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A Search for Reason in Fairy Tales

John F. Fernandez
St. Thomas University College of Law

ESSAY: A SEARCH FOR REASON IN FAIRY TALES

BY JOHN F. HERNANDEZ

A fairy[1] tale:

Once upon at time (not so very long ago), in a land (not so far away) lived a beautiful queen (well, actually a "runner up") with a golden voice. The beautiful queen reined over her people and sang of sunshine. Some of the queen's subjects had felt that they were not treated fairly by the laws of the land and sought to have their unfair treatment prohibited. Apparently, this caused the queen to develop a fear and hatred for these subjects. These subjects had done nothing to the queen. Yet, the queen made it her mission to rid the land of them. The queen convinced the ministers to pass laws that sought to punish and exclude this group of subjects. The queen believed that she could make these subjects disappear by "decreeing" them away. Hysteria swept the land. The queen's fears became amplified and rippled throughout the land. However, as time went by, some leaders began to see that the queen was misguided. The people rose up and exiled the queen. She was no longer able to sing of sunshine. The queen became powerless and unimportant. Yet, in the land, lingered some of the laws the queen had caused the ministers to pass. These laws, upon reexamination, were predicated upon the irrational fear and hatred of the queen, not grounded in reason. And, the story should say that the laws were done away with and that reason was restored to the land. But, that is not the whole tale. For, it appears that the queen's irrationality persists.[2]

One of the foundational concepts of tort law is that one person can be liable for the damages or injuries he causes another person if he is at "fault." Fault can be predicated upon intentional behavior, strict liability behavior and/or negligent behavior.[3] Negligent behavior is behavior that deviates from the behavior of a "reasonable person."[4]

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1. Pun intended. "Fairy" is sometimes used as a pejorative term for gay men, predicated upon negative stereotypes.

2. This "fairy" tale is an adaptation of the events surrounding beauty queen and Florida orange juice spokesperson Anita Bryant. In 1977, Ms. Bryant spearheaded a drive to repeal a Miami-Dade County Human Rights Ordinance that had added sexual orientation to the class of persons provided protection against some kinds of discrimination. The ordinance was repealed in a heated and often contentious referendum campaign. Ms. Bryant is alleged to have stated: "As a mother, I know that homosexuals cannot biologically reproduce children; therefore, they must recruit our children." Although Ms. Bryant won the battle, it is generally considered that it also led to her personal and professional downfall. *See* http://en.wikipedia.org/wiki/Anita_Bryant.

3. VICTOR E.SWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND

As a law professor who teaches first year Torts, I spend a lot of time, with a lot of students, exploring the concept of the "reasonable" person. If a defendant failed to act in the way a "reasonable person" would act, i.e. "unreasonably," then the defendant may be liable for damages or injuries caused by his "unreasonable" behavior. We struggle to ascertain how a court (or the jury) can determine whether certain behavior is "unreasonable." Numerous tests have been articulated by some of our most renowned jurists over time.[5] Yet, our greatest legal minds have been unable to create a litmus test for "reasonable" as opposed to "unreasonable" behavior.

Notwithstanding this difficulty, it is quite clear that we test whether the behavior of the defendant is "reasonable" considered in the real world and circumstances in which the defendant finds him/herself, not from the perspective of a disinterested third party.[6] Reasonableness, or lack thereof, is based upon the facts as they are known to exist, and as confronted by, the defendant. A defendant's liability is not tied to his behavior in some optimized, fanciful, non-existent world.

Most people would equate unreasonable behavior with irrational behavior. The lay definitions of the two words are interchangeable[7] and they are listed as synonyms for each other.[8] Further, Black's Law Dictionary defines "unreasonable" as "irrational or capricious."[9] Likewise, Black's Law Dictionary defines "irrational" as "not guided by reason . . . ."[10] Therefore, at least on some level, that which is irrational is also considered unreasonable. Or, maybe to put it in a way of greater significance to a torts professor, that which is unreasonable is also irrational.

So, why is a discussion of the torts standard of "reasonableness" appearing in a law review issue that addresses gay adoption? Because, in addition to teaching torts, I also teach a seminar course entitled "Sexual Identity and the Law" and I am confronted with reconciling what has been found by learned Justices on the Eleventh Circuit Court of Appeal to be

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SCHWARTZ'S TORTS CASES AND MATERIALS 16 (11th ed. 2005) (Hereinafter PROSSER ON TORTS).

4. Restatement (Second) of Torts § 283 (1966).

5. See e.g., Vaughan v. Menlove, 3 Bing (N.C.) 468, 132 Eng. Rep. 490 (Ct. of Common Pleas 1837); United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

6. PROSSER ON TORTS, *supra* note 3 at 150-65.

7. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 925 (4th ed. 2000).

8. ROGET'S INTERNATIONAL THEASURUS 1123 (5th ed. 1992).

9. BLACK'S LAW DICTIONARY 1574 (8th ed. 2004).

10. *Id.* at 847.

"rational" behavior with what appears to me to be clearly "unreasonable" behavior.

The "Sexual Identity and the Law" course explores the intersection of sexual and gender identity and the law.[11] I strive to make the course inclusive and to explore the relevant topics from many legal, moral, sociological and philosophical perspectives. We cover such topics as hate crimes against gays, lesbians and the transgendered, how transgendered persons are treated under the law, the evolution of the law with regard to those who are HIV positive or suffering from AIDS, gay marriages and civil unions and (of course) gay adoption.

One of my primary roles in the classroom, no matter what the subject, is to explore the reasoning and rationale behind the cases we study. Any particular court's analysis should be examined for its "fit" with the doctrine being explored. A student really has mastered an understanding of the applicable doctrine when he/she understands how the court has taken the existing doctrine, the facts of the applicable case, applied the facts to the doctrine and reached a conclusion, i.e. its holding. A case's holding that seems at odds with the application of the facts to the doctrine seems "wrong."

Obviously the Eleventh Circuit's opinion in the *Lofton v. Secretary of the Department of Children and Family Services*[12] case serves as the principal catalysts for a discussion of gay adoption. As will be discussed below, the facts and circumstances in the Lofton case contain many of the nuances of the gay adoption debate. Notwithstanding those facts and circumstances, the Eleventh Circuit ultimately holds that it is rational for Florida to absolutely preclude homosexuals from adoption.[13]

There is little doubt that Florida's law that precludes a homosexual from adopting was passed as part of the anti-gay sentiment that arose following Anita Bryant's successful efforts to overturn an anti-discrimination ordinance that included sexual orientation passed by Dade County, Florida. Anita Bryant was a former Miss Oklahoma and second runner up in the Miss America pageant for 1959. She had been serving as

11. For this course I use ESKRIDGE AND HUNTER, SEXUALITY, GENDER, AND THE LAW, (2nd ed. 2004).

12. 358 F.3d 804 (11th Cir. 2004) (*Lofton 1*). *See also* 377 F.3d 1275 (11th Cir. 2004) (en banc rehearing of *Lofton 1*) (*Lofton 2*).

13. *Lofton 2*, *supra* note 12 at 1276. In 1977, Florida codified a prohibition on adoption by any "homosexual" person. Fla. Stat. § 63.042(3) (2002).

the spokesperson for the Florida Orange Growers and appeared in numerous television advertisements in the 1970's.[14]

Given the extent to which I have explored the concept of reasonableness and examined the numerous ways torts courts have found flexibility with that concept, I should be able to follow along with the Lofton majority as it progresses towards a finding of rational basis, i.e. that Florida's statutory scheme is "reasonable." Yet, I find that my need to adhere to the principals articulated in classic tort law with regard to the "reasonableness" inquiry cause me to find that the Lofton conclusion seems discordant, out of sync. Even given the inherent flexibility in the concept of "reasonableness," I simply cannot see how the Lofton court could conclude it was "reasonable" for the Florida Legislature to pass a law that precludes *any* gay person from *ever* adopting *any* child in Florida, under *any* circumstances. The Lofton court finds that Florida's preclusive statute, which eliminates a gay person from even consideration as a potential adoptive parent, "reasonably" serves the best interests of all parentless children.[15] In other words it is "reasonable" to prefer no parent to a gay parent.

The fallacy of that reasoning is found in the facts of *Lofton* and other cases that have addressed the validity of Florida's preclusion. Prior to *Lofton* and after the "fairy" tale set out above, we encounter another "Farie" tale, the case of *Seebol v. Farie*,[16] an earlier challenge to Florida's preclusion of adoption by gay people. In this "Farie" tale we are introduced to a gay adoption paradigm, repeated in *Lofton*, which demonstrates the irrationality of Florida's ban on gay adoption.

Mr. Seebol was a well respected resident and businessman in Key West, Florida. He had resided in the city for twenty years. He had participated in the state's guardianship and guardian ad litem programs for almost ten years. He had been the executive director of AIDS Help, Inc.

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14. *See Lofton 2*, *supra* note 12, at 1301-02. *See also* Joanne Mariner, *The Beauty Queen of Bigotry, Anita Bryant's Legacy*, FindLaw, Feb. 6, 2004, *available at* http://www.counterpunch.org/mariner 02062004.html.; Dudley Clendinen, *Anita Bryant b. 1940, Singer and Crusader*, St. Petersburg Times, Nov. 28, 1999, *available at* http://www.sptimes.com/News/112899/news_pf/Floridian/ Anita_Bryant_b_1940_.shtml. It is worth noting that in 1998 the Miami-Dade County Commission again added sexual orientation as a class protected under its human rights ordinance. *See* Don Feinfrock, *Dade Outlaws Bias Against Gays Narrow Vote Spurs Joy, Prayer, Demonstration*, MIAMI HERALD, Dec. 2, 1998 at 1A.

15. *Lofton 1*, *supra* note 12, at 827. *See also Lofton 2*, *supra* note 12.

16. Seebol v. Farie, 16 Fla. L. Weekly C52 (Fla. Cir. Ct. 1991), *reprinted in* State Dept. of Health v. Cox, 627 So. 2d 1210, 1221 (Fla. Dist. Ct. App. 1998) (because *Seebol* is unreported, citations will be to the *Cox* case).

and worked in AIDS education and assistance.[17] Mr. Seebol sought to adopt a special needs child, a child unsuitable for adoption by most families.[18] Yet, simply because Mr. Seebol (truthfully) revealed on his application for adoption that he was a homosexual, the Florida State Department of Health and Rehabilitative Services, was "*unable* to approve his application."[19] The mere disclosure of his homosexuality, according to the Florida State Department of Health and Rehabilitative Services, precluded Mr. Seebol from adopting and the child from being adopted. The revelation on Mr. Seebol's adoption application that he was "homosexual" precluded the state from considering any other fact relevant to the child's adoption. The fact that Mr. Seebol might be the only viable adoptive parent for the child was not something the Department could consider. The fact that Mr. Seebol and the child may have formed a family unit and formed emotional ties could not be considered. The fact that Mr. Seebol may have had sufficient financial resources, knowledge and training to deal with a special needs child could not be considered. The fact that it may have been in the best interests of the child to be adopted by Mr. Seebol, likewise could not be considered.

A humble trial court judge in Key West, Florida, looked at the *facts* of the *Seebol* case and the Florida Statute that precluded Florida State Department of Health and Rehabilitative Services from even considering Mr. Seebol's application and had no trouble concluding that Florida's ban on gay adoption was unconstitutional.[20] Although the judge in *Seebol* thought the statute was unconstitutional for a number of reasons, he also found that the statute could not even withstand rational basis analysis.[21] The court stated that in placing a child for adoption, the state of Florida had an obligation to decide whether adoption by a putative parent was in the best interests of the child.[22] In *Seebol*, the judge clearly saw that a statutory bar to Mr. Seebol adopting a special needs child merely because Mr. Seebol disclosed that he was a homosexual was not rational. One has to ask, how do we even know if it is in the best interests of the child if we can make no further inquiry?

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17. *Id.* at 1223.

18. *Id.* at 1228. ("Such children may conceivably spend their prematurely shortened lives in state foster institutions and may never experience the joy of family life or care by a devoted parent . . . .").

19. *Id.* at 1223.

20. *Id.* at 1229.

21. *Id.* at 1226-27; *Lofton I*, *supra* note 12, at 817 ("The central mandate of the equal protection guarantee is that the 'sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.'").

22. *Seebol*, *supra* note 16, at 1226-27.

Seebol involved a homosexual male attempting to adopt a special needs child. *Lofton* presents even more compelling facts. *Lofton* involves multiple potential homosexual male parents seeking to adopt. Steven Lofton, a registered pediatric nurse, sought to adopt John Doe – a male child he had cared for since infancy, approximately thirteen years. Doe had been born HIV positive with evidence of exposure to cocaine. Lofton had nursed Doe to health and Doe had tested negative for HIV after eighteen months of living with Lofton. Lofton had also raised three other foster children who had similar disabilities. Another one of the *Lofton* plaintiffs was Douglas E. Houghton, Jr. Mr. Houghton was a clinical nurse specialist who sought to adopt John Roe. Mr. Houghton had been Roe's caretaker since 1996 (when Roe was four years old). John Roe's father, a person with alcohol abuse and unemployment problems, had voluntarily left Roe with Mr. Houghton.[23]

Lofton presents us with these very real "parents"[24] and their very real children. *Lofton* introduces many of my students to the concept of a gay family. We meet families in which the parenting is shared by two men or undertaken by one man. We meet families in which the children and the "parents" have no genetic link. We meet families in which the "parents" and the children are of different races. We meet the gay male "parent" as the "parent" of last resort. Many of the children presented in the *Lofton* case are children no one else wanted. They were racial minorities, with physical and psychological disabilities. Some had been abandoned by their biological parents and virtually written off by the state. We meet gay men who are loving, devoted and willing to make significant personal and financial sacrifices to maintain their family. We meet children who are well-adjusted, emotionally and physically rehabilitated. The *Lofton* case children know no other family and want no other parents.[25] The Lofton "parents" are probably the only possible parents available to the Lofton children.

The argument that supports the bar to gay adoption is that a homosexual parent is less fit than a heterosexual parent and placement with

23. *Lofton 1*, *supra* note 12, at 807-08. *Lofton* also involved a homosexual couple that was also trying to adopt a child. *Id.*

24. Since the statute precludes adoption, Lofton and the other plaintiffs were not technically parents.

25. *Lofton 2*, *supra* note 12, at 1290. Justice Birch in an almost apologetic "personal" afterthought notes that he is impressed by the "courage, tenacity and devotion" of Mr. Lofton and Mr. Houghton. *Id.* Of course, that did not hinder him from essentially denying Lofton and Houghton the chance to ever adopt the children at issue and from denying the Lofton and Houghton children the chance to have parents.

a heterosexual couple is the preferred placement for a child.[26] This proposition itself is subject to serious debate. The perceived superiority of the heterosexual parent may be based on nothing more than stereotypes or prejudices. There seems to be a paucity of scientific evidence to support the conclusion that the gay parent is less fit.[27]

If we assume homosexuals are less fit parents and that less fit parents are the least equipped to deal with the demands of parenting then, *Lofton*, *Seebol* and other "gay" adoption cases present a factual contradiction. The children at issue in *Seebol* and *Lofton* and other gay cases were special needs children, children that would require the greatest parenting skills. The facts in *Lofton* show that not only were the Lofton "parents" doing an adequate job of parenting, the Lofton "parents" had done an "exemplary" job as parents. The Lofton "parents" had literally saved the lives of the children they had parented. "Damaged" children had thrived in a gay household. How could it be rational to deny the Lofton parents the opportunity to even be considered for adoption of the children they had so adeptly parented?

Also, assuming that placement with a heterosexual couple is the preferred placement for children, *Lofton* makes it abundantly clear there is an insufficient supply of such potential parents waiting to adopt the children of Florida.[28] *Lofton*, *Seebol* and other gay cases also illustrate the point that some homosexuals might be willing to adopt children with special needs or other factors that made them less likely to find any other adoptive parents. By precluding gays from consideration as potential parents the state in essence sentenced these "unadoptable" children to a life of foster homes and other less stable living arrangements and effectively denied these "unadoptable" children the chance to ever form a true family relationship. By eliminating all gay or lesbian people from consideration as a potential parent the state reduced the pool of potential parents. With the pool of potential children needing adoption already greater than the pool of potential parents available to adopt, the state effectively decided no parent was better than a gay parent. Given the success of the parents in

26. *Lofton 1*, *supra* note 12, at 818-19.

27. *Id.* at 822. *See also* State Dep. of Health v. Cox, 627 So. 2d 1210, 1213 (Fla. Dist. Ct. App. 1993).

28. *Lofton 1*, *supra* note 12, at 823. A perusal of the Florida Department of Children and Family website is heartbreaking. You can look at pictures of children available for adoption. As of January 27, 2006 the website listed that 1,915 children "desperately need adoptive families." Also, according to the website, 37% of the children wait more than 3 years for adoption. *See* http://www.dcf.state.fl.us/adoption/.

Lofton and the recognition that at least in some contexts (e.g. foster care)[29] a gay parent can adequately perform parental duties, it is not reasonable or rational to conclude no homosexual should ever be allowed to adopt.

The preclusion is even more irrational. First, the statute does not really preclude homosexuals from adopting, only "practicing" homosexuals.[30] Therefore, although a "non-practicing" homosexual is no more like a heterosexual couple than a "practicing" homosexual, only "practicing" homosexuals are precluded from adopting. If the goal in eliminating practicing homosexuals from consideration is to provide a greater possibility that the child will be placed with a heterosexual couple, then allowance for the non-practicing homosexual's adoption does not further that end. The preclusion looks absurd and is tied to whether the homosexual is having sex, not whether he/she has parental skills.

Likewise, if you consider the preclusion from a statistical standpoint, the state does not increase the chance that heterosexual parents will adopt any "adoptable" child by eliminating homosexuals from consideration. It is highly unlikely that a heterosexual who was not otherwise interested in becoming an adoptive parent would do so merely because the state precluded homosexuals from adopting. Therefore, the preclusion does not increase the chance that a child will get a heterosexual parent; it merely increases the chance the child will get no parent.

Charged with a responsibility of pursuing the best interests of the (adoptable) children of the state of Florida, the Florida Legislature acted in a way that makes it less likely that some of those children will ever be adopted. Sadly, it seems to affect those children deemed the least adoptable: special needs children, older children, children of mixed racial heritage, etc.[31] Florida's ban on gay adoption certainly does not serve the best interests of the least likely to be adopted children. Furthermore, the ban precludes the state from doing its job and checking whether a particular adoption by a homosexual might be in the best interest of a particular child. It is important to keep in mind that invalidating the ban does not automatically place a child with a gay or lesbian parent. Invalidating the ban would merely allow the state to ascertain whether it would be in a

29. Florida law does allow homosexuals to be foster parents. *See generally* FLA. STAT. § 39.001 (2005).

30. This a distinction discussed in Cox, *infra* note 27, at 1214. Apparently (and absurdly) a person is a "homosexual" under Florida's definition if the person is voluntarily engaging in homosexual activity reasonably close in time to the filing of the adoption application. *Id.*

31. If you go to the Florida Department of Children and Family website, discussed *supra* note 28, and put in a search for children under the age of two with no disabilities no children meet those criteria.

particular child's best interest to be adopted by a particular gay or lesbian parent. There is not even an administrative convenience to the ban unless you assume the state would always find the adoption by the gay parent not to be in the child's best interest. The facts of *Lofton* demonstrate that this conclusion would not always be made.

So, as a torts professor, I am left confounded. I look for reason and simply cannot find it. Reason (and rationality) requires that we explore the facts as they are, not as we wish them to be. The ban on gay adoption in Florida is predicated upon a conclusion that it is in the best interests of all "adoptable" children to be placed with a heterosexual couple. This premise is questionable in general application and appears contrary to the facts as presented in *Lofton* and other cases. Furthermore, Florida seeks to pursue this objective, not by preferring heterosexuals as adoptive parents, but by precluding any (practicing) homosexual from ever adopting. Florida takes this position in an environment in which children needing adoption far outnumber potential heterosexual adoptive parents. Florida takes this position when it is confronted with many children otherwise viewed as "un-adoptable" but whom gay or lesbian parents would adopt. The bottom line is that children in need of adoption are denied potential parents and potential parents are denied the ability to be evaluated for fitness to adopt. It simply does not appear that Florida's ban furthers the best interests of the children of Florida in need of adoption.

The *Lofton* court perpetuates the irrational fears of the fairy tales of Anita Bryant.[32] The *Seebol* court got it right. Decided before *Lawrence v. Texas*[33] and *Romer v. Evans*,[34] both of which demonstrated that anti-homosexual legislation is tied to irrational fears, the *Seebol* trial judge could still see the realities. The *Seebol* judge recognized unreasonable behavior when he saw it.

Today we are left with children who need parents. Gay parents, at least in some circumstances, can be suitable parents. The state should have to at least consider the homosexual's application to adopt. The application should be considered in its totality in evaluating whether adoption would be in the best interests of the child sought to be adopted. Until the courts can get away from irrational fears that resonate from distant hysteria, and confront the real world, with real world limitations, irrationally will rein.

32. *Lofton 2*, *supra* note 12, at 1301-02.

33. Lawrence v. Texas, 539 U.S. 558 (2003) (Supreme Court invalidated Texas law that criminalized homosexual sodomy).

34. Romer v. Evans, 517 U.S. 620 (1996) (Supreme Court invalidated Colorado constitutional amendment that sought to prohibit any action to provide protections to homosexual as a class).

Children in need of adoption go without parents, languish in foster care and remain wards of the state. Homosexual persons stand ready to adopt some of these children. The state of Florida turns them away without even considering their applications. The Eleventh Circuit says, "that's reasonable." I think not.