argument, the appellate court again missed the point. By putting the question on the form, the state demanded private information about the applicants' background. Further, if Cox and Jackman had not answered the question, one of two things would have happened—they would have been presumed to be homosexual, or HRS would have specifically inquired as to their sexual orientation.[83] Either way, the end result would have been the same: they would have been denied consideration pursuant to the statute.

The court next reasoned that adoption is neither a private matter nor a right, but rather a statutory privilege.[84] In applying to adopt, the applicants sought the state's determination that, in the best interests of the child, adoption is appropriate. This determination necessarily involves extensive investigation and examination of the background of the prospective parents.[85] The court noted that "[m]any private decisions indirectly limit one's ability to obtain statutory privileges [, but] . . . indirect limitations do not render statutory privileges unconstitutional under the right of privacy."[86]

With this argument, the court did two things. First, by admitting that homosexuality is a "private decision," the court undercut its earlier statement that the statute does not compel inquiry into private matters. Second, the court mixed the due process issue with the right of privacy argument. Respondents (plaintiffs below) did not argue that investigations violated the right of privacy, but rather that they *implicated* the

80. Initial Brief for Petitioner, Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995), at 15.

81. 627 So. 2d at 1216 (citing *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989)).

82. *Id.*

83. It is possible that HRS would not have inquired further, and that Cox and Jackman, by leaving the question blank, could have been allowed to adopt despite their homosexuality. However, the couple would have put themselves at risk of having the adoption overturned later for perjuring themselves during the proceedings.

84. *See* 627 So. 2d at 1216.

85. *See id.*

86. *Id.*

right of privacy and, therefore, strict scrutiny should apply. Strict scrutiny would require the state to prove that it has a compelling state interest, and that it was using the least intrusive means to achieve that interest. Further, respondents argued that the inquiry, combined with the irrebuttable presumption of unfitness to adopt if the applicant answered that he or she was homosexual, violated the right of privacy and due process.[87] The privacy intrusion—asking the question on the adoption application—triggers the due process violation—the blanket exclusion from further consideration without any investigation into the applicant's parenting ability if the applicant declares his/her homosexuality.

The appellate court's conclusion that the right of privacy was not implicated is significant. Because Florida's right of privacy is a fundamental right, if the court had found the right implicated, the court would have applied strict scrutiny in its due process and equal protection analyses. The court correctly noted that the "best interests of the child can create a very substantial state interest."[88] But, the means must be least intrusive and related to the end, and Florida's adoption procedures already provide means for carefully screening applicants.

B. *Due Process*

The United States Constitution and the Florida Constitution limit due process to protection against deprivations of "life, liberty or property."[89] Plaintiffs argued that the statute invoked an interest in liberty.[90] The appellate court, however, refused to extend the concept of liberty beyond a person's physical freedom.[91] The court reasoned that liberty interests not involving physical freedom must be "fundamental liberties" to be protected by the due process clauses.[92] The court concluded that due process was not implicated because neither the opportunity to adopt nor the decision to engage in homosexual activity were fundamental liberties.[93]

On appeal to the Supreme Court of Florida, petitioners (plaintiffs below) argued that the statute violated the right to due process by creating an irrebutable preseumption that homosexuals are unfit parents.[94]

87. *See* Initial Brief for Petitioner, Cox v. Dep't of Health and Rehabilitative Servs., 656 So. 2d 902 (Fla. 1995), at 12-16, 39-42.

88. 627 So. 2d at 1216.

89. U.S. CONST. amend. XIV; FLA. CONST. art. I, § 9.

90. *See* Initial Brief for Petitioner, 656 So. 2d 902, at 40.

91. *See* 627 So. 2d at 1217.

92. *See id.* The court reasoned that "fundamental liberties" include those implicit in our concept of ordered liberty and deeply rooted in history and tradition. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986)).

93. *See* 627 So. 2d at 1217.

94. *See* Initial Brief for Petitioner, 656 So.2d 902, at 39-42.

For a long time, both the United States Supreme Court and the Supreme Court of Florida have disfavored irrebutable statutory presumptions.[95]

The majority of the supreme court, without addressing the petitioners' assertion, affirmed the appellate court's ruling on this issue. In dissent, however, Justice Kogan argued that the statute did implicate due process guarantees.[96] Justice Kogan stated that "[a]s a general rule, a statute irrational under an equal protection analysis necessarily violates due process, too."[97] Justice Kogan raised three specific due process issues. First, he pointed out that in oral argument, HRS conceded that it does not question heterosexuals about sexual conduct unless the background investigation hints at improprieties.[98] This is important because the sole support for HRS's due process defense was that homosexual acts violate a Florida statute making the commission of any "unnatural and lascivious act with another person" a misdemeanor.[99] Section 800.02 includes behavior other than homosexual activity, yet the state made no argument as to why it only targeted homosexual activity.[100]

In addition, Justice Kogan argued that Florida caselaw failed to support HRS's construction of Section 800.02, as the supreme court and appellate courts had only applied the statute to public acts or non-consensual sexual assaults.[101] "Because the language of section 800.02 neither exempts heterosexuals nor applies exclusively to homosexuals, . . . private consensual acts by homosexuals [ ] would not fall within section 800.02."[102] This raises a valid due process issue as to whether HRS's construction of the section violates constitutional guarantees.

The second due process issue pointed out by Justice Kogan is that while Florida prohibits homosexuals from even applying to adopt children, the state imposes no similar *per se* exclusion on convicted felons or persons listed on the Child Abuse Registry.[103] Rather, the state has expressly established administrative procedures for screening such applicants.[104] Thus, if HRS were concerned about a consistent scheme

95. *See id.* at 39-40 (citing Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976)).

96. *See* 656 So. 2d at 903-05 (Kogan, J., concurring in part and dissenting in part).

97. *Id.* (". . . a statute irrational under equal protection has no lawful purpose; and we elsewhere have noted that an improper purpose means the statute violates substantive due process") (citing Department of Law Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991)).

98. *See id.* at 904.

99. FLA. STAT. § 800.02 (1995).

100. *See* 656 So. 2d at 904, n.2.

101. *See id.* at 904 (noting that no Florida case exists which holds private, nonharmful consensual acts violative of section 800.02).

102. *Id.* at 905.

103. *See id.*

104. *See id.* (citing FLA. ADMIN. CODE r. 10M-8.00513 (1991)).

for protecting children, either these groups also would be excluded or homosexuals would be similarly screened.[105]

> The differential treatment of felons and child abusers on one hand and homosexuals on the other raises a serious substantive due process question. It suggests that the state is completely denying gays access to any meaningful legal process, even the intensive scrutiny reserved for felons and child abusers. Before the State can deny due process in this manner, it must at least advance a legitimate reason for doing so based in fact and empirical study. Here, HRS has advanced no such reason, . . . [n]or did the district court below cite to any material to justify its unsupported conclusion to the contrary.[106]

Finally, Justice Kogan pointed out that HRS did not follow proper policy-making procedures in creating its definition of "homosexual"—merely inventing it after Cox filed the lawsuit.[107] Florida cases require that an incipient rule be created in a proper administrative hearing,[108] but the parties apparently failed to raise the issue below. Nonetheless, as Justice Kogan pointed out, Florida's blanket exclusion of gay and lesbian adults from adoption raised several due process issues left unresolved by the court.

C. *Equal Protection*

The Florida Constitution's equal protection clause guarantees that "all natural persons are equal before the law."[109] Government regulations challenged as violating equal protection are subject to either "strict scrutiny" or "rational basis" review. If they infringe upon a fundamental right or target a suspect class, they are subject to strict scrutiny and will only be upheld if narrowly tailored to serve a compelling state interest.[110] If they do not implicate a fundamental right or target a suspect class, they only need to be rationally related to a legitimate state purpose.[111]

The trial court ruled that homosexuals are a suspect class and that the fundamental right of privacy was implicated, requiring application of

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105. It is ironic that the HRS procedures are more stringent against homosexuals, who have no proven record of harming children, than they are against child abusers who have been proven to have harmed children in the past.

106. 656 So. 2d at 905.

107. *See id.* at 905.

108. *See id.* (citing Florida Cities Water Co. v. Florida Public Serv. Comm'n, 384 So. 2d 1280 (Fla. 1980)).

109. FLA. CONST., art. I, § 2.

110. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 473 U.S. 432 (1985); De Ayala v. Florida Farm Bureau Casualty Ins., 543 So. 2d 204 (Fla. 1989).

111. *See id.*

strict scrutiny.[112] The trial court also concluded that even under a rational basis test, the statute was unconstitutional because there is "no rational basis to ban all homosexuals . . . from adopting any child."[113] The court noted that although rational basis review creates a presumption of constitutionality, the plaintiffs overcame the presumption with "objective evidence," while the state "failed to introduce anything except pure speculation."[114]

The appellate court, however, concluded that strict scrutiny did not apply because homosexuals do not constitute a suspect class and the fundamental right of privacy was not implicated.[115] The appellate court concluded its analysis by applying rational basis review to the equal protection challenge, holding that the statute violated neither the United States Constitution nor the Florida Constitution.[116]

The appellate court concluded that:

> . . . legislative classifications are valid unless they bear no rational relationship to the State's objectives [and] . . . should not be overturned 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'[117]

The court correctly stated that the state has a legitimate purpose in providing for the best interests of children in need of adoption.[118] The court then reasoned that because many adopted children would develop heterosexual preferences, they would need education and guidance after puberty concerning relationships.[119] As society expects parents to provide that information, and because adopted children tend to have additional developmental problems arising from adoption, the court concluded that it was more important for adopted children to have heter-

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112. *See* Final Judgment, Cox v. Dep't of Health and Rehabilitative Servs., Case No. 91-3491 CA-01 (Fla. 12th Cir. Ct. 1991), at 9-12.

113. *Id.* at 9.

114. *Id.*

115. *See* 627 So. 2d at 1215-20. For discussions supporting homosexuality "suspect class" status, see Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 U.C. DAVIS L. REV. 797 (1984).

116. *See* 627 So. 2d at 1218. The Florida Constitution provides: "All natural persons are equal before the law . . . ." FLA. CONST. art. I, § 2. The United States Constitution provides: "[No state] shall deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

117. *Id.* (quoting Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979) (citations omitted)).

118. *See* 627 So. 2d at 1220.

119. *See id.*

osexual parents.[120] As previously discussed, however, social science research suggests the courts' reasoning is flawed.[121]

The Supreme Court of Florida remanded the case on this issue, finding the record insufficient to determine whether the statute could be sustained under the equal protection challenge.[122] This may suggest that an equal protection challenge has the greatest likelihood of success when the court next considers the issue. It should be noted, however, that the Supreme Court apparently agreed with the appellate court that the rational basis standard should be applied.[123]

VI. CONCLUSION

Despite the importance of *Cox* as a case of first impression, the courts' opinions leave issues unresolved. Three possible explanations for the courts' treatment of the issues and the evidence exist. First, the opinions may reflect intentional sidestepping of the issues. Second, they may reflect genuine deference to the legislature for resolution of this sociopolitical and legal question. For example, the Second District Court of Appeal noted that perhaps the "legislature should revisit this issue in light of the research that has taken place in the last fifteen years."[124] However, deference to the legislature should not preclude the judiciary from performing its function.[125] Finally, these opinions may reflect that within the state's judiciary which, like much of society, has been historically hostile toward lesbian and gay issues, myths and misconceptions linger.[126]

Regardless of the reason(s) for the court's treatment of the issues, Florida's gay exclusion statute raises serious due process and equal protection issues. Further, from the child's point of view, the sexual orientation of the parent is largely irrelevant. The unanimity with which studies have found absolutely no harm to children raised by homosexual parents is overwhelming and undeniable. Since the primary goal of adoption is to secure suitable and loving homes for thousands of unwanted or homeless children, Florida's gay exclusion statute seems

120. *See id.* at 1220.

121. *See* Riddle, *supra* note 59 and accompanying text.

122. *See* 656 So. 2d at 903.

123. *See id.*

124. 627 So. 2d at 1220.

125. Waiting for a legislative change of heart in a state that is growing increasingly hostile to gay rights and issues would be folly. In 1993, first-term state Representative Suzanne Jacobs (D-Delray Beach) introduced a bill to overturn the adoption ban, but no senator was willing to be a sponsor, and consequently no hearing was held. *See* Freiberg, *supra* note 23, at 5 ("With Florida's legislature dominated by conservatives, there was no chance this year that the bill would pass").

126. *See* Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIBERTIES REV. 19 (1979).

completely contradictory to the "best interests of the child" standard. Thus, courts should reject unfounded assumptions about gay and lesbian adults and decide the appropriateness of adoption on a case-by-case basis, as is otherwise mandated by the Florida Adoption Act. The Supreme Court of Florida has temporarily left the status of homosexuals' adoption privilege unresolved. The issue will resurface, however, giving the court another opportunity to confront it.[127]

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127. After the case was remanded, Cox decided to abandon the suit, but a lesbian woman has reactivated a previously-filed suit in Broward County. *See* Jaime Abdo, *Lesbian Leads Battle to Adopt*, SUN-SENTINEL, Dec. 18, 1995, at B3.