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Volume 2, Issue 1

THE MODERN AMERICAN

A Publication Dedicated to Diversity and the Law

We Can Do It!



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LETTER FROM THE EXECUTIVE BOARD

This year has been marked by immense growth for *The Modern American* as an institution at American University Washington College of Law. Our staff has grown in both numbers and depth and continues to be the most diverse staff on any publication at American University Washington College of Law ("WCL"). We are honored to welcome Professor Anthony E. Varona as our new permanent faculty advisor. Our publication is used as a marketing tool by the Office of Diversity Services and is also used as a recruiting tool by WCL. We will host our First Annual Symposium this spring and have the privilege to work in conjunction with the Office of Diversity Services to produce a special summer issue in honor of the 10th Annual of the Sylvania Woods Conference on African Americans and the law.

We have not only grown at WCL, but also throughout the country and internationally. We receive submissions weekly from law students and professors from schools such as George-

town, George Washington, Cornell, Harvard, Penn State, Washington and Lee, Georgia State, and the University of Houston Law Center. Our offer and acceptance rate has grown immensely since our inception. We also are receiving subscription requests from law libraries and minority organizations throughout the United States. We are excited to reach readers in over 100 countries around the world by the end of the year.

Finally, we would like to profusely thank the founding editors, Lydia Edwards, Preeti Vijayakumaran, and Angela Gaw as they move on, leaving their legacy and vision for *The Modern American*. Their mission to bring fresh, cutting-edge dialogue on diversity has been a resounding success. And as always, we thank Ms. Sherry Weaver for her unwavering support.

Sincerely,

The Executive Board
The Modern American

Diversity is one of America's greatest assets. It continues to reshape and refine our laws and culture daily. *The Modern American* is the Washington College of Law's non-partisan, student-run publication dedicated to cutting-edge issues in diversity and the law. It promotes a provocative, fresh dialogue evaluating legal and social issues influencing minority groups in our country today. *The Modern American* discusses America's legal and social systems' treatment of racial, ethnic, sexual, and other underrepresented peoples from a wide range of political and social viewpoints.

Featuring a broad spectrum of stimulating articles by legal scholars and practitioners from all over the country, *The Modern American* publishes submissions regardless of their political sway, social leaning, or limitation to legal issues. To submit subscribe to the publication for free, send a "Letter to the Editor," provide feedback to an author, or request more information, please email tma@wcl.american.edu.

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DECONSTRUCTING THE POLITICS OF BEING YELLOW

By LeeAnn O'Neill*

I like to stop by the office of my favorite undergraduate professor at the George Washington University, a Japanese American professor of Japanese Language and Literature with strong opinions on just about everything. Sometimes we talk about the things we could not talk about when he was my professor; other times, we simply talk. This time, we discussed why he thought Asian Americans were so politically inactive, especially given their seemingly advantageous position in society. Our consensus was that Latinos have found an identity unifying multiple ethnic groups, otherwise known as a pan-ethnic identity, that Asian Americans have not. I originally stopped by his office with the intention of soliciting an article on this very topic from him. Instead, he challenged me to write this article myself.

A couple weeks later, I was drinking coffee with one of my more politically savvy friends, a prominent Chinese American K Street attorney. Recalling my conversation with my professor, I asked him who some of the prominent Latinos are in politics that he could think of off the top of his head.¹ He swiftly replied Alberto Gonzales, Antonio Villaraigosa, Mel Martinez, Anthony Romero, and Bill Richardson.² Then I asked him the same thing about prominent Asian Americans in politics.³ I was stunned to hear his answer –“Norman Mineta, that Hawaiian guy...does Connie Chung count?”⁴ It was at that moment I knew this article would come to fruition.

INTRODUCTION

The 2000 census reported that at 12.6% of the total population, Latinos outnumbered African Americans as the largest minority group in the United States. Asian Americans numbered only 3.6%.⁵ In 2003, however, Asian Americans had the highest median income of any racial group, including Caucasians, at \$63,251.⁶ Conversely, Latinos tied African Americans for the lowest median income at \$34,272.⁷ Given Asian Americans' history of disenfranchisement, continued discrimination by mainstream America, and vast potential economic power, why has there been such little political coalition building among Asian Americans? Why have Latinos, with a similar history of disenfranchisement and discrimination, successfully banded together politically to bring many Latino political figures to prominence?

Critical race theorists argue that race is a social and legal construction, a political device to keep people of color subordinated beneath mainstream America.⁸ Race refers to a “vast group of people loosely bound together by historically contingent, socially significant elements of their [...] ancestry.” Race should be understood as a unique social phenomenon that connects physical features to the essence of a social group.⁹ As such, mainstream America replaces ethnic identity with broad labels such as Latino and Asian American.¹⁰ Consequently, so-called racial groups like Latinos and Asian Americans exist as

social and political constructs against mainstream America.

This essay argues that although mainstream America views Asian Americans as a pan-ethnic political unit, in reality, there is no viable Asian American political identity today.¹¹ Why could Latinos use this construct to create a secondary identity outside of their ethnicity and establish a political coalition? In contrast, why did Asian Americans rebuff this racial construct? This essay attempts to illustrate why the politics of being Asian American has failed in comparison to the relatively successful politics of being Latino. Acknowledging the importance of the social aspect of pan-ethnic identity, the scope of this essay specifically focuses on political manifestations against or in support of racial constructions.

THE FACTORS THAT FUEL PAN-ETHNIC POLITICAL IDENTITY

General coalition building requires that a group consist of like-minded people whose backgrounds, experiences, or positions in the social structure make them receptive to the ideas of a new political movement.¹² Pan-ethnic political group identity, however, has two separate sources for coalition-building: (1) physical characteristics which induce mainstream America to treat members of separate ethnicities the same, transcending ethnicity or nationality and (2) social characteristics such as language, education discrimination, and job discrimination.¹³

THE ORIGINS OF THE LATINO POLITICAL IDENTITY: THE CASE OF CHICAGO AND THE UNLIKELY POLITICAL UNION BETWEEN MEXICAN AMERICANS AND PUERTO RICANS

“Mexicans see Puerto Ricans as U.S. Citizens who come to this country with a lot of privileges and we don't take advantage of those privileges.”¹⁴

– Interview with Puerto Rican in Chicago

“The thing with Mexicans is that they know they are wetbacks.”¹⁵

– Interview with Puerto Rican in Chicago

“Mexicans don't go on welfare; welfare is for Blacks, Americans, and Puerto Ricans, because they're lazy.”¹⁶

– Interview with Mexican American in Chicago

Chicago's Latino population is dominated by two ethnic groups: Mexican Americans, who comprise approximately 70% of the Latino population, and Puerto Ricans, who make up approximately 15% of the Latino population.¹⁷ Mexican Americans and Puerto Ricans in Chicago have a history of intense discrimination and stereotyping against each other; for example, the Southside Mexican American stereotype versus the Humboldt Park Puerto Rican gangster stereotype. For Chicago Latinos, a Mexican American should never identify or associate with

Puerto Ricans or vice versa.¹⁸ Even semantics of language, the most apparent commonality between the two groups, was a salient source of division. Rather than unifying Spanish speakers, it became a mechanism for self-stratification based on competing notions of proper upbringing and civility.¹⁹

Contrary to such tensions and isolation, the development and success of a Latino coalition reflects the unified response of Mexican Americans and Puerto Ricans to common discrimination by mainstream America. The affirmative action policy that emerged out of the 1964 and 1968 Civil Rights Acts laid the foundation for the formation of a pan-ethnic Latino political coalition.²⁰ Chicago corporations' blanket job discrimination against Mexican Americans and Puerto Ricans gave birth to the Spanish Coalition for Jobs in the 1970s, which strove to enforce the affirmative action statutes.²¹ "At the center of Latino ethnic affinity and mobilization were the structural and circumstantial conditions of working-class solidarity" and collective oppression.²² Under these conditions, the political coalition in Chicago between Mexican Americans and Puerto Ricans grew to encompass broader issues based on their common socio-economic status within the Black-White paradigm, including bilingual education and work-sponsored "English as a Second Language" classes.

Chicago illustrates the political reaction of Mexican Americans and Puerto Ricans to mainstream American discrimination against Latinos as a racial group. Mexican Americans and Puerto Ricans found common ground in the "political ethnicity" of being Latino, "a manipulative device for the pursuit of collective political, economic, and social interests in society."²³ Job discrimination manifested itself as discrimination against Spanish speakers as a racial group for the corporations in Chicago. The common thread of speaking Spanish was not the basis of the coalition, but rather a tool for strengthening their group consciousness.²⁴ Thus, Mexican Americans and Puerto Ricans in Chicago remained Mexican Americans and Puerto Ricans first, but together, they identified as Latino.

THE LATINO POLITICAL IDENTITY TODAY: THE CASE OF LOS ANGELES AND THE ELECTION OF ANTONIO VILLARAIGOSA

Los Angeles is home to one of the most diverse populations in the United States, with a population of 48% Latino, 31% Caucasian, 11% Asian American, and 10% African American.²⁵ On May 17, 2005, Mexican American Antonio Villaraigosa beat incumbent mayor James Hahn as the first Latino mayor of Los Angeles in over a century. Villaraigosa found broad support across all key demographics: racial, ethnic, economic, and geographic groups. *Time Magazine* hailed his election as a symbol of "a bridge-building, post-ethnic style of politics."²⁶ Post-

election news coverage, however, glossed over the importance of the fact that an overwhelming 84% of registered Latinos voted for Villaraigosa. The 2000 Census indicated that while about a million Mexican Americans reside in Los Angeles, well over half a million Latinos are from other countries of origin, making Mexican Americans 63% of Los Angeles' Latino population.²⁷ For the non-Mexican American Latinos in Los Angeles, Villaraigosa may have been just a Latino mayoral candidate; even though in the broad context of the election he was more than just that.

Approximately 41% of registered Latino voters in the United States indicated that they are more likely to vote if there is a Latino on the ballot. Nearly a quarter of these voters would pick a Latino candidate even when a more qualified non-Latino candidate appears on the ballot.

In Villaraigosa's failed 2001 bid for mayor, he garnered nearly the same percentage of the Latino vote as the 2005 election. Furthermore, in 2005, he generated a record voter turnout among Latinos in Los Angeles.²⁸ Pre-election data reflects that a dominating 82.4% of registered Latino voters in Los Angeles indicated that they would participate in the runoff election.²⁹ Approximately 41% of registered Latino voters in the United States indicated that they are more likely to vote if there is a Latino on the

ballot.³⁰ Nearly a quarter of these voters would pick a Latino candidate even when a more qualified non-Latino candidate appears on the ballot.³¹ In other words, a vast majority will vote for a Latino candidate if running against an equally qualified non-Latino candidate.³² Consequently, the perception of Villaraigosa as a Latino candidate in the eyes of Latinos played a large role in the participation and voting patterns of Latinos in Los Angeles.

Just as job discrimination became a uniting force in Chicago, the primaries indicated that Latino voters favor candidates who talk about *their* issues and reach out to them.³³ Although some Latino voters admitted to voting for Villaraigosa because he was "one of their own," his platform spoke to the top three issues for Latinos - education, health care, and labor.³⁴ Rather than focusing on his Mexican American heritage, which he wears proudly, he identified with his constituents as someone who grew out of poverty and championed the collective socio-economic interests held by Latinos in Los Angeles.³⁵ Instead of using language as a basis of unity, he used it as a political tool. He appealed to the Latino vote with appearances on Univision and adopted Cesar Chavez's mantra "Si, se puede," which means, "It can be done," as his campaign slogan.³⁶

Villaraigosa's victory illustrates the growth of the Latino political entity from a citywide campaign to a nationwide phenomenon. Mainstream America fears the sleeping voting superpower of Latinos and Villaraigosa's victory has heightened that fear.³⁷ Latinos across the nation see Villaraigosa's victory as one for Latinos, not just for Mexican Americans. His victory symbolizes the new Latino political power in the Democratic Party.³⁸ The Latino political movement has turned him into a

tool of the movement, motivating and facilitating the advancement of other Latinos. Consequently, Villaraigosa has paved the way for future political candidates labeled as Latinos to draw on his success.

THE ORIGINS OF ASIAN AMERICAN POLITICAL DISUNITY: THE CASE OF VINCENT CHIN

In 1982, two Caucasian males murdered Chinese American Vincent Chin in Detroit because he looked Japanese. At a time when Japan was a looming economic superpower, the two men sympathized with Congressman John Dingell's angry speech in Congress blaming "little yellow men" for the demise of American automakers and blamed Chin, as a yellow man, for the loss of American car manufacturing jobs.³⁹ The Chinese American community was not only shocked by the nature of the hate crime, but by the fact that the murderers only received a sentence of probation. The nation had yet to recognize the concept of a hate crime.⁴⁰

Chinese American organizations developed the first pan-Asian political entity, the American Citizens for Justice ("ACJ"), with some support from Japanese American, Korean American, and Filipino American organizations. The ACJ became the first explicitly Asian American civil rights advocacy effort with a national scope.⁴¹ This was an ambitious attempt given Asian Americans' tendency to disassociate themselves from harassed Asian American groups.

Historically, Asian Americans have only attempted to eschew the generic yellow label. For example, during the World War II internment of the Japanese Americans, Chinese Americans hung signs saying "This is a Chinese shop" and Korean Americans hung signs claiming that "We Hate Japs Worse Than You Do."⁴² This antagonism reflected recent Chinese American and Korean American immigrants' backlash against the imperialist policies of Japan against China and Korea back home. More recently, in the aftermath of the 1992 riots and ravaging of Koreatown in Los Angeles, there was a striking absence of other Asian Americans during the peace march to demand the rebuilding of Koreatown.⁴³ A Chinese American editor for the *Los Angeles Times* voiced what no one else wanted to admit out loud – she did not march because she was afraid of being mistaken for Korean.⁴⁴

The ACJ had only limited success and the movement in Detroit waned. The Chin saga ended with the return of Chin's mother to China in 1987, disgusted with the United States legal system for acquitting both murderers of all charges.⁴⁵ The ACJ was only successful because the Chin murder shed light on a horrible truth; Asian Americans did not have a choice in mistaken identity. In the eyes of mainstream America, if the alleged enemy is Korean, then all yellow people are Korean. If the alleged enemy is Japanese, then all yellow people are Japanese. If

Chin had been Japanese and murdered because he was Japanese, would Asian Americans have come together to fight the injustice of giving probation for murder? It is troubling that the political coalition of Asian Americans has weakened without an imminent civil rights threat based on mistaken identity.

Unlike the Latinos in Chicago, Asian Americans in Detroit found very little common political ground beyond the color of their skin and the shape of their eyes to propel the movement forward.⁴⁶ The Immigration Act of 1965 ushered in a new generation of Asian Americans, including Chinese, Korean, Filipino, and South Asian immigrants in Detroit. The new regulations heavily favored educated professionals and a new Asian

American middle class composed of the children of the laundry and restaurant owners who had completed college by the 1980s.⁴⁷

This upward movement in society removed common factors like poverty and socio-economic status as goals for political unity and consequently, removed factors that would help keep the ACJ a viable organization. Unlike Latinos, who as a group suffer from a growing occupational

divide with respect to mainstream America, Asian Americans have surpassed the success of mainstream America as a group.⁴⁸ Furthermore, Asian Americans in Detroit lacked certain tools of coalition such as the Latinos' power as the largest minority and their common language. Asian Americans were vastly outnumbered, comprising less than 1.5% of metropolitan Detroit's population.⁴⁹

It is worth noting that South Asian Americans were the largest Asian American group in Detroit.⁵⁰ Although South Asian Americans supported the ACJ, they comprised a very small part of the organization. For example, South Asian Americans were not identified as participating in street demonstrations, which consisted mostly of Chinese Americans, with some support from Korean Americans, Japanese Americans, and Filipino Americans.⁵¹ Why? Possibly because South Asian Americans, with their own distinct physical characteristics, were less likely to be mistaken for Japanese. The trend towards the social construct of Asian Pacific American as a distinct group from South Asian American is logical given the purpose for which Asian Americans created the ACJ.

THE ASIAN AMERICAN IDENTITY TODAY: THE CASE OF OREGON AND THE ELECTION OF DAVID WU

The United States Senate has two Asian American Senators. Both, unsurprisingly, are from Hawaii, the only state where Asian Americans make up the highest proportion of the total population.⁵² There are only five Asian Americans in the United States House of Representatives.⁵³ In 1998, David Wu became the first Taiwan-born American elected to Congress. He was

sworn into his fourth term on January 4, 2005 as the Representative for Oregon. Oregon is only 2% Asian American.⁵⁴

Like other Asian American political candidates, Wu avoided playing the race card and ran on a platform appealing to Oregon voters of all backgrounds, including education, health-care, and social security.⁵⁵ In fact, it is likely he alienated Chinese American supporters in the 2000 election when he voted against Permanent Normal Trade Relations with China. Many Chinese Americans voted for him in 1998 simply because he was Chinese American and crossed party lines to do so.⁵⁶ When it became clear Wu was not a candidate for Chinese Americans, they crossed back over the party lines during his re-election. His campaign website mentions his ethnicity in one small paragraph at the end of his biography.⁵⁷ A family photo with his blonde, Caucasian wife is juxtaposed against this paragraph, as if to offset the fact he is Taiwanese American.

Even more revealing is the lack of a reaction to the 1998 election. Asian Americans have not turned the election of David Wu into a symbol of the emergence of Asian Americans in politics. The media coverage did not hail it as a new day for Asian Americans. Chinese American voters felt that regardless of Wu's election, Asian Americans still lacked political clout and that "whatever we thought, it probably didn't make that much of a difference."⁵⁸ Unlike Villaraigosa, who followed "the rule of a thumb for race politics" by mobilizing "his people" and swinging enough votes among "other people," Wu was elected with "no people" by swinging all of Portland.⁵⁹

David Wu's election demonstrates that "Asian Americans are united more by the label that others put on them than by language, religion or ethnic or national ties."⁶⁰ Unlike the Latino political movement, language does not exist as a tool for coalition. Although Asian Americans experience discrimination, it does not have as great an impact on their socio-economic status.

For example, the U.S. Census Bureau estimates that 50% of Asian Americans over age twenty-five have at least a bachelor's degree in comparison to the overall average of 27%.⁶¹ Stereotypes of Asian Americans as the model minority are not as debilitating as the stereotypes for Latinos. Race politics are increasingly becoming a moot point due to the relatively minute size of the Asian American population and its economic and social diversity.⁶² As Asian American communities become more diverse, they become increasingly divided on political issues. An especially significant rift has arisen between the "liberal Asian American establishment" and the relatively new Asian American neo-conservative movement.⁶³ Additionally, "[m]any new Asian immigrants [...] are coming to the United States with no sense of Asian American solidarity and little understanding of the Asian American history of oppression."⁶⁴

CONCLUSION

Asian Americans have learned that the key to political success is not in race politics or the promotion of a pan-ethnic political identity, but rather to divorce themselves from their Asian-ness and focus on broader appeal. Even in areas dominated by Asian Americans such as South Pasadena, they have never played race as a political card. As an Asian American city councilor in South Pasadena said, "I never campaign as an Asian. I campaign as a concerned citizen."⁶⁵ As the United States becomes more diverse, lingering reasons for an Asian American political coalition will become outdated. Asian Americans will quietly continue their growth on the political scene, generating issue-based, but not race-based appeal. The continued diversification of the Asian American community signals the death knell of any lingering Asian American political unity. Unless Asian Americans can find a new common ground, the answer will likely remain, "Does Connie Chung count?"

ENDNOTES

* LeeAnn O'Neill is a second-year law student at American University Washington College of Law and is the Editor-in-Chief of *The Modern American*. She earned her B.A. from the George Washington University. She is a Korean American adoptee who was inspired to write this article by Ichiro Leopold Hanami, Assistant Professor of Japanese Language and Literature at The George Washington University.

¹ The author decided to use "Latino" with deference to the sensitivity of the issue of using the label "Hispanic" versus "Latino." See Christine Granados, *Hispanic vs Latino*, HISPANIC MAGAZINE, Dec. 2000, <http://www.hispanicmagazine.com/2000/dec/Features/latino.html> (explaining generally, those who call themselves Hispanic are more assimilated, conservative, and young, while those who choose the term Latino tend to be liberal and older. The U.S. government derived the word "Hispanic" from *España*. The word "Latino" traces its roots back to ancient Rome and some say it's more inclusive, encompassing Latin American countries such as Cuba, Puerto Rico, the Dominican Republic, Mexico, and others).

² See *The 25 Most Influential Hispanics in America*, TIME, Aug. 22, 2005, at 42-50 [hereinafter TIME] (describing Chicano Alberto Gonzales as the nation's first Latino Attorney General, Mexican American Antonio Villaraigosa as the mayor of Los Angeles, Cuban American Mel Martinez as a Senator from Florida, Puerto Rican Anthony Romero as the executive director of the ACLU, and Mexican American Bill Richardson as Governor of New Mexico and a former seven-term member of the U.S. House of Representatives).

³ The term "Asian American" includes East Asian Americans, Southeast Asian Americans, and South Asian Americans.

⁴ See Norman Y. Mineta: *Secretary of Transportation*, U.S. Dep't of Transp., <http://www.dot.gov/affairs/mineta.htm> (last visited Jan. 3, 2005) (describing Mineta as the first Asian American Cabinet member, the driving force behind reparations for Japanese internment, and the first Cabinet member to switch directly from a Democratic to Republican administration).

⁵ THE NEW YORK TIMES 2006 ALMANAC (John W. Wright ed., 2006) at 274. It is interesting to note that the U.S. Census Bureau designates "Hispanic" as a category, and race as a separate category, so that a person can be classified both as white and Hispanic or black and Hispanic, but not Hispanic and Latino.

⁶ *Id.* at 328.

⁷ *Id.*

⁸ Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUMAN RIGHTS L. REV. 47, 49 (1997).

⁹ Ian F. Haney López, *The Social Construction of Race*, in CRITICAL RACE THEORY: THE CUTTING EDGE 193 (Richard Delgado ed., 1995).

¹⁰ *See id.* at 195.

¹¹ *See contra* Iijima, *supra* note 8, at 50 (urging Asian Americans to forge a pan-Asian Pacific American political and ideological unity).

¹² FELIX M. PADILLA, LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO 120 (1985) (citing Jo Freeman, *On the Origins of Social Movements*, in SOCIAL MOVEMENTS OF THE SIXTIES AND SEVENTIES 9 (Jo Freeman ed., 1983)).

¹³ *Id.* at 61.

¹⁴ NICHOLAS DE GENOVA AND ANA RAMOS-ZAYAS, LATINO CROSSINGS: MEXICANS, PUERTO RICANS, AND THE POLITICS OF RACE AND CITIZENSHIP 57 (2003).

ENDNOTES CONTINUED

- ¹⁵ *Id.* at 59.
- ¹⁶ *Id.* at 75.
- ¹⁷ See Gina M. Pérez, *Puerto Ricans*, ENCYCLOPEDIA OF CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/1027.html> (last visited Jan. 5, 2006); Gabriela F. Arredondo and Derek Vaillant, *Mexicans*, ENCYCLOPEDIA OF CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/824.html> (last visited Jan. 5, 2006) (citing the 2000 Census).
- ¹⁸ GENOVA & RAMOS-ZAYAS, *supra* note 14, at 145-46.
- ¹⁹ *Id.* at 145. The differences between Mexican Spanish and Puerto Rican Spanish are too numerous to list here. However, two illustrative examples include: 1) the “eating [of] the r” in Puerto Rican Spanish and 2) the singsong accent of Mexican Spanish.
- ²⁰ PADILLA, *supra* note 12, at 84-85.
- ²¹ *Id.* at 89.
- ²² *Id.* at 118.
- ²³ PADILLA, *supra* note 12, at 163.
- ²⁴ *Id.*
- ²⁵ Peter Dreier, *After his landslide victory, new LA Mayor will have to live up to high expectations*, CITY MAYORS, http://www.citymayors.com/politics/la_villaraigosa.html (last visited Jan. 4, 2006).
- ²⁶ TIME, *supra* note 2, at 46.
- ²⁷ See *Hispanic or Latino Population by City, Los Angeles County*, LOS ANGELES ALMANAC, <http://www.laalmanac.com/population/po18a.htm> (last visited Jan. 5, 2006). It is unknown whether the composition of registered Latinos was the same as the general population. However, in general, 60% of registered Latinos are Mexican which indicates it is likely of a similar proportion; see also *Pew Hispanic Center/Kaiser Family Foundation 2004 National Survey of Latinos: Politics and Civic Participation 2*, Pew Hispanic Center, Jul. 22, 2004, <http://pewhispanic.org/files/reports/33.1.pdf> [hereinafter *Latino Politics Survey*].
- ²⁸ Roberto Suro, *Latino Power? It Will Take Time for the Population Boom to Translate*, WASH. POST, Jun. 26, 2005, at B1.
- ²⁹ PR Newswire, *Recently Registered Latino Voters Favor Villaraigosa Over Hahn by Large Margin*, HISPANIC BUSINESS, May 12, 2005, http://www.hispanicbusiness.com/news/news_print.asp?id=22970.
- ³⁰ *Latino Politics Survey*, *supra* note 27.
- ³¹ *Id.*
- ³² *Id.*
- ³³ Hispanic PR Wire – Business Wire, *Debating L.A.’s Future: Hawn and Villaraigosa Make Their Views Heard with L.A.’s Voters in Last Debate before May 17 Election*, HISPANIC BUSINESS, Apr. 25, 2005, http://www.hispanicbusiness.com/news/news_print.asp?id=22558.
- ³⁴ *Latino Politics Survey*, *supra* note 27, at 12-13 (citing determinative issues for the 2004 Presidential election); Deborah White, *Antonio Villaraigosa, Mayor of Los Angeles: The Bumpy Road of a Rising Democratic Superstar*, About.com Guide to Liberal Politics: U.S., Oct. 19, 2005, http://usliberals.about.com/od/peopleinthenews/a/Antonio_p.htm.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ Suro, *supra* note 28.
- ³⁸ TIME, *supra* note 2.
- ³⁹ HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* 58-61 (2000); FRANK H. WU, *YELLOW: RACE IN AMERICAN BEYOND BLACK AND WHITE* 70 (2002).
- ⁴⁰ *Id.* at 71.
- ⁴¹ ZIA, *supra* note 39, at 67.
- ⁴² *Id.* at 40.
- ⁴³ *Id.* at 184.
- ⁴⁴ *Id.*
- ⁴⁵ *Remembering Vincent Chin, Fifteen years later, a murder in Detroit remains a turning point in the APA movement*, ASIAN WEEK, Jun. 5, 1997, <http://www.asianweek.com/061397/feature.html>.
- ⁴⁶ The ACJ went on to promote Asian American awareness and help a few other Asian American victims fight civil rights violations, but its legacy lives on as the coalition for Chin. See *id.*
- ⁴⁷ ZIA, *supra* note 39, at 62.
- ⁴⁸ See Maude Toussaint-Comeau, Thomas Smith, and Ludovic Comeau, Jr., *Occupational Attainment and Mobility of Hispanics in a Changing Economy: A Report to the Pew Hispanic Center*, Pew Hispanic Center, Dec. 15, 2005, <http://pewhispanic.org/files/reports/59.1.pdf> (illustrating that 41.7% of Asians are in professional occupations compared to 16% of Latinos and 34.2% of non-Latino whites). It is also important to note that there is a divide within the Asian American community, especially among recent immigrants. There is also a notable divide between Southeast Asian communities, East Asian communities, and South Asian communities.
- ⁴⁹ Kurt Metzger, *The Demographic Tapestry of Metropolitan Detroit*, Presentation for Wayne State University, Mar. 24, 2004, at 12 (analyzing demographic trends of the Detroit metropolitan area).
- ⁵⁰ ZIA, *supra* note 39, at 77.
- ⁵¹ *Id.* at 74.
- ⁵² *U.S. Census Bureau Facts for Features: Asian/Pacific American Heritage Month May 2005*, April 29, 2005, <http://www.uscensus.gov>; *Minority Members of Congress*, Ethnic Majority, <http://www.ethnicmajority.com/congress.htm> (last visited Jan. 5, 2006) (identifying Daniel Akaka and Daniel Inouye, both from Hawaii).
- ⁵³ *Id.* (identifying Eni Faleomavaega from Alaska, Michael Honda from California, Doris Matsui from California, Bobby Scott from Virginia, and David Wu from Oregon, in contrast to the twenty-two Latinos in the House of Representatives).
- ⁵⁴ ZIA, *supra* note 39, at 308.
- ⁵⁵ *Id.*
- ⁵⁶ Election 2000: *David Wu Wins*, ASIAN WEEK, Nov. 10, 2000, http://www.asianweek.com/2000_11_10/feature4_davidwu.html [hereinafter *Wu Wins*].
- ⁵⁷ See *David Wu: Experienced, Independent Leadership in Congress*, <http://www.wuforcongress.com/about04.php> (last visited Jan. 6, 2006).
- ⁵⁸ *Wu Wins*, *supra* note 56 (quoting from interviews with Asian Americans regarding Wu’s election).
- ⁵⁹ Bruce Gilley, *Race Politics a Nonstarter for Asian-Americans*, S.F. CHRON., May 25, 1999, at A21, <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/1999/05/25/ED59121.DTL>.
- ⁶⁰ Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY’S L. J. 759, 763 (1999).
- ⁶¹ *U.S. Census Bureau Facts for Features*, *supra* note 52).
- ⁶² Gilley, *supra* note 59.
- ⁶³ Perry S. Chen and Kenly Kiya Kato, *Book Review: The State of Asian America – Activism and Resistance in the 1990s*, 30 HARV. C.R.-C.L. L. REV. 279, 282-83 (1995).
- ⁶⁴ *Id.* at 289.
- ⁶⁵ Gilley, *supra* note 59.

LEAVE THOSE KIDS ALONE: WHY THE FIRST AMENDMENT DOES NOT PROTECT THE BOY SCOUTS OF AMERICA IN ITS DISCRIMINATION AGAINST GAY YOUTH MEMBERS

By Sean Griffith, J.D.*

On June 9, 2003, the Boy Scouts of America's ("BSA") Cradle of Liberty Council released a position statement on its leadership standards stating, "[a]pplications for leadership and membership do not inquire into sexual orientation. However, an individual who declares himself to be a homosexual would not be permitted to join Scouting. All members in Scouting must affirm the values of the Scout Oath and Law, and all leaders must be able to model those values for youth."¹ Additionally, the position statement reaffirms that "the Boy Scout promises to do his duty to God and to be morally straight, as well as to be clean in his thoughts, words and deeds."² These position statements are a clear indicator that the BSA intends to extend its ban on gay leaders to its youth members.³

The Supreme Court's existing framework for deciding when a state's interest in preventing discrimination conflicts with a private group's right to associate leaves open a grey area with regard to the denial of youths' membership to the BSA. The BSA's ban on openly gay youth members likely goes beyond the scope of the Supreme Court's decision in *Boy Scouts of America v. Dale*, which found that a state could not compel the BSA to retain an avowed homosexual as an assistant scoutmaster.⁴

This article will argue that *Boy Scouts of America v. Dale* should extend only to persons in adult leadership positions within the BSA and that its current ban on openly gay youth members constitutes unacceptable discrimination. This article asserts that states have a compelling interest in preventing the discrimination of youth members based on sexual orientation that outweighs the BSA's First Amendment right of expressive association. Finally, a state may have a further compelling interest in protecting youth members of the Boy Scouts from discrimination because of the unique role the group plays in children's education.

THE SUPREME COURT: WHEN GROUP FREEDOMS CONFLICT WITH THE STATE'S INTEREST

The Supreme Court held that freedom of association is a fundamental right that, while not explicitly stated in the Constitution, is protected by the First Amendment. In protecting this right the Supreme Court recognizes two distinct incarnations of the freedom to associate. First, individuals have a freedom of intimate association which protects close relationships from government imposition by acting as a "critical buffer between the individual and the power of the state."⁵ Second, the Supreme Court recognized that citizens must have freedom of expressive association, which protects First Amendment rights against gov-

ernment intrusion by allowing individuals to unite with others holding common views for an expressive purpose.⁶ This article is concerned with the freedom of expressive association.

Implicit in the freedom to associate is the freedom not to associate, which is to say, the freedom to discriminate.⁷ Conversely, the Supreme Court has recognized that a state may have a compelling interest in protecting certain classes of people from discrimination.⁸ States have passed public accommodation statutes which prohibit private groups from denying an individual access to a public accommodation because of his or her race, sex, orientation, or other characteristics. In *Roberts*, the Supreme Court emphasized that public accommodations laws "plainly serve[d] compelling state interests of the highest order,"⁹ and recognized that a state's compelling interest in mandating equal access to women extends to the acquisition of leadership skills and business contacts.¹⁰ Therefore, because the Supreme Court recognizes both a group's freedom to discriminate and a state's interest in preventing discrimination, the stage is set for conflict.

In *Roberts*, *Duarte*, and *New York Club Ass'n*, the Supreme Court laid the framework for considering how conflicts between state interests and group rights should be decided.¹¹ First, the Supreme Court considered whether the state's interest was compelling. All three cases recognized that states have a compelling interest in eliminating public accommodations' policies which discriminated against women.¹² Second, the Supreme Court asked whether the group in question was an expressive association. In *Roberts*¹³ and *Duarte*,¹⁴ the Court found that individuals had united to engage in purposeful, protected speech and thus, the freedom to associate was implicated.¹⁵ Third, the Supreme Court asked whether inclusion of the excluded group would burden the group's messages. Although no burden was found in these cases, the Supreme Court recognized that inclusion of an unwanted group *could* impair the expressive capacity of the association enough to trigger First Amendment protection.¹⁶

In these three cases, the Supreme Court never had to balance a state's interest in preventing discrimination against a private group's First Amendment freedoms because in all three cases, the Supreme Court found no burden on First Amendment activity.¹⁷ However, two points are vital to this article. First, *Roberts* held that the amount of protection the First Amendment offers may be conditional. "The nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake."¹⁸ Second, even where a court recognizes that inclusion of an unwanted group will burden an

association's ability to express its message, "[t]he right to associate for expressive purposes is not, however absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of association freedoms."¹⁹

DALE: WHEN THE STATE CANNOT FORCE A GROUP TO ADMIT A LEADER WHO WOULD COMPROMISE EXPRESSION

James Dale began scouting as an eight year old and attained the rank of Eagle Scout at the age of eighteen. The following year he applied for adult membership, and BSA approved him for the position of assistant scoutmaster. During this time Dale became the co-president of the Rutgers University Lesbian/Gay Alliance and was interviewed by a newspaper regarding his advocacy for the psychological needs of homosexual teenagers. Soon after, Dale received a letter from a BSA executive asking him to revoke his adult membership.²⁰ Dale was denied his right to attend a hearing to review his case because BSA, "does not admit avowed homosexuals to membership in the organization."²¹

Consequently, Dale filed a complaint against the BSA, alleging that it violated New Jersey's public accommodations statute, Law Against Discrimination ("LAD"), by revoking his admittance because of his sexual orientation.²² The BSA successfully appealed the case to the Supreme Court, which held that applying New Jersey's public accommodations law to the BSA violated its First Amendment right of expressive association.²³

The Supreme Court first considered whether BSA was an expressive group, and if so, whether an anti-homosexual message was part of its expression, noting that the purpose of BSA is to instill values in youths, "by having its adult leaders spend time with the youth members, instructing and engaging them" in various activities.²⁴ "The scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values – both expressly and by example."²⁵ Thus, the Supreme Court held that BSA is an expressive group, with its expression being anti-homosexuality.²⁶ The Supreme Court held that the judiciary may not "reject a group's expressed values because they disagree with those values or find them internally inconsistent."²⁷ If BSA claims to be anti-homosexual, the Court holds, it "cannot doubt that the Boy Scouts sincerely holds this view."²⁸

Next, the Supreme Court asked, "whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not promote homosexual conduct as a legitimate form of behavior."²⁹ The Court declared, "as we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."³⁰ The Court emphasized that Dale was a gay activist and his presence as a leader would "at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."³¹

The Supreme Court then analogized this case to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. In *Hurley*, the Massachusetts Supreme Court ruled that the Gay, Lesbian, and Bisexual Group of Boston (GLIB) was entitled to march because it was impossible to detect an expressive purpose in the parade, there was no state action, and the parade was a public accommodation.³² The South Boston Allied War Veterans Council ("Council") did not wish to exclude GLIB because of the orientation of its members, but because it did not want to march behind a GLIB banner. However, the Supreme Court reversed the Massachusetts Court's decision finding there was no violation of Massachusetts' public accommodation law by the Council in excluding the GLIB from the parade. The Supreme court consistently ruled that GLIB's presence behind a banner would have "interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."³³ Therefore, the Supreme Court ruled that requiring BSA to, "retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct."³⁴

Finally, the Court considered whether the New Jersey public accommodations law requiring that the Boy Scouts accept Dale as an assistant scoutmaster interferes with the Scouts' freedom of expressive association.³⁵ Without ruling directly on whether BSA was a public accommodation or whether New Jersey had a compelling interest, the Court distinguished *Dale* from *Duarte*, *Roberts*, and *New York State Club Assn*. While the Court found a compelling state interest in each of these cases, there were no "significant burdens" to expressive association and as such, the Supreme Court did not have to balance state interests against group rights in any of those cases.³⁶ In *Dale*, however, the Supreme Court had to conduct a balancing test because of its finding of a "significant burden" and held that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."³⁷

LEAVE THOSE KIDS ALONE

Given the BSA's vocal opposition to gay members as well as adult leaders in their position statement of 2003, it is likely that they will attempt to bar openly gay youth in the same manner as the ejection of Dale from the BSA. In doing so, the BSA will likely attempt to invoke *Dale* as extending to openly gay youth.

WHY THE BSA CANNOT DIRECTLY EXTEND DALE TO YOUTH MEMBERS

There are two main reasons why the Supreme Court should read *Dale* as restricted to adult leadership positions, and not youth members. First, the language of every *Dale* holding specifically pertains to adult leadership positions. Second, *Dale*'s critical analogy to *Hurley* would prove unworkable if it was

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meant to apply to youth membership. Additionally, lower courts have reached no consensus on a reading of *Dale*.³⁸

In *Dale*, the Supreme Court determined that BSA was an expressive association and that an anti-homosexual message was part of their First Amendment protected speech.³⁹ However, in the Supreme Court's examples of how this message was expressed, it only cited the expressions of adult leadership. BSA wrote that its mission was

“to instill values in young people... by having its adult leaders spend time with the youth members... During this time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scout's values – both expressly and by example.”⁴⁰

In every example the Supreme Court offered, the speaker was the adult scout leader and the audience was the youth member. The Supreme Court did not address the expressive message of the individual boy scouts who were “inculcated.”

Having established that BSA is an expressive group with an anti-homosexual message, the Supreme Court then considered “whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not ‘promote homosexual conduct as a legitimate form of behavior.’”⁴¹ The Supreme Court found in the affirmative, finding that allowing Dale to continue as a leader would, “force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁴² The Supreme Court did not rule on whether it was Dale's identity as a gay activist, a gay scout leader, or merely self-identification as being gay which would burden the BSA's message. The Supreme Court only asked whether Dale, who was a vocal gay advocate, would burden the Scouts message.

Based on the preceding findings, it seems likely the Supreme Court intended a narrow holding. The language of *Dale* is confined to answering a question about James Dale and possibly adult leadership positions in general, but it never represents youth members as speakers. As such, the holding should be limited to vocal gay advocates in positions of adult leadership. Rather, the youth members are the intended audience of BSA's speech and message and the Supreme Court does not identify any expressive role for them.

Furthermore, the *Dale* Court relies greatly on *Hurley*. While the Council stated their reasoning for not admitting the GLIB into the parade was because they did not want to march behind a banner,⁴³ the Council would not have had power to deny admittance to individual homosexuals who wished to march.⁴⁴ If the *Dale* decision were meant to extend to youth members without any contention that youth members expressed the BSA's message, then the Court would be allowing BSA to discriminate based only on sexual orientation, which was explicitly prohibited in *Hurley*.⁴⁵ The analogy between *Hurley* and *Dale* only works if *Dale* is read not to implicate youth members.

It is important to note the significance of the absence of a Supreme Court ruling on whether BSA should be considered a public accommodation in *Dale*. One of the pre-requisites of a violation of the First Amendment right to expressive association is state action. As noted earlier, state public accommodation laws circumvent the requirement of state action to apply to private groups.⁴⁶ Because the Supreme Court in *Dale* declined to rule directly on the issue of public accommodation, going directly to the First Amendment balancing test, it set the precedent that a case regarding exclusion of the BSA's gay youth members should be governed by the balancing test.

Consequently, the Supreme Court would need to conduct a balancing test and find that the state's interests in preventing discrimination against children would outweigh the group's interest in expressive association. Two factors would weigh in favor of the state's interest in preventing discrimination: inclusion of a gay youth member would be less of a burden than inclusion of a gay scout leader,⁴⁷ and, the state has a recognized compelling interest in protecting youths from BSA's discrimination because of the unique role it plays in children's education.⁴⁸

The Supreme Court was clear that James Dale was an expressive agent of the BSA and, like a group holding a banner in *Hurley*, he contributed to the overall message of the organization. While gay adult scout leaders may be denied participation in the BSA because they are expressive agents analogous to sign holders in *Hurley*, a youth member is more analogous to the gay individual who wishes to march in the parade without a sign. *Hurley* is clear, moreover, that the First Amendment does not protect an expressive association's decision to deny the mere presence of an individual based only on his or her orientation.⁴⁹ Thus, a person's presence alone is not expressive. Just as individual gay marchers could not have burdened the Council's expression enough to outweigh the commonwealth's interest in preventing discrimination, a BSA youth member's presence alone cannot burden expression enough to outweigh a state's interest in preventing discrimination.

A state may also have a compelling interest in protecting youths from BSA's discrimination because of the unique role the group plays in children's education. This compelling interest may outweigh BSA's freedom of expressive association. In *Boy Scouts of America v. Wyman*, Judge Calabresi writing for a unanimous court upholding the state interest in Connecticut's Gay Rights Law over the BSA's right to associative expression, personally noted that,

“[i]t is possible that, under the Fourteenth Amendment, a state that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy, even if the federal government has not recognized that same group's claim to heightened scrutiny for the purposes of equal protection...”⁵⁰

Merely because the state interest in *Dale* could not outweigh

BSA's right to expressive association does not mean that other states with less restrictive expressive association rights do not have a compelling enough state interest to justify the restrictions.⁵¹

Not only have courts recognized that states may have a compelling interest in eliminating discrimination, but they have also acknowledged states' "compelling interest in educating its youth, to prepare them to participate effectively and intelligently in our open political system, and to be self-reliant and self-sufficient participants in society."⁵² The Boy Scouts prepare children to be all of these things during a time when, as the BSA proclaims on its web site, nearly one in five children in the United States lives in poverty.⁵³

In programs like "Scoutreach," the BSA "targets youth in distressed areas of [the U.S.], where they have many chances to fail, and few opportunities to succeed, much less to excel." The BSA tries to help the many children in the United States who struggle with the issues of "[s]ingle parent families, often headed by mothers and grandmothers, unemployment, a pattern of alcohol and drug abuse and family income below the poverty line."⁵⁴ Representative Dana Rohrabacher (R-CA) explains that the Boy Scouts is, "America's number one values program for youth. Scouting helps strengthen character, develops good citizenship, and enhances both mental and physical fitness among

its participants. Scouting has helped countless youths from broken families by providing them with the moral discipline and leadership they would have otherwise lacked."⁵⁵

CONCLUSION

When it comes to the state's interest in preventing discrimination, children are easily distinguishable from grown men. James Dale was a grown man. The educational needs, identity formation, and self-esteem of an adult is not comparable to a child, who is just developing a sense of self and habits for success. The balancing test the Supreme Court should engage in is not simply between the interests of a private group and the state, but between the irrefutable needs of children and a group's interest in an untrammelled message. Each year, the Boy Scouts provide stability, discipline, and community to hundreds of thousands of youths, helping them become successful adults.

If a case based on the BSA's exclusion of gay youth is raised, the Supreme Court should address the interests of the children. Furthermore, the Supreme Court should find not only that *Dale* does not extend to the non-leadership positions in the BSA, but also that a state has a compelling interest in the rearing of its children that outweighs whatever burden a gay youth member could place on the message of the nation-wide Boy Scouts of America.

ENDNOTES

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¹ *Position Statement on the Cradle of Liberty Council's Stance Regarding the Leadership Standards of the Boy Scouts of America*, Boy Scouts of America, <http://www.scouting.org/media/press/2003/030612/statement.html>.

² *Id.*

³ *See* *Boy Scouts of America v. Dale*, 530 U.S. 640, 645 (2000).

⁴ *Id.* at 643.

⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984).

⁶ *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

⁷ *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *see also Roberts*, 468 U.S. at 623.

⁸ *Roberts*, 468 U.S. at 625; *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 535, 549 (1987).

⁹ *Roberts*, 468 U.S. at 624.

¹⁰ *Id.*

¹¹ *Duarte*, 481 U.S. at 535; *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1 (1988); *Roberts*, 468 U.S. at 609.

¹² *Id.*

¹³ *Roberts*, 468 U.S. at 613.

¹⁴ *Duarte*, 481 U.S. at 537; *see also City of N.Y.*, 487 U.S. at 12.

¹⁵ *Roberts*, 468 U.S. at 623; *Duarte*, 481 U.S. at 548.

¹⁶ *City of N.Y.*, 487 U.S. at 13; *Roberts*, 468 U.S. at 622; *Rotary*, 481 U.S. at 548.

¹⁷ *Duarte*, 481 U.S. at 548; *Roberts*, 468 U.S. at 622; *Rotary*, 481 U.S. at 548.

¹⁸ *City of N.Y.*, 487 U.S. at 13.

¹⁹ *Roberts*, 468 U.S. at 623.

²⁰ *Dale*, 530 U.S. at 645.

²¹ *Id.* at 579.

²² *Id.*

²³ *Id.* at 645.

²⁴ *Id.* at 649.

²⁵ *Id.* at 649-50.

²⁶ *Dale*, 530 U.S. 649-50.

²⁷ *Id.* at 651.

²⁸ *Id.*

²⁹ *Id.* at 653.

³⁰ *Id.*

³¹ *Id.*

³² *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 563 (1995) (citing *Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston*, 418 Mass. 238, 242-248 (1994)).

³³ *Dale*, 530 U.S. at 654.

³⁴ *Id.* at 659.

³⁵ *Id.* at 656.

³⁶ *Id.* at 658.

³⁷ *Id.* at 659.

³⁸ *Compare* *Boy Scouts of Am., S. Fla. Council v. Till*, 136 F.Supp.2d 1295, 1308 (S.D.Fla. 2001) (holding that inclusion of homosexual members would burden BSA's free expression under *Dale*), *and Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations*, 748 N.E.2d 759,767 (2001) (holding that *Dale* applied only to leadership positions in BSA), *with Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192, 1201-03 (D.C.2002) (holding that *Dale* was limited to only scout leaders who are also public gay advocates).

³⁹ *Dale*, 530 U.S. at 649-51.

⁴⁰ *Id.* at 650.

⁴¹ *Id.* at 652.

⁴² *Id.* at 653.

⁴³ *Id.* at 653.

⁴⁴ *See Hurley* 515 U.S. at 572.

⁴⁵ *Id.*

⁴⁶ *See Roberts*, 468 U.S. at 624.

⁴⁷ *Id.* at 622.

⁴⁸ *See Dale v. Boy Scouts of America*, 160 N.J. 562, 619 (1999) (holding that New Jersey had a compelling interest in preventing "the destructive consequences of discrimination from our society" because "the overarching goal of LAD is nothing less than the eradication 'of the cancer of discrimination.'")

⁴⁹ *Hurley*, 515 U.S. at 574-75.

⁵⁰ *Boy Scouts of America v. Wyman*, 335 F.3d 80, 95 n.5.

⁵¹ *Id.*

⁵² *See Immediato v. Rye Neck School District*, 73 F.3d 454, 461 (2d. Cir.); *see also Murphy v. Arkansas*, 852 F.2d 1039, 1042 (8th Cir. 1988); *Palmer v. Bd. of Educ. of City of Chi.*, 603 F.2d 1271, 1274 (7th Cir. 1979) (finding that "there is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society.")

⁵³ What is Scoutreach?, <http://www.scouting.org/factsheets/02-346.html>.

⁵⁴ *Boy Scouts of American, Circle 10 Council*, http://www.circle10.org/support_us/?index_item=3174&db_item=listitem.

⁵⁵ Edwin Meese III, *The Fight for Moral Right: Boy Scouts undaunted by left-wing attacks for refusing to accept gay Scout leaders*, <http://www.defendscouting.com/sldf/meesearticle.html>.

CRITICIZING CRITICISM OF CRITICISM: A LESSON IN OBJECTIVITY FROM REVIEWING “IS THE RADICAL CRITIQUE OF MERIT ANTI-SEMITIC?”

By David Dae Hoon Kim, J.D.*

Eight years ago, professors Daniel A. Farber and Suzanna Sherry compiled a collection of articles into a book entitled, *Beyond All Reason*.¹ Although they self-identify as Jewish liberals, Farber and Sherry argue that certain liberals, who they call “radical constructivists,”² undermine the “aspiration to universalism and objectivity that is the fruit of the European Enlightenment.”³ By writing this book they sought to reclaim reason in the law.

“*Is the Radical Critique of Merit Anti-Semitic?*,”⁴ adapted as a chapter in *Beyond All Reason*, was originally a law review article published in the *California Law Review*. The article challenges critical legal theories for adopting the radical critique of merit, merit being measures of group success and achievement. The article argues that if existing standards of merit are not valid, history has taught that the available explanations for Asian American and Jewish success must be anti-Asian and anti-Semitic.

Farber and Sherry argue that because radical constructivists could not possibly wish to endorse anti-Asianism and anti-Semitism, radical constructivism is internally inconsistent and thus, the wrong approach for critiquing merit. Farber and Sherry propose an alternative approach to radical constructivism: pragmatism. Pragmatism accommodates societal and legal change, but defers more to tradition and, according to the authors, does not have anti-Asian and anti-Semitic consequences. However, while Farber and Sherry aspire to objectivity, they fail to adhere to objective principles in making their argument for pragmatism, ultimately leading to the same result they fear under radical constructivism and unwittingly applying another strain of it.

RADICAL CONSTRUCTIVISM AND PRAGMATISM CONTRASTED

Farber and Sherry define the “meritocratic ideal” as the belief that “positions in society should be based on the abilities and achievements of the individual rather than on characteristics such as family background, race, religion, or wealth.”⁵ Furthermore, “[i]n a society that uses merit as a standard for professional success, everyone should have an equal right to compete for desirable occupations.”⁶ But according to Farber and Sherry, the radical constructivist position on merit views “fundamental concepts as socially constructed aspects of systems of power.”⁷ Specifically, “standards of merit are socially constructed to maintain the power of dominant groups,”⁸ and thus, “‘merit’ has no meaning, except as a way for those in power to perpetuate the existing hierarchy.”⁹

Farber and Sherry find this reasoning politically convenient

because it allows radical constructivists to avoid investigating the underlying reasons for inequality by focusing on effects. That is, arguing that “the unequal success rates are per se proof of unjust treatment . . . and sufficient justification for remedial action.”¹⁰

To set up the consequences of radical constructivism, Farber and Sherry first assert that “[b]y almost every measure of success, [Jews and native-born Asian Americans] succeed at far higher rates than white gentile Americans.”¹¹ Farber and Sherry argue that radical constructivism undermines these successes, leading to invariably negative stigmas for these groups. To support their argument, Farber and Sherry provide four historical, prejudicial explanations for the successes of Jews and Asian Americans in America as alternatives to those based on accepting existing standards of merit.

The first explanation purports Asians and Jews succeed as a consequence of a “powerful and pervasive” Asian and Jewish conspiracy (“conspiracy” theory).¹² The second explanation characterizes Asians and Jews as “chameleons who, with no culture of their own, take on the cultural coloration of the society around them” (“cultural imitation” theory).¹³ A third account charges Asians and Jews with infiltrating American culture (“cultural infiltration” theory). According to this account, “Jews succeed because American culture has taken on Jewish characteristics . . . [i]f American culture is really Jewish culture, then Jews are the cause of these deficiencies in our culture and are themselves deficient and unappealing.”¹⁴ The final explanation finds Asian and Jewish success is nothing more than a statistical anomaly (“statistical anomaly” theory). This is “in many ways the most damaging, because it amounts to a denial that Jews exist as a distinct or identifiable group.”¹⁵

These explanations, because they are undesired consequences of radical constructivism, are deemed sufficient to establish a case against this mode of thought: “Having deconstructed merit into pure power, radical constructivists face an implication they will surely find wholly unpalatable – for if merit is merely group power, then Jewish success becomes the fruit of Jewish power. That way lies madness.”¹⁶

Finding radical constructivism undesirable, Farber and Sherry assess three alternative theories. The ‘arbitrariness’ view argues that, “[b]ecause certain groups were, for whatever reason, non-participants during the creation of the standard, they tend to be excluded by those standards.”¹⁷ However, this view’s lack of normative basis does not allow any judgments against discriminatory policies.¹⁸ The ‘objectivist’ view holds, “completely objective, timeless standards of merit do exist, [but] there can be no

guarantee that we have reached a final understanding of those standards.¹⁹ Farber and Sherry prefer the pragmatist view, which is aligned with the objectivist belief in standards, but “values tradition as the essential foundation for intellectual and social progress.”²⁰

Farber and Sherry adopt a useful and optimistic definition of objectivity, consistent with their moderate politics. Objectivity is “the aspiration to eliminate beliefs based on bias, personal idiosyncrasy, fiat, or careless investigation.”²¹ Because it relies upon aspiration, Farber and Sherry’s objective merit, premised on the meritocratic ideal, allows for evolving standards of merit not entrenched in the status quo and allows for groups to achieve disproportionate success.

Objectivism and pragmatism seem initially consistent with this objective merit allowing for criticism of existing concepts. Objectivism acknowledges that “[a]n objective standard can be distorted by the limited vision of those in power.”²² Pragmatism “neither reifies tradition nor denies the importance of experimentation.”²³ However, even armed with the best intentions in pursuing objective merit, just as groups in power may exercise limited vision within the objectivist framework, Farber and Sherry fall victim to lapses in objectivity leading to unintended consequences. In arguing against radical constructivism and for Asian and Jewish merit, they demonstrate: (1) careless investigation, (2) fiat, and (3) bias or personal idiosyncrasy.

RADICAL CONSTRUCTIVISM AND PRAGMATISM COMPARED CARELESS INVESTIGATION

The disproportionately higher incomes and disproportionate representation of Asian and Jewish Americans in higher education brings Farber and Sherry to the conclusion that “[b]y almost every measure of success, both groups succeed at far higher rates than White Gentile Americans.”²⁴ This conclusion is hasty in three major respects, showing careless investigation on Farber and Sherry’s part.

First, Farber and Sherry arbitrarily compare the single ethnicity of Jewish Americans, to a racial category, Asian Americans, which contains dozens of ethnicities.²⁵ Farber and Sherry use the identifiers “Chinese American,” “Japanese American,” and “Korean American” interchangeably with the general category, “Asian Americans,” and do not mention Vietnamese, Cambodian, Hmong, Indian, or Pakistani Americans, etc. Farber and Sherry consolidate the diverse Asian American community into a singular identity, falsely analogizing the alleged success of Chinese, Japanese, and sometimes Korean Americans as representative of the entire Asian American community.

Focusing on the success of a single ethnically distinct minority to dispel claims of racial discrimination, especially where the ethnic minority is a part of the racial majority in America, is imprecise. In fact, Farber and Sherry argue against themselves by citing statistics that demonstrate that economic success is racially dependent, not racially neutral: Jewish Americans are the most economically successful White ethnic group. Chinese

and Japanese Americans are the most economically successful Asian American ethnic groups. In 1970, Jewish Americans earned 172% of the average American income, but their Asian analogs, the Chinese and Japanese Americans, earned 40% and 60% less, respectively.²⁶ This data tends to reinforce that Whites and Asians are not on par in America.

Second, Farber and Sherry do not consider other fundamental factors that would allow proper analysis of the data. The cited statistics on incomes do not control for the levels of education Chinese, Japanese, and Korean Americans achieve. In fact, the data shows that although Asian Americans in the aggregate have high educational levels, their incomes do not reflect their education, especially compared with incomes of groups with similar education levels.²⁷ Asian immigrants, in particular, do not attain achievement commensurate to their skills and education.

Third, Farber and Sherry make the far-ranging assertion that economic status and representation in higher education accounts for “almost every measure of success.” There are many other vital measures of success by which Asian Americans do not succeed at rates higher than Whites.²⁸ For example, Asian Americans endure stereotypes as the model minority, perpetual foreigners, or passive/submissive peoples.²⁹ Asian Americans are often depicted in mainstream media in stereotypical and arbitrary ways.³⁰ Asian Americans are regular targets of hate crime.³¹ Despite economic success and educational attainment, a glass ceiling bars Asian Americans from obtaining promotions to higher levels of management.³² Asian Americans are also not perceived as needing affirmative action even though they suffer discrimination.³³ At worst, Asian Americans are pitted against other minorities resulting in catastrophic financial and psychological, i.e., Korean American small business owners in the Los Angeles riots, or they are “scapegoated” resulting in a unique deprivation of civil rights, i.e., Japanese American internment. Thus, Farber and Sherry’s claim that Asian Americans succeed at far higher rates than White Americans neglects to consider the diversity of Asian Americans, the disproportionate effort they expend, and other substantial indicia of success. These omissions show careless investigation.

FIAT

Farber and Sherry endorse an alternative mode of thought called “pragmatism,” espoused by jurists like Richard Posner. Pragmatists believe “current conceptions of objectivity, knowledge, and merit may be flawed, but are necessary starting points in analysis,”³⁴ and they “recognize the importance of logic and clear thinking.”³⁵ Under Farber and Sherry’s pragmatism, the degree of deference to be given to current conceptions of merit is vague and impractical. If current conceptions are necessary starting points in analysis, this does not suggest that a presumption should weigh heavily in favor of keeping them. For example, a starting point can be analogized to a hypothesis in the scientific method. In the face of sufficient evidence to suggest otherwise, a hypothesis, the starting point in analysis, can be

readily rejected as a tentative explanation. Similarly, if current conceptions of merit cease to explain differences in success rates among ethnic groups, they should be discarded, not given continued deference.

Nevertheless Farber and Sherry argue that existing standards should be given the “*benefit of the doubt*.”³⁶ This standard suggests greater deference than starting points in analysis. The article even inflates this standard, eventually stating that existing standards should have a “*rebuttable presumption of validity*.”³⁷ Current merit then: (1) is to be a necessary starting point; (2) is to be given the benefit of the doubt; (3) and finally, is to receive a rebuttable presumption of validity. It is not readily apparent how this multifaceted characterization of pragmatism is expressly distinct from radical constructivism.

In fact, both radical constructivism and pragmatism emerge as subjective viewpoints: radical constructivism exists on the notion that merit is socially constructed by dominant groups to maintain their hegemony; and pragmatism defers to tradition, but recognizes that “current conceptions of objectivity, knowledge, and merit may be flawed.”³⁸ The only difference between the critiques is that Farber and Sherry subjectively judge standards in a context favoring tradition.

So even while Farber and Sherry classify pragmatism as an “alternative”³⁹ to radical constructivism, this brand of pragmatism may just represent another branch of radical constructivism catering just another group, i.e., White European Americans. Farber and Sherry fail to distinguish their definition of pragmatism from radical constructivism, thus evincing fiat and failing the second element of objectivity.

BIAS

As a key premise of their argument, Farber and Sherry claim radical constructivism allows only racist and anti-Semitic explanations for Asian and Jewish success. “These groups have obtained disproportionate shares of important social goods; if they have not earned their shares fairly on the merits, then they must have done so unjustly.”⁴⁰ As summarized above, Farber and Sherry propose four available theories for Asian and Jewish success in America under the radical constructivism critique: conspiracy, cultural imitation, cultural infiltration, and statistical anomaly. These explanations are highly infused with connotations derived from the fear experienced by those in the position of the majority.

By not adequately considering minority viewpoints, Farber and Sherry ignore two universes of explanations that do not have the same anti-Asian and anti-Semitic consequences. That is, (1) explanations blaming the majority, and (2) explanations recognizing Asian and Jewish resourcefulness in overcoming culturally discriminatory barriers erected by the majority. The former suggests neutral characterizations of Asian and Jewish Americans. The latter suggests positive characterizations. Both suggest that negative characterizations of the majority and current critiques of merit are not objective.

Many critical theorists would say that Asians and Jews

succeed as a consequence of a powerful and pervasive *majority* conspiracy to maintain the subordination of minority groups.⁴¹ For example, cultural imitation can be explained in Asian and Jewish-neutral terms if one believes majority culture has subsumed and oppressed Asian and Jewish culture – the marginalization of these cultures results from majority intolerance of difference. Asian and Jewish Americans must assimilate because they otherwise face alienation from mainstream participation.

Cultural infiltration in Asian and Jewish-neutral terms can be explained by cultural overlap in their preferences and practices. The fact that mainstream Americans enjoy aspects of minority culture may be seen as their choice. The better question is who determines what is incorporated into mainstream society, not what gets incorporated.

Finally, statistical anomaly might be explained by a group having the attributes most appropriate for success in a given cultural moment. Success need not be a result of a particular group being “better” than another, but simply out of being the right group, at the right place, at the right time, in the right context.

Minorities may be able to attain above parity success in a system biased against their interests by expending disproportionate effort and expense.⁴² History contains countless stories of immigrant underdogs defeating the odds, but in the broad context of immigrant success, these stories are rare and do not validate the oppressive regime. With this considered, Asian and Jewish American successes serve as an example of how two groups achieved financial and educational successes *despite* the structural barriers impeding their progress.

Asian and Jewish Americans’ relative success may be attributed to their cultural contributions to mainstream society and their status as cultural “chameleons.” Cultural “chameleons” are less threatening because of their adaptability. Both attributes carry positive connotations and potentially remove dependency on race and ethnicity to explain success. In light of these alternate explanations, current standards may still be in need of revision.

Giving disproportionate weight to limited perspective leads Farber and Sherry to seemingly logical double standards. The potential consequences of radical constructivism upon two specific groups is deemed dispositive for rejecting it altogether. Farber and Sherry also forgo due inquiry into the existing effect of current standards on other groups: they prefer a conception of merit that has specific desired outcomes: no anti-Asianism, no anti-Semitism, notwithstanding whether the current conception of merit is presently anti-Latino or anti-Black. Taking on the majority perspective allows Farber and Sherry to pursue the same line of effects-based reasoning they criticize critical theorists for using.⁴³

LESSONS OF AN ASPIRATIONAL OBJECTIVITY

Farber and Sherry’s objectivity contingent upon aspiration is commendable, but in arguing against radical constructivism, they fail to achieve it. Advocating for current standards without

due examination of relevant perspectives, precise definitions, and thorough investigation hinders the pursuit of objectivity. Farber and Sherry evince bias by ignoring alternative explanations for Asian and Jewish success that are possible under radical constructivism. They evince fiat by proposing a pragmatist model that has multiple interchangeable standards of deference to be afforded to tradition. They evince careless investigation by ignoring considerations that would provide a fuller and more accurate assessment of Asian and Jewish success. Through bias, fiat, and careless investigation, Farber and Sherry are led astray from their ideal of objectivity.

But this is not to say Farber and Sherry should not have spoken. Farber and Sherry express a sincere conviction about the deficiencies of radical constructivism.⁴⁴ If we keep quiet for fear of being wrong or too subjective, it is possible we may never speak and the fruits of public debate may never be enjoyed. Refusing to engage in debate leads to the “twin perils of an unthinking adherence to tradition and an unreflective over eagerness for change”⁴⁵ that Farber and Sherry fear. However, when we go about assessing their argument, we should remain

adherents to the principles required by objectivity. Where tradition is excessively optimistic, criticism is left out in the cold, with no entry into the house of knowledge. Where criticism is excessively pessimistic, tradition is a collection of foolish tales, with no attachment to the tree of history.

CONCLUSION

Farber and Sherry’s article, “*Is the Radical Critique of Merit Anti-Semitic?*” draws an arbitrary line between criticism and objectivity by addressing the distinction between radical constructivism and pragmatism within the context of merit. A society adopting strategies of exclusive arbitrary line-drawing generates barriers to debate that will not provide the freedoms and equal opportunity it might hope to achieve. A better model for objective merit balances criticism and tradition.

If even the best intentions lead to undesired outcomes, a case for opening the debate is made. Bridging the perceived gap between radical constructivism and pragmatism, as opposed to creating it, encourages dialogue to occur and critics to more readily realize an aspirational objectivity.

ENDNOTES

* David Dae Hoon Kim earned his J.D. from Georgetown University Law Center in 2005. He would like to give special thanks to Jerry Kang for his guidance.

¹ DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* (Oxford University Press 1997) [hereinafter *BEYOND*].

² For the sake of consistency and clarity, I exclusively use Farber and Sherry’s own classifying labels and definitions of the key terms in their argument. The targets of their scrutiny are critical theorists. I will employ the term “radical constructivists” since this is the term Farber and Sherry use in their essay.

³ *BEYOND*, *supra* note 1, at 5.

⁴ Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853, 879 (1995).

⁵ *Id.* at 858.

⁶ *Id.*

⁷ *Id.* at 855.

⁸ *Id.* at 856.

⁹ Farber & Sherry, *supra* note 4 at 856.

¹⁰ *Id.*

¹¹ In 1970, Jewish family income was 172% of the average American income. By 1980, native-born Chinese Americans were earning 150% of the non-Hispanic white average, with Japanese and Korean American families close behind. Unemployment rates for East Asian Americans were approximately half that of the general population. Jews and Asian Americans are disproportionately represented in higher education—in 1990, the percentage of Jews with some college education was almost twice that of the general population. Asian Americans also completed college at twice the rate of the general population. *Id.* at 869-70.

¹² *Id.* at 871.

¹³ *Id.* at 874.

¹⁴ Farber & Sherry, *supra* note 4, at 875-76.

¹⁵ *Id.* at 877.

¹⁶ *Id.* at 879.

¹⁷ *Id.* at 880.

¹⁸ Also, under this model, fair process leads to the minority being outvoted, and fair distribution allows reverse discrimination against disproportionately successful minorities. *Id.* at 881.

¹⁹ Farber & Sherry, *supra* note 4, at 882.

²⁰ *Id.* at 883 (quotations omitted).

²¹ *BEYOND*, *supra* note 1, at 27.

²² Farber & Sherry, *Radical Change*, *supra* note 5 at 882.

²³ *Id.* at 883.

²⁴ *Id.* at 869.

²⁵ Even the Census Bureau combines sixteen countries of origin or ethnic groups and more than twenty Pacific Island cultures into one definition of “Asian American.” See Pat K. Chew, *Asian Americans: The “Reticent Minority” and their Paradoxes*, 36 WM. AND MARY L. REV. 1, 26 (1994).

²⁶ Chinese and Japanese Americans earn 132% and 112%, respectively. Farber & Sherry, *supra* note 4, at 869.

²⁷ See Chew, *supra* note 25, at 52-53.

²⁸ Some Jewish Americans believe Jewish Americans are not successful. See, e.g., Beverly Horsburgh, *The Myth of a Model Minority: The Transformation of Knowledge into Power*, 10 UCLA Women’s L.J. 165 (1999) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

²⁹ See, e.g., Chew, *supra* note 25; see generally FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (Basic Books 2002).

³⁰ See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1270-73 (1992).

³¹ See Jerry Kang, *Racial Violence against Asian Americans*, 106 HARV. L. REV. (1993) (noting that stereotypes act as a rational catalyst towards violence against Asian Americans).

³² For example, 23.6 million whites hold bachelor or graduate degrees and, comparably, 26.5 million whites hold managerial or professional positions – a ratio of 1.12. The number of Asian Americans with these degrees (1.3 million) is significantly higher than the number in managerial or professional positions (1 million) – a ratio of 0.77. Thus, one can infer that many Asian Americans are ‘underemployed’ relative to their educational background.” Chew, *supra* note 25, at 53.

³³ See Chew, *supra* note 25 at 75-76 (“[T]here is a trend not to include Asian Americans in affirmative action and diversity enhancement programs.”); William C. Kidder, *Situating Asian Pacific Americans in The Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts*, 7 ASIAN L.J. 29 (2000) (citing that Asian American law school admission rates fell without affirmative action).

³⁴ Farber & Sherry, *supra* note 4, at 856.

³⁵ *Id.*

³⁶ *Id.* at 883.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Farber & Sherry, *supra* note 4, at 883.

⁴¹ See, e.g., Mari Matsuda, *We Will Not Be Used*, 1 ASIAN AM. PAC. ISLANDS L.J. (1993) (highlighting that interest convergence theory purports the majority will only act in a minority’s interest when it is also their interest); see generally Derek Bell, Jr., *Brown v. Board of Education and the Interest – Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁴² See Chew, *supra* note 25, at 54-55.

⁴³ “Discrimination is the most promising explanation of differing success rates, but it does not fully satisfy the needs of critical theorists... Finding all the possible answers unsatisfactory, radical constructivists change the question. Instead of asking whether all races are judged by the same standards and have the same opportunities, they argue that the unequal success rates are per se proof of unjust treatment.” Farber & Sherry, *supra* note 4, at 866-67.

⁴⁴ Farber and Sherry synonymously use the terms “radical constructivist” and “critical theorists.”

⁴⁵ Farber & Sherry, *supra* note 4, at 883.

ABORTION, EUGENICS, AND A THREAT TO DIVERSITY

By Chris McChesney*

After nearly three months of pregnancy, Mary sits in her doctor's office anxiously awaiting to hear the results. Though still in her first trimester, Mary's doctor explained to her that it is becoming more common, and even more accurate, to have certain screening tests done early.¹ Today Mary will learn if the child growing inside of her will be born with Down syndrome, an abnormality in the 21st chromosome that usually leads to mental retardation.² If the test results show that her child will have Down syndrome, Mary will be forced to make a host of difficult decisions, the hardest being whether or not to carry the fetus to term. The majority of parents-to-be in Mary's position, whose fetus tests positive for Down syndrome, choose to have an abortion rather than bringing the fetus to term and raising the child or allowing the child to be adopted.³ Many doctors counsel their patients in such circumstances to undergo abortions and doctors who treat patients with Down syndrome report seeing fewer and fewer patients.⁴ While not government mandated, such abortions are government sanctioned even when the pregnancy is at a later stage and when other selective abortions are not permitted.⁵

The reduction of people born with a disorder that can cripple families both emotionally and financially may be seen as an accomplishment of modern science and medicine. Alternatively, given our country's history, the drop in the number of Down syndrome babies can be viewed as the eradication of a distinct class of people. Eugenics is believed to be non-existent in the United States today, but the systematic selective breeding of humans remains a current part of society.⁶ The selective abortion of fetuses with Down syndrome is not referred to as eugenics, but the parallel is easy to make. The future consequences of enhanced understanding of our genetic makeup and advances in prenatal screening foreshadow a society that justifies eugenics as a means to creating the perfect child.

This article first discusses the history of eugenics in the U.S. and compares it with today's treatment of prenatal detection of Down syndrome. Drawing on this comparison, the article will discuss potential advances in genetic screening and how such advances may be used for eugenic purposes. Specifically, the article will focus on the potential threat genetic advances and selective abortion pose to diversity, in particular, homosexuality, via a eugenics-like desire for the perfect child. This article will also discuss the genetic component of eugenics and the biological roots of homosexuality, arguing that homosexuality is not a choice, but a predetermined trait. After discussing several scientific studies and drawing the conclusion from them that there is a genetic link to homosexuality, the article will pose a hypothetical

in which parents have the option to abort a fetus solely for the reason that the child would more likely than not be homosexual. Finally, this article will argue that while it may be a form of eugenics and threat to diversity to abort a fetus based on Down syndrome or the hypothetical detection of homosexuality, the woman's right to choose must not be infringed upon, whatever the reason for her choice.

AMERICA'S EUGENICS PAST

The eugenics movement was most prominent in the United States from the early twentieth century through World War II.⁷ Eugenics, first developed by Francis Galton, stemmed from early knowledge of genetics and a desire among intellectuals to improve society.⁸ Society's ills were blamed on groups of people who had traits that scientists believed to be inherited, including: disabilities, drug or alcohol addiction, homelessness, and "feeble-mindedness."⁹ Backed by scientists, intellectuals, and politicians of the time, many states, beginning with Indiana in 1907, passed laws based on the principles of eugenics.¹⁰ By the

1920s, twenty-seven states had codified such laws, most of which called for the mandatory sterilization of certain groups of people.¹¹

While early court cases began to limit sterilization laws, the Supreme Court upheld them in a 1927 case, *Buck v. Bell*.¹² The issue in *Buck* stemmed from a Virginia court's decision ordering the sterilization of eighteen-year old Carrie Buck based on her status as

an institutionalized person in the Virginia State Colony for Epileptics and Feeble Minded.¹³ Virginia institutionalized Buck because she was a "deviant" who had given birth to an illegitimate child, despite evidence that her pregnancy was the result of a rape.¹⁴ Justice Holmes, writing for the eight-justice majority, described Buck as, "the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child," and determined in an infamous quote that, "[t]hree generations of imbeciles are enough."¹⁵ Ruling in favor of the state, Holmes compared the sterilization to previously upheld mandatory vaccination policies, thus upholding sterilization laws and solidifying eugenics as valid public policy.¹⁶ Ultimately, over 60,000 people in the United States were lawfully sterilized.¹⁷

Only after the horrors of Nazi Germany and the Nuremberg trials, did the United States begin to view eugenics in a negative light.¹⁸ However, although sterilization laws were not heavily enforced, states were slow to repeal them; between 1970 and 1974, North Carolina sterilized twenty-three persons.¹⁹ The federal government only banned the use of federal funds for sterili-

Eugenics is believed to be non-existent in the United States today, but the systemic selective breeding of humans remains a current part of society.

zation in 1978 and as of 2004, seven states still had sterilization laws on the books.²⁰ Additionally, *Buck* has never been overturned, though a law requiring the sterilization of criminals was overturned in 1942 (largely because criminality was not proven inherited trait).²¹ The Court has also cited to *Buck* multiple times, referring to it as valid case law, most notably in *Roe v. Wade* to support the proposition that the state can impose some limits on the right to privacy.²² The Court's use of *Buck* as an example on allowable limits on the right to privacy is far from the historical support of eugenics. Indeed, the Court noted its unfavorable opinion of eugenics when it reviewed *Roe* in *Planned Parenthood of Southern Pennsylvania v. Casey*.²³

DOWN SYNDROME

Down syndrome is characterized by multiple physical traits including flat facial features, dysplastic ears, and an enlarged tongue in comparison to the mouth.²⁴ It is also associated with mild to severe mental retardation.²⁵ The cause of Down syndrome is the nondisjunction of chromosome 21, resulting in cells carrying three of the twenty-first chromosome instead of the normal pair.²⁶ This faulty cell division occurs in either the sperm or the egg prior to conception.²⁷ Prenatal testing can accurately diagnose Down syndrome in fetuses through several procedures: chorionic villus sampling (CVS), amniocentesis, and percutaneous umbilical blood sampling (PUBS).²⁸ While these tests are typically done during the second trimester, new studies are beginning to show that testing during the first trimester is more effective.²⁹

An estimated 80% - 90% of Down syndrome fetuses are aborted, indicating it is a common practice among women who have learned that the fetus they are carrying has Down syndrome.³⁰ This practice is generally accepted among academics and the general public, with some going as far as saying that, "prospective parents have a moral obligation to undergo prenatal testing and to terminate their pregnancy to avoid bringing forth a child with a disability."³¹ Analogizing such a position with the eugenics philosophy of our past is not difficult. After all, people with mental disabilities were one of the groups forcefully sterilized; preventing their very existence is the ultimate form of breeding them out of society.³²

Recently, the comparison to eugenics has begun to be publicly discussed, generally by those associated with the Pro-Life movement.³³ Proponents of selectively aborting fetuses with Down syndrome avoid the eugenics comparison and point to the emotional and financial burdens a child with Down syndrome imposes on a family, concluding that neither a woman, nor society, should be forced to carry such a burden.³⁴ The debate reached the Senate with the introduction of the 'Prenatally Diagnosed Condition Awareness Act' by Senator Brownback (R-KS) and co-sponsored by Senator Kennedy (D-MA).³⁵ The bill

would not limit a woman's right to choose; rather, it would increase available information to women after prenatal tests detect Down syndrome and prior to their decision of whether or not to carry the fetus to term.³⁶ Principally, the bill would expand available information about Down syndrome, create access to support services, and establish a national registry for those wishing to adopt children with Down syndrome.³⁷ At the close of the 2005 legislative session, the Senate Committee on Health, Education, Labor, and Pensions was considering the bill.

GENETICS OF HOMOSEXUALITY

While Down syndrome has a clear genetic link detectable through prenatal screening, allowing for the current eugenics-like treatment of fetuses with Down syndrome, homosexuality is not currently detectable in the womb. The two are not facially comparable; Down syndrome is considered a genetic disorder, while homosexuality is no longer deemed a disease or disorder.³⁸ For purposes of this article, however, the two will be compared as minority groups, whose members do not choose their status as a minority. Additionally, the classification of selective abortions as eugenics in cases of fetuses with Down syndrome will be used in a hypothetical by replacing the detection of Down syndrome with the theoretical detection of homosexuality in the womb. Prior to the hypothetical, this article will discuss what is currently known about the genetics of homosexuality to give support to the premise that prenatal screening will eventually have the capability to detect homosexuality in fetuses.

Though some argue that homosexuality is a choice of lifestyle,³⁹ science is providing more and more conclusive evidence that sexuality is a predetermined trait that cannot be changed.⁴⁰ These studies continually

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bolster the contention that homosexuality is not a choice.⁴¹ Unlike many predetermined traits that can be linked to one gene or chromosome, sexuality is believed to be determined by both genetics and conditions in the womb.⁴² In the early 1990s, a "gay" gene was discovered, but the results were not repeated and the study sample was small.⁴³ The study's result indicated the locus Xq28 (a point on the X chromosome) had a higher probability of being the same among homosexual brothers, suggesting the gene has a link to the trait of homosexuality.⁴⁴ Since then, a host of genetic discoveries have been made along with studies showing anatomical and physiological similarities among gay men and studies of homosexuality in other animals, including sheep, penguins, and fruit flies.⁴⁵

In 2005, two separate groups of scientists published articles detailing their studies, which located a gene in fruit flies that has the ability to change sexual orientation.⁴⁶ The gene, which geneticists refer to as the *fruitless* (*fru*) gene, controls male courtship behavior and orientation, but not sexual anatomy.⁴⁷ There are both male specific *fru* (*fru^M*) and female specific *fru* (*fru^F*)

genes. When geneticists spliced the female version into male flies, the male ceased courtship of females, and when paired with other male flies spliced with the female version, showed male-male courtship behavior.⁴⁸ Similar results occurred in females; when the male version was spliced into female flies, they began to actively court other females not spliced with the male gene.⁴⁹ While the study does not prove such a gene exists in humans, it does show there is a genetic link to sexual behaviors in fruit flies, which share a majority of genes with humans.⁵⁰

Along with genetics, several anatomical and physiological characteristics have been studied and compared between homosexuals and heterosexuals.⁵¹ Sweat glands produce pheromones as a response to sexual behavior.⁵² By monitoring brain activity of sexually dimorphic nuclei, Swedish scientists determined that homosexual men were aroused in a similar manner as women by pheromones produced by men.⁵³ Several anthropometric (measurement and characteristics of the body) studies have also been conducted, with the most conclusive study relating to finger length.⁵⁴ The majority of men have ring fingers that are longer than the index finger and women tend to have approximately equal length ring and index fingers.⁵⁵ Lesbians, however, tend to have a ring-index finger ratio similar to men, and while not all gay men share the female ratio, men with the female finger ratio tend to be more sensitive and nurturing.⁵⁶ Another common trait among homosexual men and women often appears in the brain. In heterosexual men, the two brain hemispheres are more specialized whereas women have brain hemispheres that are more similar and share functions. Homosexual men's brains show the same relationship among the hemispheres as women's brain.⁵⁷

Recently scientists have begun studying the brains of homosexual male sheep (rams).⁵⁸ Among domesticated rams, approximately 6% - 8% only court and mate with other rams.⁵⁹ Wild rams also have shown homosexual courtship behavior, as do over 450 other animal species, including penguins, ostriches, and chimpanzees.⁶⁰ Scientists in Oregon have begun investigating why some rams are homosexual and have discovered differences in the brains of heterosexual rams and homosexual rams.⁶¹ The sexually dimorphic nucleus is typically larger in males than it is in females, but gay rams have a sexually dimorphic nucleus that resembles the smaller nuclei found in ewes as opposed to other rams.⁶² A 1991 study showed similar results among the sexually dimorphic nucleus of humans.⁶³

While these studies do not show a direct link between genetics and homosexuality, they do support that homosexuality is not a choice.⁶⁴ Genes merely code proteins, and there are several steps between genes and behavior.⁶⁵ Most scientists, however, will acknowledge that homosexuality is genetic, although environmental factors, such as testosterone levels in the womb, likely play a role.⁶⁶ Given this, it is not hard to hypothesize that scientists will find a direct link to homosexuality. However, as geneticist Dean Hamer, a leading researcher noted, many heterosexual scientists do not research the so-called "gay gene" be-

cause they do not want to offend anyone.⁶⁷ After all, "if scientists identify a 'gay gene,' will expectant parents use it for selective abortion?"⁶⁸

HOMOSEXUAL HYPOTHETICAL: DIVERSITY VERSUS CHOICE

The potential detection of homosexuality is far different from the prenatal detection of Down syndrome.⁶⁹ As scientists learn more about the roots of homosexuality and its genetic links, it may become possible to determine that a child will likely be born gay. This determination, like all prenatal testing, may not be 100% accurate, but a doctor may be able to tell parents that their child has a certain percent chance of being gay.⁷⁰ If this percentage provides a more likely than not chance that the child will be gay, parents will face a difficult question -- should they have a child knowing that he or she will be born gay?

Often, some of the biggest fears expressed by parents when their child comes out as being gay are based on their child's safety and future happiness.⁷¹ Being gay in a heteronormative⁷² society can mean facing discrimination, misunderstanding, and even danger.⁷³ Hate crimes against gays remain a problem and acceptance, or even tolerance, is never assured.⁷⁴ In light of these concerns, would a parent-to-be knowingly bring a child into the world who could be hated solely for something they cannot control?⁷⁵ Would a parent-to-be whose religious convictions tell them homosexuality is sin and unacceptable bring a child into the world if they believed they could never accept for who the child truly would be? Would parents view their child's homosexuality as an imperfection like many view Down Syndrome?

A child should be loved for who they are when they are born, whether gay or straight, disabled or not. However, as has been the case with Down syndrome, parents often want the perfect child and some choose to abort what is perceived to be an imperfect fetus. A controversy erupted in Britain when a parent was allowed to abort a child past the point of viability because it was determined that the child would have a cleft palate.⁷⁶ Given this controversy, along with current homophobic attitudes, it is not outlandish to imagine a parent aborting a fetus because the child will be born gay. If that were to become the norm, abortion could begin to pose an even bigger threat to diversity than it presently does.

Considering this country's history, it is not unreasonable to believe U.S. citizens would attempt to selectively remove a group of people from the population by practicing eugenics; in fact, it is not outrageous to assert that eugenics is alive and well as demonstrated by the abortion of the vast majority of fetuses with Down syndrome.⁷⁷ As genetics and prenatal testing become more advanced, abortion may become a legitimate means to lowering diversity and reigniting eugenics as parents strive to have "perfect" heterosexual children. This would truly be a travesty, not only to the minority communities affected, but to the nation as whole. Diversity plays a vital role in this country

and should be protected, but should it be protected to the detriment of woman's right to choose?

CONCLUSION

The choice of whether or not to have a child is a personal one. Thus, a woman's right to choose should not be infringed upon, no matter her reasoning. Despite the importance of diversity and the importance of protecting the rights of minorities, including homosexuals and those with disabilities, placing restrictions on the allowed reasons for having an abortion pre-viability would arguably violate the standard of an "undue burden" set out in *Casey*, which was recently reaffirmed in *Ayotte v. Planned Parenthood of Northern New England*.⁷⁸ A state may offer alternatives, educate those wishing to obtain an abortion, and develop other such regulations with regard to the right to choose; a state regulation, however, may not impose an undue burden on a woman's right to choose.⁷⁹ Telling a woman what reasons are valid to have an abortion and that she is not allowed to have an abortion if she has different reasons would certainly be an undue burden to place on a woman's right to choose.

Abortion and advancements in genetics have the potential to become, and within some communities have already become, another form of eugenics. Even so, regulating the reasons for a woman's choice is not the solution, nor is halting advancements in genetic technology; rather, the solution lies in education. The

current tragedy of aborting fetuses with Down syndrome can and should be curbed with legislation similar to the bill introduced by Senator Brownback and Senator Kennedy. Knowing that people with Down syndrome lead happy, healthy lives, and that there are parents who want to adopt unwanted Down syndrome babies may change some decisions to abort, without placing an undue burden on their right to do so. Similarly, as scientists learn more about the roots of homosexuality, people may begin to accept that sexuality is not a choice. As acceptance and rights increase for the LGBT community, parents will not fear as much for the safety of their gay children, and they themselves may become more accepting of having a gay child.

Diversity and protecting individual rights are a vital part of this country. However, in this case, the legal system can only protect diversity so much before it may interfere with individual rights, such as placing an undue burden on a woman's right to choose. When this happens, it becomes the task of the individual to advocate and protect diversity. Twenty years from now, Mary's daughter may have to decide whether to abort her own fetus, which she has just learned will be gay. If she decides to abort her child and further the practice of eugenics, it will be because our country failed to educate, promote, and accept all forms of diversity — including homosexuality — not the failure to restrict a woman's right to choose.

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SPOTLIGHT ON MICHAEL NAVA: WRITING THE WRONGS FOR ALL

By María Lucero Ortiz*



Courtesy Stathis Orphanos

Most students studying for the California bar could not imagine writing a novel, but Michael Nava was unlike most law students. Late one night, after graduating from Stanford University Law School, he began to write The Little Death, the first of his seven-volume, critically acclaimed, legal mystery series. His fictional

protagonist, Henry Rios, is an openly gay, Latino criminal defense attorney. In a recent interview with *The Modern American*, Nava explained his motives for creating Henry by citing a comment from Toni Morrison: “She once said that she wrote the kind of books she wished she could have had to read when she was growing up as an African American. I wish that I had read books with characters like Henry Rios when I was growing up as a gay Latino.”

Professionally, Nava has dedicated the majority of his career to the government sector, working as one of the few Latino appellate lawyers. Personally, Nava has created support systems for minority communities. This spotlight focuses on Nava's contributions to social justice as an author and an attorney, in and out of the limelight, and the lessons to be learned from his achievements.

Nava grew up in a predominately working-class Mexican neighborhood in Sacramento, California, where his maternal family settled in 1920 after escaping the Mexican Revolution. His grandmother was an influential force whose piety and humility were highlighted by her Catholic beliefs. As a precocious child, Nava constantly read. He was the first person in his family to attend college, where he excelled and acquired a special affinity for literature and writing. He fondly remembers debating the merits of one poet over another with his friends until the early hours of the morning.

After graduating from Colorado College *cum laude*, he was awarded a Thomas Watson Fellowship to study abroad. He spent the next year in Buenos Aires and Madrid working on translations of the great Spanish American poet Ruben Dario (1867-1916). Returning home, he decided to go to law school after briefly contemplating a graduate degree in English or History. Law school was a difficult experience for psychological

rather than academic, reasons. “I felt like such an outsider,” he remembers, “I was no longer part of the working-class brown community where I grew up, but I would never be a part of the upper middle-class white society of my classmates, many of whom had been groomed for law school from a young age. I think many of us from working-class minority backgrounds suffer this kind of culture shock when we enter professional schools and the emotional energy required to adjust to the culture of that environment can take a toll academically.”

He continued to write during law school, winning awards for his poetry. Eventually, he turned to fiction and specifically, to the mystery genre, to express his own history while giving life to Henry Rios. During Nava's youth, society considered homosexuals as sick, sinners, or criminals. The only gay person he encountered as a child was a drag queen uncle. Nava could not identify with these stereotypes. Enter Henry Rios, a dynamic character who, as a recovering alcoholic, deals with loving and losing his lover to AIDS, being an openly gay Latino in California, and finding a balance between what is morally right and what is legally just.

Nava described the process of writing his first book as a “lark,” for which he had modest expectations. The Little Death was rejected by thirteen publishers before Alyson Books, an independent gay publisher, brought it out in 1986 and encouraged him to write a follow-up. His hard work paid off when his second book, Goldenboy, was critically acclaimed by the New York Times, which described him as a brilliant storyteller. Over the next thirteen years, Nava wrote five more novels, received six Lambda Literary awards, and was awarded the Whitehead

Award for Lifetime Achievement by a gay or lesbian writer. He also received a grant in creative writing from the California Arts Council and an honorary degree as a Doctor of Humane Letters from his alma mater, Colorado College. His books have been translated into to French, German, Japanese,

and Spanish. In addition, he also co-authored Created Equal: Why Gay Rights Matter to America.

The last of the Henry Rios novels, Rag & Bone, was published in 2001 with widespread acclaim. For many of his readers, Nava's decision to end the series was a personal loss because they had come to regard Henry Rios as a friend. Despite the series ending, Nava continues to write, working on a novel based loosely on the early life of Mexican silent film star Ramon Navarro (1899-1969).

At the beginning of his literary career, Nava was viewed largely as a gay writer, but he is now recognized as an important

For me, being an educated Latino from a working-class family was more alienating than being gay...

Latino writer, too. Each novel explores Henry's psychological struggles and the complex lives of "ordinary" people. Nava portrays very honest and explicit accounts of gay love and sex and the intimate tensions of an upwardly-mobile, educated Latino. "Henry isn't me, but I borrowed from my psychological experience to describe his character, especially the challenges he faces as an educated Latino from a working-class family. In my personal experience, being educated was more alienating than being gay in terms of dealing with my family. I think many Latinos and Latinas who entered the professions also face this challenge."

Outside the limelight of his literary celebrity, Nava dedicated his legal career to pursuing social justice through the government sector. Nava insisted that, "attorneys of color need to be everywhere. From corporate counsel to the bench and the human rights organizations, we have to be in a position to institutionalize the diversification of the legal profession that has begun with my generation of lawyers. This is the special challenge for law students of color – to build on what we began in the 70s and 80s." He also stated that attorneys of color have a responsibility to work directly or through philanthropic activities to expand access to justice for marginalized communities. In his free time, Nava is an active member of the Most Holy Redeemer, a largely gay and lesbian Catholic parish in San Francisco with a deep tradition of social justice activism. He heads a project in the parish to fund education for children in Africa orphaned by AIDS. He is also a role model and a benefactor for a charter school that sets high educational standards for first-generation, college bound Latino students. He contributes a percentage of his annual income to charitable and cultural institutions. "We have to learn to become philanthropists," he says, "however modest our contributions may be."

While practicing appellate law at a firm, a former Stanford classmate encouraged Nava to apply for a judicial position with Justice Arleigh Woods, the first African American woman appointed to the California Court of Appeals. After ten years with Justice Woods, he was invited to apply for his current position by a former colleague in the city attorney's office. "Judicial attorneys and law clerks can have a huge influence in shaping the direction of the law, but there are very few attorneys of color in those positions because they are mostly filled through the Old Boys Network. We need to establish our own network." This kind of diversification among judicial attorneys and law clerks

will result in more inclusive and fair results in the cases that come before the appellate judiciary. He advises law students and practicing attorneys to perfect their legal writing skills and to seek judicial clerkships to break into the profession as a judicial attorney.

In his current position as a judicial attorney, Nava works for Justice Carlos R. Moreno in the California Supreme Court. Justice Carlos R. Moreno is only the third Latino to sit on the California high court. Nava deals with complex legal issues in every area of civil and criminal law on one of the country's most active and well-respected courts. He is aware that his personal beliefs and his professional responsibilities do not always mesh. For example, while he is personally opposed to the death penalty, he has worked on death penalty cases in which the court has affirmed the death sentence. "Once an attorney takes the oath to uphold the law, he agrees to set aside some of his personal beliefs regarding the wisdom of those laws," Nava explains, "Of course, you can become an advocate to change the laws but I view my work within the appellate court system to be important enough that I trade off my personal feelings about some of the cases I work on in order to have some influence in other crucial cases."

As an author, Nava utilizes the written word to create a vision that did not exist when he was a youth; as a lawyer, he wields the written word to advocate for justice; and as a concerned citizen, he empowers others to pass on the knowledge they have acquired through their legal and life experience. Nava is an inspiration for all law students to write the wrongs.

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“HUMAN GARBAGE” OR TRASH-WORTHY LAW? FLORIDA’S BAN ON GAY ADOPTION IN THE INTERNATIONAL LIGHT

By Cecilia Isaacs-Blundin*

Florida law currently provides, “No person eligible to adopt... may adopt if that person is a homosexual.”¹ Legislation to change this provision died recently in the Florida senate.² Although several other U.S. states’ common law discourage adoption by homosexuals,³ no other state has a statute categorically excluding homosexuals, as a class, from adopting. Florida’s uncompromising current statutory ban on adoption by homosexuals is not only unique domestically,⁴ it also bucks the larger Western world’s trend towards expansion of adoption rights for gays and lesbians.⁵

This article will detail the Floridian approach to homosexual adoption, looking at the various justifications for the existence of Florida’s ban on gay adoption, while also identifying approaches taken by selected foreign jurisdictions. It will then put forth domestic and international critiques of the Floridian justifications for preventing gay and lesbian adoption, and will promote a different interpretation of the best interest of the child standard to allow for gay adoption. Finally, this article concludes with the assertion that, in light of international precedent, the Florida senate should have eliminated the categorical ban on adoption by homosexuals.

FLORIDA’S LAW ON ADOPTION BY HOMOSEXUALS

Florida’s adoption law allows “any person, a minor or an adult, [to] be adopted” by “a husband and wife jointly... an unmarried adult; or... a married person without the other spouse...”⁶ Since 1977, however, the statute has also contained a provision reading, “no person eligible to adopt under this statute may adopt if that person is a homosexual.”⁷ At least five congressional bills attempting to repeal the provision have been introduced since its enactment,⁸ two of which were introduced in the 2005 Florida senate session, but both died in committee.⁹

The first 2005 bill, introduced by Senator Rich, would have maintained a general ban on gay adoption. However, it would have allowed an exception in cases where, by clear and convincing evidence, the court finds “that the adoptee resides with the person proposing to adopt the adoptee, the adoptee recognizes the person as the adoptee’s parent, and granting the adoptee permanency in that home is more important to the adoptee’s developmental and psychological needs than maintaining the adoptee in a temporary placement.”¹⁰ The second bill, proposed by Senator Dawson, aimed to replace Florida’s current provision that “no homosexual may adopt under this statute if that person is a homosexual,” with a case-by-case evaluation of the best interest of the child.¹¹ The new section would state: “A prospective adoptive parent of a minor must undergo an individual assessment of

his or her capacity to understand and meet the needs of the particular child.” Because none of the proposed bills passed, Florida statutory law continues to categorically prohibit adoption by homosexuals.

The constitutionality of Florida’s provision banning adoption by homosexuals was challenged in state and federal court. Over ten years ago, in *Dept. of Health & Rehab. v. Cox*, a Florida appeals court heard one such challenge.¹² It upheld the provision as constitutional against challenges of vagueness, privacy, and equal protection brought by two gay men seeking to adopt a special needs child.¹³ Although the Florida Supreme Court affirmed the rulings, it remanded the case for further development of the factual record.¹⁴ The case, however, was never heard on remand because the plaintiffs withdrew the claim.¹⁵ Even so, *Cox* established a working definition of “homosexual,” which courts consider when evaluating the Florida statute.¹⁶ *Cox* defined that a “homosexual [is] limited to applicants who are known to engage in current, voluntary homosexual activity,” thereby making “a distinction between homosexual orientation and homosexual activity.”¹⁷

More recently, the constitutionality of Florida’s statutory ban on adoption by homosexuals has been upheld by the Eleventh Circuit Court of Appeals in *Lofton v. Dep’t of Children and Family Servs.*¹⁸ The *Lofton* case has been widely publicized¹⁹ and involved several plaintiffs, each of whose application for adoption was denied under the Florida statute based on his homosexuality.²⁰ At the district court level, in *Lofton v. Kearney*, the defendants Secretary and District Administrator of Florida’s Department of Children and Families asserted that the Florida statute served two legitimate purposes.²¹ First, it “reflects the State’s moral disapproval of homosexuality consistent with the legislature’s right to legislate public morality.”²² Second, the Department of Children and Families claimed that the best interests of the child are served when he or she is “raised in a home stabilized by marriage, in a family consisting of both a father and a mother” because “married heterosexual family units [will] provide adopted children with proper gender role modeling” and will minimize social stigmatization.²³ Like most other states, Florida uses the “best interest of the child” standard to make adoption determinations.²⁴ In *Lofton*, summary judgment was granted based on the Department’s arguments.²⁵ The court accepted that even if the rationales underlying the assumptions are flawed, “the very fact that they are ‘arguable’ is sufficient, on a rational basis review, to ‘immunize’ the congressional choice from constitutional challenge.”²⁶ Pointing to the federal and Floridian Defense of Marriage Act, the court added that:

[H]omosexuals are not similar in all relevant aspects to other nonmarried adults with respect to [the]... best interest of the child. Nonmarried adults, unlike homosexuals, can get married. On the other hand, homosexuals cannot marry or be recognized as a marital unit and, thus, cannot meet the state's asserted interest underlying the homosexual adoption provision.²⁷

The United States Court of Appeals for the Eleventh Circuit upheld the lower court decision.²⁸ The opinion expounded several of the rational bases upon which the statute could indeed be based.²⁹ The court noted that Florida has a legitimate state interest in furthering public morality³⁰ and that the statute is part of a "broader adoption policy, designed to create adoptive homes that resemble the nuclear family as closely as possible."³¹ Citing "the accumulated wisdom of several millennia of human experience" to confirmed "marital family structure" as a "superior model," the court reasoned that "it is rational for Florida to conclude that it is in the best interest of adoptive children . . . to be placed in a home anchored by both a father and a mother."³² The statute, therefore, furthers the best interest of children by placing them in families with adoptive mothers and fathers, who offer both male and female authority figures, which is "critical to optimal childhood development and socialization."³³ Because homosexual homes are "necessarily motherless or fatherless, [they] lack the stability that comes with marriage."³⁴

In response to the petitioners' argument that Florida's ban on homosexual adoption does not promote the nuclear family model inasmuch as it allows unmarried heterosexuals to adopt, the court reasoned that the legislature could have rationally acted on a theory that heterosexual singles are not only more likely to marry eventually, but are also "better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence," because the "children will need education and guidance after puberty concerning relationships with the opposite sex."³⁵ Ultimately, the Eleventh Circuit declined to rehear *en banc* the *Lofton* case, affirming the constitutionality of the Florida statute.³⁶ The American Civil Liberties Union subsequently petitioned the U.S. Supreme Court for review of the *Lofton* case on October 1, 2004,³⁷ but the Court denied certiorari in mid-January, 2005.³⁸

TREATMENT OF ADOPTION BY HOMOSEXUALS IN EUROPEAN COUNTRIES

No European nation categorically denies homosexuals the opportunity to adopt children. Instead, the current discussion throughout Europe is not whether homosexuals can adopt, but rather whether gay and lesbian *couples* should be able to adopt *jointly*. Like Florida, many European nations also employ the "best interest of the child" standard in adoption determinations. The outcomes, however, of a "best interest of the child" analysis in Europe often yield a very different result in same sex adoption cases.

In 2001, The Netherlands legalized same-sex marriage, extending to same-sex couples identical rights, benefits, and burdens associated with marriage. This also included the right to adopt children.³⁹ Joint adoptions by homosexuals are permitted under the 2000 amendments to the Dutch Act on Adoption by Persons of the Same Sex, so long as the requesting individuals "have been living together during at least three continuous years immediately before the submission of the request. The request can be an adopter who is the . . . registered partner or other life partner of the parent . . ."⁴⁰ As in Florida, section 1:227(3) of the Act explicitly requires that the adoption be *in the child's best interest*.⁴¹ Even so, one in every thirteen Dutch same-sex couples has adopted children.⁴²

DENMARK

Denmark currently allows joint adoption by same-sex couples.⁴³ Before 1999, however, homosexual couples were not allowed to adopt children together, regardless of whether it was the partner's child or an unrelated child.⁴⁴ The legislature's rationale for denying joint adoption was based on a belief that the child's best interest required having both a "father" and a "mother"⁴⁵ and a fear that least developed countries may be deterred from sending adoptable children to Denmark if same-sex couples may potentially be the adoptive parents.⁴⁶

In 1999, however, Denmark lifted its categorical ban on same-sex couple adoption, realizing a "new understanding of the phrase *the child's best interest*" (emphasis added).⁴⁷ The Danish legislature noted that the children affected by the ban had "inferior legal status compared to that of children in marriage regarding inheritance rights and in cases in which the partnership dissolved."⁴⁸ Moreover, the children had not been safeguarded against the possibility that the parental figure who had not been legally allowed to adopt could avoid certain legal obligations connected with the child if the partnership ended or the parent died.⁴⁹

Because foreign born children represent the large majority of adoptable children throughout Europe⁵⁰ and homosexuality is considered immoral or illegal in their countries of birth,⁵¹ it is no surprise that Denmark still prohibits gays and lesbians from jointly adopting unrelated children from abroad.⁵² Same-sex couples are limited to adoption of their partner's biological children.⁵³

SPAIN

Spanish law is among the most liberal because both gay and straight couples can marry and adopt children.⁵⁴ Until very recently, each of the country's autonomous communities (regional groupings of provinces) used its wide executive and legislative autonomy⁵⁵ to legislate varying types of adoption law.⁵⁶ On June 30, 2005 Spanish Parliament approved⁵⁷ a bill which extends the Spanish constitutional right to marry to couples of the same sex, thereby insuring them all the rights previously afforded only heterosexuals.⁵⁸ The bill cites an increasing social

acceptance of homosexuality alongside the Constitutional guarantees of nondiscrimination and free personality development in support of the modifications.⁵⁹ Among other changes, it amended the second paragraph of Article 44 of the Spanish Civil Code to read, "marriage is to have the same requirements and effects whether both contracting parties be of the same or different sex,"⁶⁰ including the right to adoption.⁶¹

FLORIDA'S TRASH-WORTHY LAW

Florida's current law is ill-advised for several reasons, all of which could be remedied by the passage of a bill similar to those proposed in the Florida senate during the 2005 session.⁶² Florida's current statutory law stands alone as the only United States' jurisdiction to categorically deny gays and lesbians the opportunity to adopt, and Florida's law looks regressive and discriminatory by other Western nations' standards. This article's survey of the current status of same-sex adoption law in other countries demonstrates that a large number of Western nations have moved well beyond the question of whether gays and lesbians should be able to adopt. The contemporary Western world's question is whether homosexual couples should be able to adopt *jointly*. Moreover, the rationales employed by Florida in the *Lofton* case are pre-textual, at best.⁶³ It is not in the best interest of any Floridian child for homosexuals to be categorically prohibited from adopting.

ORIGINS OF ADOPTED CHILDREN

While "international adoptions comprised approximately 21% of unrelated adoptions in the United States, they comprised a staggering 96% of unrelated adoptions in Sweden. Statistics from the Netherlands show an almost identical contrast. Similarly, in Denmark, only 7% of the total adopted children were born in Denmark."⁶⁴ Moreover, European nations fear that allowing gay and lesbian couples to adopt jointly will discourage least developed countries from sending foreign born children to Europe, thus severely diminishing the number of adoptions annually.⁶⁵ This fear is hardly irrational, as the China Center for Adoption Affairs (CCAA) "recently advised that 'adoption applications from homosexual families are not acceptable.'"⁶⁶ Florida, however, does not suffer a native-born-children shortage like Europe does. In 2001 "there were over 3,400 children in Florida eligible for adoption for whom there were no adoptive parents available."⁶⁷ By putting a categorical ban on adoption by homosexuals, Florida automatically decreases the number of its children who will be adopted each year.

THE BEST INTERESTS OF THE CHILD

It may in fact be in the best interest of Floridian children if homosexuals were not categorically excluded from adopting them. By changing the standard to a case by case analysis, the legislation currently pending before Florida's Senate wisely recognizes that the best interest of the child should be paramount to prejudice against homosexuals.⁶⁸ As noted above, Florida is home to 3,400⁶⁹ of the approximately 117,000 U.S. children

legally free and adoptable.⁷⁰ Rather than statutorily excluding homosexuals from the potential pool of available parents,⁷¹ Florida should be taking steps to remove the barriers that keep waiting children from adoption. This is especially true because no conclusive evidence establishes that homosexuals are less competent parents.⁷² "Children raised by parents with a same-sex orientation are thriving."⁷³ In fact, the alternative of allowing children to remain not adopted may have negative developmental impact on children.⁷⁴ The propriety of removing said barriers becomes especially important in light of the fact that childrearing by homosexuals is widespread throughout Florida⁷⁵ and is on the rise nationwide.⁷⁶ In 1976, an estimated 300,000 and 500,000 gay and lesbian biological parents had children.⁷⁷ By 1990, there were between six million to fourteen million children with a gay or lesbian parent, and between eight million to ten million children being raised in a gay or lesbian household.⁷⁸ According to the 2000 census, every county in Florida reported at least one same-sex couple with children under age eighteen in the household,⁷⁹ and over 40% of Florida counties have a higher proportion of same-sex couples with children than the national average.⁸⁰

Whether or not these numbers can be extrapolated to other geographical locations is unimportant. What is significant is that the European response to modern homosexual parenting trends, though not perfect, seems more concerned with determining the *actual* best interests of the child than the Florida approach by allowing homosexuals to adopt children either alone or jointly.⁸¹ For example, one motivation Denmark had in extending joint adoption rights to homosexuals was precisely to avoid situations in which children raised by gays and lesbians would be disadvantaged by *an inferior legal status* because of the parent's sexual orientation.⁸²

DISCRIMINATION

Florida's law is not supported by the state's purported rationales, and it is discriminatory in such a way that would be impermissible under foreign and international law. The legislative history of Florida's ban on homosexual adoption would be fatal for the bill if it were being proposed before the legislative body of one of the countries discussed above. Judge Barkett details the legislative history of § 63.042 in his *Lofton* dissent, calling the statute's enactment a "witch-hunting hysteria more appropriate to the 17th century than the 20th," during which Anita Bryant, one of the law's biggest advocates, referred to homosexuals as "human garbage," among other things.⁸³

DOMESTIC TRENDS

Despite the burgeoning number of European countries that allow same-sex couples to adopt jointly, as well as the growing judicial and legislative mandate internationally that gays and lesbians should at least be allowed to adopt individually, it is unlikely that an increased number of jurisdictions in the United States⁸⁴ will feel compelled to extend similar adoption opportunities anytime soon. In 2004, eleven American states amended

their state constitutions to exclude same sex couples from ever realizing marriage.⁸⁵ Those states include Kentucky, Oklahoma, Michigan, Mississippi, Oregon, Ohio, Georgia, Utah, Arkansas, Montana, and North Dakota.⁸⁶ In addition, since the federal Defense of Marriage Act (“DOMA”) became federal law in 1996,⁸⁷ over thirty-seven states have enacted state versions of the DOMA,⁸⁸ which preclude recognition of same sex marriages performed by another state.⁸⁹ If anything, these anti-gay marriage provisions create a climate of animus against homosexuals, which fosters rather than discourages legislation akin to Florida’s statutory ban on homosexual adoption.

Given the fact that the United States Supreme Court has denied certiorari in the *Lofton* case,⁹⁰ and the Florida Supreme Court has upheld equal protection, due process, and privacy challenges to the adoption statute,⁹¹ few legal alternatives are left to homosexual Floridians seeking to adopt children. There is the possibility of amending the Florida Constitution in such a way as to effectively repeal the anti-gay adoption law or an amendment as a citizen’s initiative process.⁹² Given that Floridians have used their initiative process to protect health and welfare before,⁹³ it is not beyond the realm of possibility to think that Florida citizens may one day amend their constitution to protect the best interests of adoptable children by removing barriers to gay adoption.

Florida’s statute is inconsistent with the developed world’s treatment of homosexual adoption. This article exposes the fact that Florida lags behind other U.S. states, as well as many foreign jurisdictions inasmuch as it remains the only state with a statute categorically banning homosexuals from adopting. Given the persuasive case made by the past legislative proposals in the Florida senate and foreign jurisdictions, the Florida legislature should reconsider shutting down future bills attempting to revise the categorical ban on gay adoption. Instead, it should revise or eliminate the statutory ban on homosexual adoption, using the European perspective on the best interest of the child. Though trends in other Western nations proved of little influence on the final disposition for the *Lofton* plaintiffs, the Loftons will hardly be the last gay Floridians seeking to adopt. Florida would be well advised to pay attention to the best interest of the child analysis utilized by other countries so that more eligible Floridian children can be adopted. Instead of allowing the homophobic rhetoric of “human garbage” to permeate Florida law, lawmakers should strongly consider allowing gays and lesbians access to adoption.

ENDNOTES

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¹ FLA. STAT. § 63.042(3) (2003).

² See S.B. 986, Reg. Sess. (Fla. 2005) (amending the Florida statute to change standard to clear and convincing evidence to allow for possible adoption by a gay parent).

³ See, e.g., CONN. GEN. STAT. § 45a-726a (stating that, “Nothing in this section shall be deemed to require the Commissioner of Children and Families or a child-placing agency to place a child for adoption or in foster care with a prospective adoptive or foster parent or parents who are homosexual or bisexual”); MISS. CODE § 93-17-3(2) (2002) (providing that “[A]doption by couples of the same gender is prohibited”); UTAH CODE § 78-30-1(3)(b) (2002) (stating that, “A child may not be adopted by a person who is cohabiting in a relationship that is not legally valid and binding marriage under the laws of this state”); Act 98-439, HJR35 (Ala.) (stating that, “[W]e hereby express our intent to prohibit child adoption by homosexual couples”); see also Adoption Laws: State by State, Human Rights Campaign, http://www.hrc.org/Template.cfm?Section=Laws_Legal_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19984 (stating that Arkansas, Missouri, Nebraska, and North Dakota are the only states where it is unclear whether or not the law allows gay adoption).

⁴ See, e.g. National Adoption Information Clearinghouse, *Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents* [hereinafter NAIC], http://naic.acf.hhs.gov/pubs/f_gay/index.cfm (April 2000).

⁵ See Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INT’L LAW 437, 459 (Robert Wintemute & Mads Andenaes, eds., Hart Publishing 2001) (providing English translation of statute).

⁶ FLA. STAT. § 63.042(1)-(2) (2002).

⁷ FLA. STAT. § 63.042(3) (2002).

⁸ See S.B. 1534, Reg. Sess. (Fla. 2005); S.B. 986, Reg. Sess. (Fla. 2005); S.B. 752, Reg. Sess. (Fla. 1995); H.B. 349, Reg. Sess. (Fla. 1995); H.B. 1461, Reg. Sess. (Fla. 1993).

⁹ Fla. S.B. 1534; Fla. S.B. 986. Fla. S.B. 1534 was proposed in February 2005 by Senator Rich while Fla. S.B. 986 was proposed in January 2005 by Senator Dawson.

¹⁰ Fla. S.B. 1534

¹¹ Fla. S.B. 986.

¹² *Cox v. Dept. of Health & Rehab*, 656 So. 2d 902, 902 (Fla. 1995).

¹³ *Id.*

¹⁴ *Id.* at 903.

¹⁵ *Gay Men Give Up on Adoption*, ST. PETERSBURG TIMES, Dec. 15, 1995, at 6B.

¹⁶ See, e.g., *Lofton v. Dep’t of Children & Fam. Servs.*, 377 F.3d 1275, 1290 n.1 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) (Barkett, J. dissenting) (citing *Cox*’s definition of the term “homosexual”).

¹⁷ *Cox*, 627 So.2d 1210, 1215 (Fla. Dist. Ct. App. 1993), *aff’d in part*, 656 So.2d 902, 903 (Fla. 1995).

¹⁸ 358 F.3d 804, 818 (11th Cir. 2004).

¹⁹ *Id.* at 808 n.4.

²⁰ *Id.* at 807-809.

²¹ 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001).

²² *Id.*

²³ *Id.* at 1383.

²⁴ See FLA. STAT. § 39.01(41) (2005) (proscribing placement that is not in a child’s best interest). See also William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 788 (2003) (noting that all U.S. states use the best interest of the child standard).

²⁵ *Kearney*, 157 F. Supp. 2d at 1385.

²⁶ *Id.* at 1384 (citing *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993)).

²⁷ *Id.* at 1385.

²⁸ *Lofton*, 377 F.3d 1275.

²⁹ *Id.*

³⁰ *Id.* at 819 n.17.

³¹ *Id.* at 818.

³² *Id.* at 820.

³³ *Lofton*, 377 F.3d. at 818.

³⁴ *Id.*

³⁵ *Id.* at 820.

³⁶ *Lofton*, 377 F.3d at 1275-76.

³⁷ *Phil LaPadula, Supreme Court Gets Adoption Case*, WASHINGTON BLADE at 1 (Oct. 8, 2004); see also Press Release, ACLU, *ACLU Asks U.S. Supreme Court to Hear Appeal in Challenge to Florida Gay Adoption Ban*, Oct. 1, 2004, <http://www.aclu.org/court/court.cfm?ID=16627&c=286>.

³⁸ *Lofton*, 377 F.3d 1275, *cert. denied*, 543 U.S. 1081 (2005); See also Joe Crea,

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Supreme Court Declines to Hear Fla. Adoption Case, WASH. BLADE, Jan. 14, 2005, at 12.

³⁹ *Inching Down the Isle: Differing Paths Towards the Legalization of Same Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2008 (2003).

⁴⁰ See Waaldijk, *supra* note 5.

⁴¹ See Machteld Vonk, *One, Two or Three Parents? Lesbian Co-Mothers and a Known Donor With 'Family Life' Under Dutch Law*, 18 INT'L J. L. POL'Y & FAM. 103, 106 (2004) (citing Adoption by Same-Sex Couples Act).

⁴² *Belgium Votes to Recognize Gay Marriages*, CHI. TRIB., Jan. 31, 2003, at 6 (hereinafter *Belgium Votes*).

⁴³ YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES at 74-75 (The University of Chicago Press 2002).

⁴⁴ *Id.* at 74.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ingrid Lund-Andersen, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 421 (Robert Wintemute & Mads Andenaes, eds., Hart Publishing 2001) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Nancy Polikoff, *Recognizing Partners but Not Parents/ Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 717-18 (2000).

⁵¹ See, e.g., *Ahmadis Warn Against Gay Marriages*, GHANAIAN CHRONICLE, Jul. 22, 2004, http://www.mask.org.za/SECTIONS/mind%20body%20spirit/islam_4.htm (calling on religious elders of Ghana to prevent the spread of the "moral virus from which God destroyed Sodom and Gomorrah" after homosexual marriages began in two U.S. states); see also THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION, 252-342 (Aart Hendriks, et al. eds., Prometheus Books 1993) (detailing "Official Attitudes and the Law" as well as societal attitudes towards gays worldwide).

⁵² Lund-Andersen, *supra* note 47, at 42; see also MERIN, *supra* note 43, at 75.

⁵³ See *Belgium backs gay adoption plans*, BBC NEWS, Dec. 2, 2005, <http://news.bbc.co.uk/1/hi/world/europe/4491688.stm>.

⁵⁴ Renwick McLean, *Spain Legalizes Gay Marriage*, N.Y. TIMES, July 1, 2005, at A9.

⁵⁵ C.E. Art. 149 (1978). An English translation of Spain's Constitution is available at http://www.senado.es/constitu_i/articulos/arts_old.html.

⁵⁶ *Matrimonio y ley de parejas: situación actual* [Marriage and partnership law: current situation], Fundación Triángulo, <http://www.fundaciontriangulo.es/Derechos/Familia/InicioParejas.htm>.

⁵⁷ See McLean, *supra* note 54.

⁵⁸ See Anteproyecto de ley por la que se modifica el código civil en materia de derecho a contraer matrimonio (Draft bill to modify the civil code regarding marriage rights) [hereinafter Anteproyecto], at 1-2, <http://www.juecesdemocracia.es/pdf/ProyectoLeyreformaMatrimoniopersonasmisosexo.pdf>.

⁵⁹ *Id.*; see also C.E. Arts. 9.2, 10.1, & 14.

⁶⁰ Anteproyecto, *supra* note 58, at 3 ("Tendrá los mismos requisitos y efectos el matrimonio cuando ambos contrayentes sean del mismo o de diferente sexo") (author translation).

⁶¹ See *Spain approves gay bill*, BBC NEWS, Oct. 1, 2004, <http://news.bbc.co.uk/2/hi/europe/3706414.stm>.

⁶² Fla. S.B. 986.

⁶³ Lofton, 377 F.3d 1275.

⁶⁴ *Id.*

⁶⁵ MERIN, *supra* note 43, at 75.

⁶⁶ Barbra Stark, *Baby Girls From China in New York: A Thrice Told Tale*, 2003 UTAH L. REV. 1231, 1275 n.300 (2003).

⁶⁷ Petition for Certiorari, *Lofton v. Dep't of Children & Family Serv.*, 377 F.3d 1275 (Oct. 1, 2004), available at <http://www.lethimstay.com/resources/CertPet.pdf>.

⁶⁸ Fla. S.B. 986; Fla. S.B. 1534.

⁶⁹ Petition for Certiorari, *supra* note 67.

⁷⁰ See NAIC, *supra* note 4, at 1.

⁷¹ FLA. STAT. § 63.042(3).

⁷² Compare ERIC FERRERO, ET. AL., TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 42-47 (2005), http://www.lethimstay.com/resources_publications.html (summarizing twenty two leading studies which

show "no...evidence to support the claim that lesbians and gay men are unfit to be parents"), with NAIC, *supra* note 4, at 2 ("the effects on children of being raised by gay and lesbian adoptive parents cannot be known"), and Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 833 (1997) (suggesting there are "significant potential [negative] effects of gay childrearing on children").

⁷³ Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 631 (2004).

⁷⁴ *Id.* (citing Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam. L.Q. 121, 133 (1995)) (noting that having no legal parent for a substantial time affects "a child's perception of self, especially in the context of the lifeline to the biological family, is difficult to assess).

⁷⁵ See The Urban Institute, *Gay and Lesbian Families in the Census: Couples With Children*, at http://www.urban.org/UploadedPDF/900626_Checkpoints_Couples.pdf (2003).

⁷⁶ See NAIC, *supra* note 4, at 1.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ The Urban Institute, *supra* note 75.

⁸⁰ *Id.* (identifying the national average of same-sex couples with children as two per thousand).

⁸¹ See, e.g., Lund-Anderson, *supra* note 47.

⁸² *Id.*

⁸³ Lofton, 377 F.3d at 1301-03 (Barkett, J., dissenting)

The Florida statute was enacted after an organized and relentless anti-homosexual campaign led by Anita Bryant, a pop singer who sought to repeal a January 1977 ordinance of... Dade County... prohibiting discrimination against homosexuals in the areas of housing, public accommodations, and employment... In the course of her campaign, which the Miami Herald described as creating a "witch-hunting hysteria more appropriate to the 17th century than the 20th," Bryant referred to homosexuals as "human garbage..." In response to Bryant's efforts, Senator Curtis Peterson introduced legislation in the Florida Senate banning both adoptions by and marriage between homosexuals...

[It was t]he Florida legislature's intention to stigmatize and demean homosexuals...

Throughout all of these proceedings, it could hardly be said that there was any discussion of the "best interests of the child" standard... Senator Peterson stated that his bills were a message to homosexuals that "we're really tired of you. We wish you would go back into the closet..." In short, the legislative history shows that anti-gay animus was the major factor—indeed the sole factor—behind the law's promulgation.

⁸⁴ See *supra* note 4 for list of some states that have allowed homosexual individuals and/or couples to adopt.

⁸⁵ See Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39 (noting that all eleven states that proposed anti same-sex marriage bans passed those bans.)

⁸⁶ See Press Release, National Gay and Lesbian Task Force, *Anti-Gay Marriage Amendments Pass in 11 States*, Nov. 3, 2004, <http://www.thetaskforce.org/media/release.cfm?releaseID=756>; see also Virginia F. Coleman, *Married in Massachusetts: Now What? Status of Same-Sex Couples Under Federal Law, Laws of Other States, and a Few Planning Thoughts*, SK020 ALI-ABA 279, 298 (2004) (listing the states that have passed such laws).

⁸⁷ 28 U.S.C. 1738C.

⁸⁸ See *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 ("At least thirty-seven states have already adopted 'mini-DOMAs'"); see also Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569, 622 n.20 (2004).

⁸⁹ *Id.*

⁹⁰ Lofton, 377 F.3d 1275.

⁹¹ See Cox, 656 So. 2d at 902 (Fla. 1995).

⁹² *Id.*

⁹³ See FLA. CONST. art. X, § 21 (2002) (amendment to the Florida Constitution using the citizen initiative process to protect health and welfare, specifically to protect pregnant pigs from cruelty).

OPEN WINDOW: MATTER OF LOVO'S IMPLICATIONS FOR TRANSSEXUAL AND IMMIGRANT COMMUNITIES

By Grisella Martinez, Esq.*

A valid marriage was defined under federal law in the passage of the Defense of Marriage Act (“DOMA”) in 1996,¹ as one between a man and a woman. Many legal advocates recognized this legislation as a door slamming shut the possibility of legal recognition of same-sex marriages. However, the DOMA failed to define the terms “man” and “woman.” Presumably this omission occurred because federal legislators and America’s heterosexual dominant culture did not contemplate scenarios involving men and women who had undergone sexual reassignment. Congress’ failure to define these terms opened a window where marriage between a man and a post-operative transsexual woman,² or vice-versa, could be classified as a valid marriage under federal law, thereby providing a basis for conferring immigration and other federal benefits. The Board of Immigration Appeals’ (“BIA”) affirmed this basis for immigration benefits in *Matter of Lovo*, which firmly established immigration benefits could be conferred on a spouse in a marriage where the other spouse was a postoperative transsexual.

MATTER OF LOVO: AN OVERVIEW

The BIA³ held in *Lovo*⁴ that the DOMA “does not preclude, for purposes of federal law, recognition of a marriage involving a postoperative transsexual, where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.” In addition, the BIA held that “a marriage between a postoperative transsexual and a person of the opposite sex may be the basis for [spousal immigration] benefits...where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage a valid heterosexual marriage.” The Immigration and Nationality Act (“INA”) states that U.S. citizens may file beneficiary petitions for “alien relatives” who are “immediate family members.” Immediate family members, who qualify as “beneficiaries” of a petition, include spouses, as well as parents, and children. The INA does not define who constitutes a “spouse” for purposes of immigration law.

The petitioner in *Lovo* was a postoperative transsexual U.S. citizen woman who married a male citizen of El Salvador. The couple wed in North Carolina, and the petitioner subsequently filed a visa petition for her husband so that he could apply for lawful permanent resident status and acquire his “green card.” The petitioner provided the United States Citizenship and Immigration Service (“the Service”) with: 1) her North Carolina birth certificate showing her sex as “female;” 2) an affidavit from her physician attesting to her sexual reassignment surgery; 3) a North Carolina court order demonstrating her change of name;

4) her North Carolina marriage certificate; and 5) her North Carolina driver’s license showing her name and her current sex as a female.

During its investigation, the Service discovered that the Petitioner was born a male in North Carolina, and had undergone sexual reassignment surgery to become a female. The Service erroneously denied her visa petition stating that a valid marriage for purposes of immigration law was a federal question; therefore, her marriage was invalid because it was not between one man and one woman. The Service found that the beneficiary was ineligible for immigration benefits as a spouse. The petitioner filed a Notice of Appeal to the BIA.

On appeal, the BIA stated that its analysis involved “determining first whether the marriage is valid under [s]tate law and then whether the marriage qualifies under the [Immigration and Nationality] Act.”⁵ The BIA concluded that under the statutory laws of North Carolina,⁶ a valid marriage is one between a male and a female (although these terms were undefined in the statute) and that the law expressly prohibited same-sex marriages. The BIA also discussed provisions of North Carolina’s statutes that set forth requirements for amending birth certificates.⁷ These statutes explicitly permit the changing of an individual’s sex on the birth record after sexual reassignment surgery and when proof of such surgery is provided from a licensed physician. Based on these facts, the BIA determined that the petitioner and beneficiary had entered into a valid marriage under the laws of the State of North Carolina.

The BIA next addressed the second issue of whether the marriage qualified as a valid marriage under current immigration law. It noted the absence of any language in the INA defining “spouse” and the failure of the DOMA to elaborate on the definition of “spouse” other than to state that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”⁸ The BIA also closely examined the failure of the DOMA and federal law to address the specific issue of postoperative transsexuals entering into marriage. In addressing this failure, the BIA looked to several sources of statutory construction and interpretation including the text of the DOMA, its legislative history, and relevant case law.

Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁹ the BIA followed the well-settled canon of statutory construction that “if the language of the statute is clear and unambiguous, judicial inquiry is complete, as we clearly ‘must give effect to the unambiguously expressed intent of Congress.’” It found that the legislative history and plain text of the DOMA clearly applied to marriages between a man and a woman and not

to same-sex couples. It also found that the House Committee Conference Report used the terms “same sex” and “homosexual” interchangeably and repeatedly addressed the repercussions of allowing homosexual couples to marry. The BIA highlighted the fact that Congress never addressed the issue of marriage by post-operative transsexuals in any legislative proceedings and found this failure to be remarkable in light of various state statutes recognizing transsexual marriage.¹⁰ The BIA held that:

[T]he legislative history of the DOMA indicates that in enacting that statute, Congress *only* intended to restrict marriages between persons of the same sex. There is no indication that the DOMA was meant to apply to a marriage involving a postoperative transsexual where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.¹¹

Of even greater interest is the BIA’s conclusion that Congress did not intend to overrule long-standing case law that provides for state dominion in determining the validity of marriage. The BIA held that the recognition of such a marriage deemed valid under state law did not require Congressional authorization for the purposes of immigration.¹²

However, the Service argued against this interpretation and asked the BIA to give the terms “man” and “woman,” as used in the DOMA, their “common meaning” when evaluating the validity of a marriage. Arguing that chromosomal patterns conclusively established “sex” because of their immutability, the Service contended that females with XX chromosomes and males with XY chromosomes could never change their sex, even if they underwent sexual reassignment surgery. The BIA rejected this argument, citing the great debate within the medical community concerning determinations of an individual’s sex.¹³

Additionally, the BIA also recognized that not all individuals are born with strictly XX or XY chromosomes and that “[a] chromosomal pattern [was] not always the most accurate determination of an individual’s gender.”¹⁴ Furthermore, the BIA declared an individual’s original birth certificate did not provide an accurate method for determining gender. The “incongruities” and “ambiguities” in medical criteria for determining a person’s sex using purely physical markers at birth supported this finding.¹⁵ The BIA ended its analysis by reaffirming its position that, “for immigration purposes,” it is appropriate to use a current birth certificate “to determine an individual’s gender.”¹⁶

RECOGNITION OF THE ABILITY TO CONFER IMMIGRATION BENEFITS ON A TRANSSEXUAL SPOUSE AS A TWO-FOLD PRECEDENT

Lovo raises many issues, not only for the transsexual immigrant community, but the greater transsexual community at large. The primary importance of the BIA’s holding is that the Department of Homeland Security and the Department of Justice are bound by this precedent in adjudicating visa petitions and depor-

tation and removal proceedings involving transsexual immigrants. On a broader scale, this holding is significant because it suggests that other agencies within the federal government may recognize the validity of transsexual marriages in conferring federal benefits on spouses.

IMMIGRATION BENEFITS

The full implication of *Lovo* has yet to be established. To date, the Service has not adjudicated *Lovo*’s petition on remand from the BIA, but in theory, the Service cannot deny the petition solely because the petitioner or beneficiary is a transsexual. However, this does not preclude the Service from denying the visa petition on other grounds. The most relevant example of this situation is the case of Donita Ganzon (a U.S. citizen Filipino male to female transsexual) and her husband Jiffy Javellana (a Filipino male immigrant).

Donita Ganzon immigrated to the United States in the 1970s. In 1981, she underwent sexual reassignment surgery. Subsequently, she legally changed her name and sought recognition of her sex change through the California state courts. The state of California

issued her a California driver’s license and allowed her to change her nursing license to reflect her sex as female.¹⁷ When she became a U.S. citizen six years later, her Certificate of Citizenship listed her current name and her sex as female. In addition, the United States State Department issued her a passport which listed her sex as female.

In 2000, Ms. Ganzon met Jiffy Javellana in the Philippines. Approximately one year later she filed a fiancé visa for him with legacy INS¹⁸ and he entered the United States. They married in Nevada a few months later.¹⁹ During their interview with the Service for Mr. Javellana’s green card, Ms. Ganzon revealed that she was a transsexual. Shortly thereafter, the Service denied her husband’s application for permanent resident status based on the invalidity of his marriage to Ms. Ganzon. The couple filed suit in U.S. District Court for the Western Division of California²⁰ seeking a declaratory judgment against the Department of Homeland Security. While the suit was pending, Mr. Javellana filed a second application for adjustment of status and hoped that the BIA’s ruling in *Lovo* would preclude the Service from denying him a green card based on the alleged invalidity of his marriage to a transsexual. In October 2005, the Service denied Mr. Javellana’s application “in the exercise of discretion,” stating that Ms. Ganzon and Mr. Javellana had failed to prove that they entered into their marriage in good faith and that the marriage was “bona fide.”²¹

This case illustrates how future effects of *Lovo* have yet to be realized in the context of visa petitions and adjustment applications. It remains to be seen whether the Service will grant the petition or deny it on another “discretionary” ground. Regardless of the outcome, *Lovo* endures as precedent in immigration law and potentially allows transsexual spouses to claim immigra-

...in theory, the Service cannot deny the petition solely because the petitioner or beneficiary is a transsexual.

tion benefits in other contexts aside from family-based visa petitions. Under *Lovo*, the opportunities for transsexual spouses to claim immigration benefits extend to employment-based visa petitions, non-immigrant visa petitions, asylum applications, and deportation and removal proceedings.

For example, aliens sponsored for an immigrant visa by a United States employer may also file for derivative permanent resident status for their spouses and children. Again, as with family-based immigrant visas, there is no definition of “spouse” and the couple need only prove that they entered into a valid and bona fide marriage. *Lovo* also potentially applies to visa petitions for non-immigrants. This includes applicants for student visas, employment visas, diplomatic visas, and other special non-immigrant visa categories. As long as a benefit is given to the visa holder’s spouse it could appropriately be considered under the BIA’s ruling. Likewise, an alien filing for asylum, if granted, may also pass on benefits to qualifying “derivatives.”²² In the case of a spouse, the only requirement for the spouse to receive benefits based on asylum (such as permanent resident status) is that the asylee married their spouse prior to receiving a grant of asylum.

In deportation and removal proceedings,²³ an immigrant may request various forms of relief from removal based on marriage to a U.S. citizen or legal permanent resident. For example, when an “out-of-status”²⁴ alien has continuously remained in the United States for over ten years, the alien may request cancellation of removal based on “extreme hardship” to the U.S. citizen or legal permanent resident spouse. Again, the statutes and regulations²⁵ discussing cancellation of removal do not define “spouse” nor do they impose any other prerequisites on the marriage, other than it be bona fide. Therefore, it is possible, under *Lovo*, that a transsexual spouse could claim or confer the benefit of marriage as a basis for relief from removal.

To better illustrate this point, imagine the following: a U.S. citizen male to female transsexual legally marries a male immigrant who is out-of-status. He has resided in the United States continuously for over ten years prior to the commencement of his removal proceedings. They have two adopted minor U.S. citizen children, but have no other immediate or extended family members in the United States. The U.S. citizen wife does not work and the husband is the sole source of financial income for the entire family. They own real property together and various other assets. Under this set of facts, the Immigration Court is bound by the determination of the BIA in *Lovo* to allow the husband to apply for cancellation of removal based on extreme hardship to his U.S. citizen spouse and children. Although the grant of the application is still a discretionary decision made by the immigration judge, the husband could not be precluded from applying for cancellation of removal before the Court based on an “invalid” transsexual marriage. In addition, if the judge denies the application, the husband could appeal to the BIA, which would have the power to remand the case to the Immigration Court for a decision consistent with its holding in *Lovo*.

Therefore, the extent to which the BIA’s holding in *Lovo*

affects transsexual spouses has yet to manifest before the Service or the Immigration Court. The uncertainties involved in the ability of transsexual spouses to confer benefits as U.S. citizens or to receive them as immigrants has great potential for litigation in federal courts and before administrative agency adjudicatory bodies.

FEDERAL BENEFITS

If the DOMA does not preclude a transsexual spouse from conferring an immigration benefit on their legal spouse, then it follows that it would not preclude any transsexual spouse from conferring *any* federal benefit on their legal spouse. This conclusion stems from the implication, drawn from *Lovo*, that a valid marriage under state law where a spouse is transsexual may serve as the basis for receiving or conferring federal benefits on the other spouse, regardless of the DOMA.

The arena of federal health benefits is a prime example of the potential benefits for married couples. The federal government currently employs more than two million people.²⁶ The Office of Personnel Management (“OPM”), the self-proclaimed “human resources agency” of the government is responsible for administering the Federal Employees Health Benefit Program (“FEHB”) and several other benefits programs.²⁷

Under the FEHB Program, federal employees and their family members are eligible for health coverage. The enacting statute for the FEHB states that a “‘member of family’ means the spouse of an employee” as well as certain categories of children.²⁸ The statute does not provide a definition of the term “spouse.” The accompanying regulation offers no further clarification other than to state that the term “member of family” has the meaning set forth in the statute given above.²⁹ Aside from the applicable statute and regulations, the only other source of guidance is the FEHB Handbook which reiterates that “[f]amily members eligible for coverage under your self and family enrollment are your spouse (including a valid common law marriage [in accordance with applicable state law]) and children.”³⁰

There are no publicized cases where a federal employee attempted to confer health benefits on a transsexual spouse or where a transsexual federal employee attempted to confer benefits on a spouse. There is no reliable data on how many transsexuals are residing in the United States,³¹ but probability dictates that someone will inevitably raise a claim based on the ability to confer federal benefits to a spouse, in which one of the parties is a transsexual. The OPM does have an adjudicatory board (the Merit System Protection Board) for handling various administrative issues, but they do not review health benefit issues.³² Under the FEHB’s enacting statute “[t]he district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States[.]”³³ Therefore, the federal employee would have the right to file an action against the government in federal court immediately.

CONCLUSION

Lovo opens the door to analyzing multiple types of potential “federal benefits” conferred on transsexual spouses, including, but not limited to, Social Security, tax and veterans benefits. However, the factual dynamics of *Lovo* are very narrow and may raise other issues that potentially complicate the rights of those who do not fall into the same category. This is because *Lovo* did not contemplate the numerous other possible permutations of transsexual marriage. The BIA did not identify the possible outcomes if both spouses had been transsexuals. It also did not take into account for the marriage of a transsexual woman to a biological man.³⁴ Nor did it consider the applicability of its ruling to transsexuals trying to confer benefits but whom were unable to legally change their sex, were married in states that

did not legally recognize changes of sex, or were already married prior to having sexual reassignment surgery. Therefore, while the BIA clearly recognized that there were potentially “anomalous results” in refusing to recognize legal changes of sex, the BIA did not fully address the consequences of its holding on a broader scale.³⁵

In the final analysis, *Lovo* is an important and precedential case not only in the immigration context, but also as a step forward for the transsexual community as a whole. Although the DOMA closed an important door for the lesbian, gay, bisexual, and transgendered community, the BIA’s holding in *Lovo* seems to have opened a window in the fight for transsexual rights. It will take time and litigation in both the administrative and judicial arenas to determine exactly how far these rights extend.

ENDNOTES

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¹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

² See Sarah Leinicke, *Post Operative Transsexuals Right to Marriage*, 1 MODERN AM. 18 (Spring 2005), available at <http://wcl.american.edu/modernamerican/01/1sleinicke.pdf> (providing a more comprehensive discussion of transsexual marriages).

³ The BIA is an administrative appellate body in the Executive Office of Immigration Review, U.S. Department of Justice. It is responsible for adjudication of appeals of family-based visa petitions (among other areas) filed with the U.S. Citizenship and Immigration Services, Department of Homeland Security. Decisions by the BIA in these matters are considered final agency determinations.

⁴ In re *Lovo*, 23 I&N Dec. 746 (BIA 2005).

⁵ *Id.* at 748 (citing *Adams v. Howerton*, 673 F. 2d 1036, 1038 (9th Cir. 1982)).

⁶ N.C. GEN. STAT. § 51-1.2 (2004).

⁷ N.C. GEN. STAT. § 130A-118(b)(4) (2004).

⁸ *Lovo*, 23 I&N at 749.

⁹ 467 U.S. 8376, 843 (1984).

¹⁰ *Lovo*, 23 I&N at 750 (stating that at the time of its review 22 States and the District of Columbia had passed laws recognizing transsexual marriages).

¹¹ *Id.* at 751.

¹² *Id.* at 752.

¹³ *Id.* at 752 (listing eight criteria generally used within the medical community to determine sex to prove the complexity of the argument as: 1) genetic or chromosomal sex, 2) gonadal sex, 3) internal morphologic sex, 4) external morphologic sex, 5) hormonal sex, 6) phenotypic sex, 7) assigned sex and gender of rearing, and 8) sexual identity).

¹⁴ *Id.*

¹⁵ *Id.* at 753.

¹⁶ *Id.*

¹⁷ Vrinda Normand, *Gender Bender*, METRO, Mar. 23, 2005, available at <http://www.metroactive.com/papers/metro/03.23.05/empaqu-0512.html>.

¹⁸ The Immigration and Naturalization Service (INS) was moved from the jurisdiction of the Department of Justice to the newly created Department of Homeland Security and is now called the U.S. Citizenship and Immigration Services. Agency proceedings prior to this change are often referred to as those under the “legacy INS.”

¹⁹ See Normand, *supra* note 17.

²⁰ *Jiffy Javellana et al. v. John Ashcroft et al*, No. 2:04-cv-09672-DT-RC.

²¹ Yong B. Chavez, *Transgender Spouse is Denied Green Card Again*, PACIFIC NEWS, Oct. 20, 2005, available at http://news.pacificnews.org/news/view_article.html?article_id=62a7b0ce817d740a7d9fb0f496fe93f3.

²² Derivatives include children and spouses.

²³ Deportation and Removal proceedings are adjudicated by the Immigration Court, Executive Office of Immigration Review, under the Department of Justice. Deportation proceedings are distinguished from removal proceedings as proceedings which commenced prior to September 30, 1996, subsequent to the amendments of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). All actions commencing after this time are removal proceedings. ²⁴ “Out of status” refers to an alien who is no longer in legal immigrant or non-immigrant status.

²⁵ See NACARA 203 Relief, U.S. Citizenship and Immigration Services, http://uscis.gov/graphics/services/residency/nacara_howapply_ins.htm.

²⁶ See STRATEGIC MANAGEMENT OF HUMAN CAPITAL SECOND QUARTER FY 2005 UPDATE, <http://apps.opm.gov/humancapital/stories/2005/Quarter2.cfm>.

²⁷ Such as the Federal Employees Group Life Insurance Program (FGLI), the Federal Long Term Care Insurance Program (FLTCIP) and the Federal Employees Retirement Benefits (FERS) program

²⁸ See Government Organization and Employees 5 U.S.C. § 8901(5) “Definitions.”

²⁹ See Federal Employees Health Benefits Program 5 C.F.R. 890.101(a).

³⁰ See FEHB Handbook, U.S. Office of Personnel, www.opm.gov/insure/handbook/fehb01.htm, at 153.

³¹ Varied estimates place the number from 30,000-40,000 while others postulate that the number may be as high as 3 million.

³² See *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (1985) (stating that The Merit System Protection Board’s jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation); see also *Trotter v. Office of Personnel Management*, 50 M.S.P.R. 267, 269 n.2 (1991) (stating that the Board lacks jurisdiction to review OPM determinations concerning the denial of health insurance benefits).

³³ See Government Organization and Employees 5 U.S.C. § 8912.

³⁴ See *Littleton v. Prange*, 9 S.W.3d 233 (Tex. App. 1999) (refusing to recognize the marriage of a transsexual woman to a biological man because they were chromosomally the same sex, which requires recognizing the marriage of same-sex couples where one partner is a transsexual).

³⁵ *Lovo* 23 I&N at 753, n. 5 (noting the potentially anomalous results of this refusal and providing examples of ambiguity).

UNDER GRACE:¹ LEGAL ISOLATION AND THE CHILDREN OF THE OLD ORDER AMISH

By Jennifer Lavoie*

Largely defined by their isolation, the Amish have carved out pockets in which self-policing communities shun intrusion and view modernity as contrary to their dogma. Born into these insular communities, most children of the Old Order Amish will know only a Plain² life. This life entails simplicity in worship, dress, lifestyle, and work. Amish parents' religious beliefs dictate what experiences or practices are acceptable and few Amish children stray from such restrictions.³ Because of their idiosyncratic isolation, the Amish have been granted exceptions from certain laws,⁴ and the seclusion inherent to Amish life impedes the enforcement of others. These factors converge to create unique legal issues for Amish children.

For the Amish, religion is not simply professed, but lived; every action is devotional. Sins, even otherwise legally punishable acts, are confessed to God before the entire community. Once forgiveness has been sought, the issue is deemed resolved.⁵ To confront someone with a matter that they believe is only between God and the sinner is itself, a separate sin. Transgressions against God or the community are punished through *meidung*, or public shunning.⁶ Although this, too, varies in severity depending on the group—some treat it as a mere formality, while others enforce the ban as absolute—the temporary excommunication can mean up to six weeks of no social contact whatsoever.⁷ Shunning is meant to be redemptive; those who have broken their baptismal vows are isolated until they have atoned for their sin.⁸

Thus, Amish children do not avail themselves of the protections of the State. Not only are they often unaware of laws intended to protect them, but if they become aware, they rarely report violations.⁹ Child labor laws, for example, are not a consideration in Amish communities. According to Amish tradition, children are trained and supervised until competent.¹⁰ Working on a rural farm can be dangerous, and even though care is taken, the Amish do not prohibit children from participation in hazardous employment. Children injured do not report violations because they are taught that the community resolves issues, and they are loath to become an informant against their families. In 1998, responding to fines for labor violations, the Amish sought a Congressional exemption from child labor laws.¹¹ A bill was subsequently signed into law in 2004.¹²

State intrusion into Amish affairs is infrequent. Officials are alerted to problems only rarely and experience considerable resistance during investigations.¹³ Moreover, the public perception of the Amish is that of an idiosyncratic but peaceful and law-

abiding people, which afford the Amish certain legal exemptions. Some exemptions, such as their exemption from Social Security, affect Amish children only tangentially. Others directly affect Amish children, such as the Supreme Court decision in *Yoder*, which permitted Amish parents to withhold education from their children.¹⁴

In 1968, several Amish parents were convicted for failing to send their children to school. Although Wisconsin requires education to the age of sixteen, their tradition was to educate children only to the eighth grade. More education, they argued, caused arrogance, as it elevated an individual's intellectual interests over their community involvement and constituted a deterrent to salvation.¹⁵ Another reason cited when Amish parents

sought exemption for their children from mandatory attendance requirements was that exposure to modern culture in high school would introduce an unacceptable value system at a critical stage of development.¹⁶ As one Lancaster woman argued, "The more they know, the more apt they are to leave."¹⁷

The Supreme Court determined that compulsory attendance requirements unduly burdened the parents' free exercise of religion.¹⁸ Since everything the Amish do or refrain from doing is dictated by their religious beliefs, activities that would otherwise be secular became religious observances. Justice Burger also noted that few, if any, other sects or religions could successfully make such an argument.¹⁹ The decision in *Yoder* represents only the fifth time the Supreme Court granted a free exercise exception beyond those protected by the speech clause.²⁰

The Supreme Court previously held that a religious conviction does not nullify the state's authority within a family unit and explicitly permitted legal restriction of a parent's rights in areas such as child labor or mandatory school attendance,²¹ yet the *Yoder* decision stands. Thus the state's compelling interest in the education of Amish children is subsumed by their parents' constitutionally-protected religious beliefs. *Yoder* is so fact-specific to the Amish that it would be of little precedential value for other religious groups,²² but opens the door for further exceptions, if the Amish choose to claim them.

Even so, the Amish are hardly a litigious group poised to exploit their unique circumstances. In the decades since *Yoder*, there has not been a rush of policy-changing suits. Yet no group, however quaint, is immune from problems. When such problems arise, it is perhaps inevitable that a self-policing group that perceives "the force of law as contrary to the Christian spirit"²³ will present significant and troubling deviations from the law.

For the Amish, religion is not simply professed, but lived; every action is devotional. Sins, even otherwise legally punishable acts, are confessed to God before the entire community.

The most striking example of a harmful deviation from the legal protection within Amish sects is the communities' response to sexual assault. Although it may contradict the popular idea of Amish lives as ones of idyllic simplicity, there are problems of statutory rape, child molestation, and incest within these insular communities. Local shelters and counseling centers have had to tailor education programs to target victims who rarely, if ever, enter schools or hospitals where such assaults might be recognized.²⁴

The problems common to prosecuting sexual battery charges are exacerbated in the Amish community. Reports of rape are discouraged in Amish communities.²⁵ When charges are filed, entire villages refuse to cooperate with investigations,²⁶ and witnesses are ordered not to testify.²⁷ One investigating officer lamented, "The moment we approach them as police, they shut up, the whole clan."²⁸ Victims find little support or opportunity for recovery and are punished for making their experiences public.²⁹

Circumstances are even more dire for those who report sexual abuse while still minors. When Anna Slabaugh, 13, reported her brothers were raping her, adults in her community threatened and beat her. Even when, as punishment for coming forward, Anna's mother and an Amish man removed all her teeth, Anna was never taken into protective custody.³⁰ Browbeaten into rescinding the accusations, she eventually ran away from her community.³¹

Similarly, Mary Byler, who until recently was a member of an Amish community in Wisconsin, was raped by her older cousins and brothers from the time she was six until she turned seventeen.³² When she sought help from her mother and clergy, she was rebuffed with instructions to fight and pray harder. Her neighbors blamed Mary for her brothers' actions and she was forbidden to discuss the subject. She was told, "He says he's sorry and you have to forgive him."³³ When Mary finally filed a police report, her brothers were arrested. One eventually was sentenced to eight years in prison; the other received ten years of probation, with one year of nights spent in county jail.³⁴

At Mary's rapists' sentencing, a large contingent of friends and family showed up to support the young men³⁵ who had already served their Amish punishment of shunning.³⁶ Mary, for her part, may no longer contact her family or childhood friends; her church voted unanimously to excommunicate her.³⁷ Soon after Mary filed her report two more women from her church came forward to report their own cases of assault.³⁸

In another case, Norman Byler molested several of his daughters and granddaughters over the course of three decades. He was eventually prosecuted and sentenced to five years in prison, but despite the terms of his release, was returned to the same family members he molested.³⁹

Victims must choose between aiding in the cover-up of their own assault or banishment and losing contact with everyone they

know.⁴⁰ Even if their attacker is convicted and imprisoned, many victims must accept their rapist back into the congregation upon release.⁴¹ With their community united in silencing them, and the state unwilling to interfere in the sphere of "The Gentle People,"⁴² young victims of sexual abuse truly have nowhere to turn.

It would be unfair to characterize the entirety of Amish society by the actions of a few. Many Amish single out childrearing as the single most important aspect of their life and entire communities participate in preparing children for adulthood.⁴³ Even those who leave the church acknowledge that Amish life is fulfilling for most born into it.⁴⁴

The decision to abandon their heritage is a harrowing one, yet some Amish do so for the sake of their children. Genetic disorders, in particular, are common among the Amish—a result of centuries of intermarriage.⁴⁵ When their children are ill and treatment is available and conflicts with the *ordnung*, some parents must choose between their children and their religion. Iva Byler left her community, her husband, and her two healthy adult children so that she might obtain treatment for her three youngest daughters who were stricken with a rare crippling disease with no known name or cure.⁴⁶

Ananius and Delia Stutzman chose to remain in their religious community when their daughter, Mary, was diagnosed with leukemia. The Stutzmans believed the illness was God's will. They would have preferred to keep her at home with their six other children, administer homeopathic remedies, and try to keep her comfortable until death—which doctors estimated to be only weeks or months away, if she remained untreated. Instead,

a Michigan judge ordered that Mary receive a spinal tap and chemotherapy. With treatment, doctors testified, she stood a 65% chance of surviving to middle age.⁴⁷

The Stutzmans objected to modern medical treatment for Mary on the grounds that it was excessively intrusive, destroyed healthy cells along with

the bad, and presumed to contravene God's will.⁴⁸ Not all Amish reject Western medicine, although their use of it remains selective.⁴⁹ The complexity of treatment, or use of electricity, is not at issue. Rather, they emphasize that although medicines may help the ill, only God can heal.⁵⁰ Amish parents do seek preventative medicine for their children, though not to the extent that mainstream Americans utilize medical care.⁵¹

In *People v. Pierson*,⁵² the Court of Appeals of New York found a man who believed disease should be cured only by divine intervention criminally liable for the death of his daughter. The Supreme Court held that the right to practice religion freely does not include the liberty to expose the community or a child to disease, ill health, or death,⁵³ parents must safeguard both society and their children. Nevertheless, Amish children are less likely to be vaccinated than their counterparts.⁵⁴

Although no religious tenets specifically forbid vaccines,

Victims must choose between aiding in the cover-up of their own assault or banishment and losing contact with everyone they know.

most Amish parents choose not to immunize their children.⁵⁵ In 1979, America's last significant polio outbreak swept through Amish communities in Iowa, Wisconsin, Missouri, and Pennsylvania.⁵⁶ At that time, the Amish were almost entirely unvaccinated. Many sought immunizations, yet five more cases of polio were detected in a Minnesota community in 2005.⁵⁷ Public health officials traveled door-to-door, seeking permission to test for the disease and entreating people to vaccinate. Nevertheless, fewer than twenty children were vaccinated of a two hundred-person village.⁵⁸

Although the faith itself is not founded upon the absence of conveniences, the culture created by the Amish is so bound to religious observances that Amish belief and Amish life are indistinguishable. Thus, under the free exercise clause, both receive protection. Consequently, the Amish exist not only outside the modern world, but outside its laws, as well.

Perhaps any inherent inequality in the enforcement of laws is preferable to the alternative. Any attempt to remedy disparities may spawn new, equally troubling problems. Certainly the importance of free exercise should be clear. Applying religious freedom to all but the Amish would be an even more problematic exception than what currently exists.

While some Amish would argue that intrusion through more regulation or enforcement could end the Amish way of life, surely some issues are remediable, without mortally wounding Amish existence. Mere tradition need not subrogate the well-being of Amish children. Strict enforcement of child labor laws could be economically disastrous for the Amish, but engaging children in hazardous activities is not fundamental to a Plain life. Blaming the victim and concealing sexual battery is neither desirable nor a central feature of a religious community.

ENDNOTES

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¹ In *Romans* 6:14, Paul argues that the saved need not concern themselves with the laws of man, for the only edict that should govern them is the will of God. "Sin shall have no dominion over you, for ye are not under the law, but under grace."

² FREDRIC KLEES, *THE PENNSYLVANIA DUTCH* 11 (The Macmillan Company 1950).

³ Thomas J. Meyers, *The Old Order Amish: To Remain in the Faith or to Leave*, 68 *MENNONITE QUARTERLY REVIEW* No. 3, 390 (July 1994).

⁴ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish children cannot be compelled by the State to attend high school past age 16 due to the constitutional provisions in the first and fourteenth amendments).

⁵ Nadya Labi, *The Gentle People*, *LEGAL AFFAIRS* (Jan. 2005), http://legallaaffairs.org/issues/January-February-2005/feature_labi_janfeb05.msp; see also, Ed Hoskin, *A Question of Justice in Amish Community*, *LACROSSE TRIB. MAR.* 28, 2004, <http://www.lacrossetribune.com/articles/2004/03/28/news/00lead.txt>; Barbara Pinto, *Sex Abuse Case Shocks Amish Community* (ABC News television broadcast Oct 22, 2004), available at <http://openweb.tvnews.vanderbilt.edu/2004-10/2004-10-22-ABC-10.html>.

⁶ KLEES, *supra* note 2, at 31.

⁷ DONALD KRABILL, *THE RIDDLE OF AMISH CULTURE* 133 (John Hopkins Press 2001).

⁸ *Id.* at 137.

⁹ Brad Igou, *2002 Amish Series: People of Peace, Victims of Violence*, *AMISH COUNTRY NEWS* (2002), <http://www.amishnews.com/amisharticles/peopleofpeace.htm>.

¹⁰ Brad Igou, *The Traditional Family and the Amish*, *AMISH COUNTRY NEWS Pt. 1* (2001), <http://www.amishnews.com/amisharticles/traditionalfamily.htm>.

¹¹ Steven Greenhouse, *Foes of Idle Hands, Amish Fight Child Labor Rule*, *N.Y. TIMES*, Oct. 18, 2003, at A9.

¹² Consolidated Appropriations Act, 2004, Pub. L. No. 108-199 (allows Amish teenagers to work in apprenticeships once they have completed their formal education).

¹³ Labi, *supra* note 5.

¹⁴ *Yoder*, 406 U.S. at 207.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Labi, *supra* note 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

²² William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 *CASE W. RES.* 357, 367 (1990).

²³ Labi, *supra* note 5.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Labi, *supra* note 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Labi, *supra* note 5.

³⁴ Barbara Pinto, *Sex Abuse Case Shocks Amish Community* (ABC News television broadcast Oct 22, 2004).

³⁵ *Id.*

³⁶ Labi, *supra* note 5.

³⁷ *Id.*

³⁸ *Id.*; see also, David E. Yoder, *Equal Protection Clause in Jeopardy in the State of New York*, *Amish Abuse* (Aug. 22, 2004), <http://www.amishabuse.com/byler.htm>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Yoder v. Wisconsin Dep't of Corr.*, 03-C-193-C, 2004 U.S. Dist. LEXIS 4915, at *12 (W.D. Wis. Mar 11, 2004).

⁴² JOHN HOSTETLER, *AMISH SOCIETY*, 83 at 343 (John Hopkins Press 1963) (1993).

⁴³ Igou, *supra* note 9.

⁴⁴ RUTH IRENE GARRETT & RICK FARRANT, *CROSSING OVER: ONE WOMAN'S ESCAPE FROM AMISH LIFE* (Harper Collins 2003).

⁴⁵ HOSTETLER, *supra* note 41, at 328-31.

⁴⁶ *Genetic Disorders Hit Amish Hard* (CBS News television broadcast June 8, 2005), <http://www.cbsnews.com/stories/2005/06/08/6011/main700519.shtml>.

⁴⁷ Shantell M. Kirkendoll & Ken Palmer, *Chemo Begins for Amish Girl*, *FLINT JOURNAL* (Apr. 22, 1999), <http://www.rickross.com/reference/general/general46.html>.

⁴⁸ *Id.*

⁴⁹ HOSTETLER, *supra* note 41, at 322-28.

⁵⁰ Richard Pletcher, *Amish Children in the Hospital* *Amish Acres* (Nov. 18, 1998), http://www.amishacres.com/aa_farmstead/miscellaneous/amish_children_hospital.htm.

⁵¹ HOSTETLER, *supra* note 41, at 326-28.

⁵² *People v. Pierson*, 68 N.E. 243, 244 (N.Y. 1903).

⁵³ *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

⁵⁴ Alicia M. Fry, *Haemophilus influenzae Type b Disease Among Amish Children in Pennsylvania: Reasons for Persistent Disease*, 108 *PEDIATRICS* 4 (2001).

⁵⁵ Gardiner Harris, *Five Cases of Polio In Amish Group Raise New Fears*, *N.Y. TIMES*, Nov. 8, 2005 available at <http://www.nytimes.com/2005/11/08/national/08polio.html?ex=1289106000&en=3dd9b31a55c475b0&ei=5088&partner=rssnyt&emc=rss>.

⁵⁶ David Brown, *Polio Outbreak Occurs Among Amish Families In Minnesota*, *WASH POST*, Oct. 14, 2005, at A03.

⁵⁷ Harris, *supra* note 54.

⁵⁸ Brown, *supra* note 55.

LEGISLATIVE UPDATES

By Eriade Hunter*

H. R. 288 Civil Rights Amendments Act of 2005

Introduced by Representative Towns (D-NY)

This bill will amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of sexual orientation and will be known as the "Civil Rights Amendments Act of 2005." The amendment contains the same text of the original Acts protecting people from being discriminated against, but substitutes the words "religion" and "color" with "affectional or sexual orientation."

H. R. 40 Commission to Study Reparation Proposals for African-Americans Act

Introduced by Representatives Conyers (D-MI), Brown (D-FL), Clay (D-MO), Davis (D-IL), Jackson-Lee (D-TX), Lee (D-CA), Meek (D-FL), Nadler (D-NY), Olver (D-MA), Payne (D-NJ), Rush (D-IL), Thompson (D-MS), Waters (D-CA), Watt (D-NC), Jackson (D-IL), McDermott (D-WA), Meeks (D-NY), Millender-McDonald (D-CA), Norton (D-DC-AL), Owens (D-NY), Rangel (D-NY), Schakowsky (D-IL), Towns (D-NY), and Watson (D-CA).

This bill acknowledges the abhorrent nature of the slavery as it existed in the United States and aims to establish a commission to evaluate the subsequent discrimination against African-Americans and to make recommendations to the Congress on possible reforms. The purpose of this Act is to "examine the lingering negative effects of the institution of slavery" and decide if any formal apology is needed or any form of compensation to the descendants of the African slaves is fitting.

H. R. 286 Medicaid Obesity Treatment Act of 2005

Introduced by Representative Towns (D-NY)

This bill intends to require the states that provide Medicaid prescription coverage to cover drugs medically necessary to treat obesity. Deaths related to obesity are the second leading cause of death in the U.S. and the prevalence of obesity in children is nearly twice what it was in the 1980s. This is particularly troublesome as childhood obesity continues into adulthood and increases the risk of other serious diseases. Gender, age, race, ethnicity, and income create variances in risk factors for many of these diseases. For instance, there are overweight people in all segments of the population, but obesity is more common in Hispanic, African American, Native American, and Pacific Islander women. Overweight people often are victims of discrimination and thus, psychological stress and reduced income.

S. 2160 Asian Americans and Pacific Islanders Higher Education Enhancement Act

Introduced by Senator Boxer (D-CA)

This bill aims to amend the Higher Education Act of 1965 to include Asian Americans and Pacific Islanders. The Asian American and Pacific Islanders are an extremely diverse population due to the existence of varying ethnicities, immigration patterns, historical experiences, and social group issues. Census figures record that there are seventeen ethnic groups considered as Asian and four considered as Pacific Islander. Despite acknowledging these differences, educational programs and policies are based on aggregated data that assumes Asian Americans and Pacific Islanders are a homogenous group, neglecting the differences in level of education attained by subgroups within the larger group. The diverse cultural, linguistic, socioeconomic, and historical experiences affect educational levels.

In addition, the predominating "model minority myth" negatively affects many youth who are incorrectly perceived as being academically superior and thus, not needing educational support services. Only 12.6% of the total Asian Americans and Pacific Islander population lives in poverty which masks the disparity contained within the group. For instance, 25% of Vietnamese Americans, 63.6% of Hmong Americans, 42.6% of Cambodian Americans, 34.7% of Laotian Americans, and 17.7% of Pacific Islanders live in poverty. These statistics are inextricably linked with educational attainment as only 13.8% of Vietnamese Americans, 5.8% of Laotian Americans, 6.1% of Cambodian Americans, less than 5.1% of Hmong Americans, and only 13.8% of Pacific Islanders had college degrees.

H. RES. 367 Condemning bigotry, violence, and discrimination against Iranian-Americans.

Introduced by Representatives Meehan (D-MA), Shays (R-CT), Mica (R-FL), and Feeney (R-FL).

This resolution urges all levels of law enforcement officials to aggressively prosecute crimes committed against Iranian Americans as a result of their national origin or ethnicity. Iranian Americans have been subjected to an increased number of arrests followed by extended arbitrary detentions without charges, denials of access to counsel, and abuse by prison guards in the aftermath of September 11, 2001. Additionally, since September 11, there has been a massive surge in the number of discriminatory crimes directed towards Americans of Middle Eastern descent, including Iranian Americans.

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