Justice Handler's Concurrence in *Dale v. Boy Scouts of America*: A Morality Tale

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For more than two decades, Justice Handler was the conscience of the New Jersey Supreme Court. He wrote some of the Court's most compelling decisions expanding protections for individual rights under the state constitution,[1] yet he insisted upon principled standards for invoking the state constitution as an independent source of individual rights surpassing those guaranteed under the United States Constitution.[2] To the end, Justice Handler remained the Court's lone voice in opposition to the death penalty on state constitutional grounds,[3] yet he was entrusted with the solemn,

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[1] *See* State v. Schmid, 84 N.J. 535, 568, 423 A.2d 615, 633 (1980) (finding that the regulations of a private university violated a defendant's state constitutional rights by "evicting him and securing his arrest for distributing political literature upon its campus").

[2] *See* State v. Hunt, 91 N.J. 338, 359, 450 A.2d 952, 962 (1982) (Handler, J., concurring) (writing separately to "explain more fully the judicial principles which . . . underlie the salutary resort to state constitutions as a fountainhead of individual rights"). For cases in which the Court resorted to the state constitution to protect individual rights, see, for examples, *State v. Smith*, 155 N.J. 83, 100, 713 A.2d 1033, 1042 (1998) (holding that under the state constitution, police did not have probable cause to search a defendant and to seize his keys), *cert. denied*, 119 S. Ct. 576 (1998); *State v. Mollica*, 114 N.J. 329, 335, 554 A.2d 1315, 1318 (1989) (holding that "state constitutional [protections] against unreasonable search and seizure applie[d] to [protect] an individual's hotel telephone billing records based on his or her use of a hotel-room telephone"); *State v. Williams*, 93 N.J. 39, 48, 459 A.2d 641, 645 (1983) (holding that the state constitution protected the right of the general public and the press to be present during criminal pretrial proceedings); *Schmid*, 84 N.J. at 568, 23 A.2d at 633 (finding that regulations of a private university violated a defendant's state constitutional rights by "evicting him and securing his arrest for distributing political literature upon its campus").

[3] *See* State v. Ramseur, 106 N.J. 123, 344, 524 A.2d 188, 300 (1987) (Handler, J., dissenting) (dissenting from the majority's decision to uphold the death penalty under the New Jersey Constitution because the majority "fail[ed] to meet the challenge to vindicate individual rights, and squander[ed] the opportunity to

sobering responsibility of hiring and supervising the Court's law clerks who focused exclusively on death penalty appeals.

Justice Handler gave us many such memorable moments, but one of his finest came at the close of his distinguished tenure. In his concurrence in *Dale v. Boy Scouts of America*,[4] he reminded us of both how far we have come in combating invidious discrimination and how far we still have to go. His stirring words also spoke volumes about his personal journey as a jurist.

In *Dale*, the Court unanimously ruled that New Jersey's Law Against Discrimination[5] (LAD) prohibited the Boy Scouts of America "from expelling a member solely because he [was] an avowed homosexual."[6] This was the first time that the New Jersey Supreme Court had addressed the LAD's 1991 amendment prohibiting discrimination based on "affectional or sexual orientation."[7]

While joining in the unanimous *Dale* opinion, Justice Handler filed a separate concurrence specifically to rebuke the trial court for "impermissibly invok[ing] stereotypical assumptions about homosexuals."[8] The Justice elaborated:

> One particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society. . . . Like stereotypes about an individual based on sex or race, similar assumptions about a lesbian or gay man are false and unfounded, and reveal nothing about that individual's moral character, or any other aspect of his or her personality[.][9]

Justice Handler added: "In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be

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deepen our understanding of the Constitution"); State v. Biegenwald, 106 N.J. 13, 73, 524 A.2d 130, 161 (1987) (Handler, J., dissenting) (dissenting from the majority's ruling to uphold death penalty under the New Jersey Constitution because "state constitutional principles place the highest value on individual life and require the greatest protections when life itself is at stake").

[4] 160 N.J. 562, 734 A.2d 1196 (1999), *cert. granted*, No. 99-699, 2000 WL 21144 (U.S. Jan. 14, 2000). The United States Supreme Court recently granted certiorari on the question of whether this application of New Jersey's Law Against Discrimination (LAD) would violate the Boy Scouts of America's federal constitutional rights of free speech and association under the First Amendment. *See id.*

[5] N.J. STAT. ANN. §§ 10:5-1 to -49 (West 1999).

[6] *Dale*, 160 N.J. at 570, 734 A.2d at 1200.

[7] *Id.* (citing N.J. STAT. ANN. § 10:5-4 (West 1999)).

[8] *Id.* at 649, 734 A.2d at 1243 (Handler, J., concurring).

[9] *Id.* at 647, 734 A.2d at 1242-43 (Handler, J., concurring) (citation omitted).

moral than a person who is a heterosexual."[10] The Justice then concluded:

> Stereotypes cannot be invoked to extend the meaning of self-identifying expression of one's own sexual orientation, and thereby become a vehicle for discrimination against homosexuals. Such stereotypes, baseless assumptions, and unsupported generalizations reflecting a discredited view of homosexuality as criminal, immoral and improper are discordant with current law and public policy. Accordingly, they cannot serve to define contemporary social mores and morality.[11]

Justice Handler was compelled to send this powerful message to future generations because he realized that our state courts will increasingly be called upon to define the civil and constitutional rights of homosexuals. The federal courts have yet to recognize the same level of protection for this minority group as they have for many other minority groups.[12] For this reason, it will necessarily become the responsibility of state courts to review such issues under their own state constitutions and, where applicable, antidiscrimination laws.

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[10] *Id.* at 647, 734 A.2d at 1243 (Handler, J., concurring).

[11] *Id.* at 651, 734 A.2d at 1245 (Handler, J., concurring).

[12] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (holding that there is no fundamental right for "homosexuals to engage in sodomy" under substantive due process); Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996) (finding that the First Amendment is not violated by using service member's declaration of homosexuality as evidence of engaging in conduct inconsistent with military activity); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (finding that regulations that discriminate against homosexuals are only entitled to a rational basis standard of review because homosexual conduct may constitutionally be criminalized); Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984) (holding that constitutional rights of equal protection and privacy are not violated by the Navy's policy requiring discharge for homosexual conduct); Adams v. Howerton, 486 F. Supp. 1119, 1123-24 (C.D. Cal. 1980) (rejecting a claim under both federal and Colorado law that two men were married for the purposes of immigration status), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); Doe v. Commonwealth's Attorney of Richmond, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (upholding the constitutionality of a Virginia statute that criminalized sodomy), *aff'd*, 425 U.S. 901 (1976). *But see* Romer v. Evans, 517 U.S. 620, 623, 624 (1996) (holding that an amendment to the Colorado Constitution that prohibited "all legislative, executive[,] or judicial action at any level of state or local government designed to protect" homosexuals violated the Equal Protection Clause of the United States Constitution). Indeed, the United States Supreme Court recently granted certiorari in the *Dale* case on the issue of whether the Boy Scouts of America have a First Amendment right to bar homosexuals from membership in that organization. *See* Dale v. Boy Scouts of Am., 160 N.J. 562, 734 A.2d 1196 (1999), *cert. granted*, No. 99-699, 2000 WL 21144 (U.S. Jan. 14, 2000).

Of further note, in 1996, Congress enacted, and President Clinton signed into law, the Defense of Marriage Act, which provides that no state is required to recognize same-sex marriages sanctioned by another state. *See* Pub. L. No. 104-199, 110 Stat. 2419 (to be codified at 28 U.S.C. § 1738C).

Through his impassioned plea in *Dale*, Justice Handler was also undoubtedly anticipating a momentous issue to come—whether same-sex couples should have the right to marry or to receive the same benefits afforded married couples under state law. Although Justice Handler did not make any specific reference to that issue in his *Dale* concurrence, he wrote on that subject more than twenty years earlier as a judge of the appellate division.[13]

In *M.T. v. J.T.*,[14] a postoperative transsexual married a man but later filed for support and maintenance. The husband argued that his transsexual wife was really a male, so the marriage was void as an illegal same-sex marriage. The appellate division held that a postoperative transsexual was "female" for marital purposes and that her husband therefore had a legal obligation to support her. Writing for the Court, Justice Handler noted, in dicta, that the New Jersey marriage statute did not permit same-sex marriage.[15] The Justice acknowledged that the statute did not contain any "explicit references to a requirement that marriage must be between a man and a woman[,]" but reasoned that the "statutory condition [of heterosexuality] must be extrapolated. It is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed."[16] Justice Handler concluded: "We accept—and it is not disputed—as the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female."[17]

More than two decades later, the same jurist who once could not "fathom" same-sex marriage has admonished us to "renounce" the "archaic" "stereotype" that "homosexuals are inherently immoral."[18]

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[13] *See* M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (App. Div. 1976).

[14] 140 N.J. Super. 77, 355 A.2d 204 (App. Div. 1976).

[15] *See id.* at 84, 355 A.2d at 207 (noting that there is "almost universal" agreement that a "heterosexual union is . . . the only one entitled to legal recognition" and "[t]here is not the slightest doubt that New Jersey follows the overwhelming authority").

[16] *Id.* at 84-85, 355 A.2d at 208.

[17] *Id.* at 83, 355 A.2d at 207.

[18] *Dale*, 160 N.J. at 647, 650, 734 A.2d at 1242, 1244 (Handler, J., concurring). The very "stereotype" to which Justice Handler referred, however, has pervaded the many court opinions that have rejected constitutional challenges by same-sex couples seeking to marry. *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 331 (D.C. 1995) (holding that "same-sex marriage [is] not a 'fundamental right' protected by the due process clause" because same-sex marriage is not "'deeply rooted in this Nation's history and tradition'" and because the status of marriage as a fundamental right is based on its link to procreation) (citation omitted); Adams v. Howerton, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (rejecting a claim under both federal and

Even accepting Justice Handler's interpretation of the New Jersey marriage statute in *M.T.*,[19] his conversion in *Dale* begs the question whether that law discriminates against same-sex couples under the LAD and violates their due process and equal protection rights under the state constitution.[20] The highest courts of two other states have already addressed that issue under their state constitutions.

First, in *Baehr v. Lewin*[21] (*Baehr I*), the Hawaii Supreme Court, in a plurality opinion, held that Hawaii's marriage statute, as applied to bar same-sex couples from marrying, was presumptively unconstitutional under the Hawaii State Constitution.[22] In the wake of *Baehr I*, Hawaii's voters passed a state constitutional amendment, proposed by both houses of Hawaii's legislature, to grant the legislature the authority to reserve marriage to only opposite-sex couples.[23] On that basis, late last year, the Hawaii Supreme Court ruled that Hawaii's marriage statute was now entitled to be given "full force and effect," regardless of "whether or not in the past it was violative of the equal protection clause" of the Hawaii State Constitution.[24] Accordingly, the Court remanded the case for entry

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Colorado law that two men were married for the purposes of immigration status partly because it would violate federal public policy that views "propagation of the race" as a basic concept of marriage making same-sex marriage "impossible and unthinkable"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that the trial court's denial of marriage license to two males did not violate the Eighth, Ninth, or Fourteenth Amendments partly because "marriage is so clearly related to the public interest in affording a favorable environment for the growth of children"); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (upholding the trial court's refusal to allow two women to a obtain marriage license because the very definition of marriage requires two people of the opposite sex, and "marriage has always been considered as the union of a man and a woman"); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (prohibiting same-sex couples from marrying because marriage is "a union of man and woman, uniquely involving the procreation and rearing of children within a family, [and] is as old as the book of Genesis"). *Cf. In re* Estate of Cooper, 187 A.D.2d 128, 133-34 (N.Y. App. Div. 1993) (refusing to give the surviving partner of a long-term homosexual relationship a right of election under decedent's will based on a definition of marriage as a "historic institution [that] is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend").

[19] *See* Rutgers Council of AAUP Chapters v. Rutgers, The State Univ., 298 N.J. Super. 442, 455-56, 689 A.2d 828, 834-35 (App. Div. 1997) (citing Justice Handler's dicta in *M.T.* with approval), *cert. denied*, 153 N.J. 48, 707 A.2d 151 (1998).

[20] *See* N.J. CONST. art. I, ¶ 1; N.J. STAT. ANN. §§ 10:5-1 to -49 (West 1999).

[21] 852 P.2d 44 (Haw. 1993).

[22] *See id.* at 67.

[23] Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *5 (Haw. Dec. 9, 1999).

[24] *Id.* at *6, 7.

of judgment dismissing it.[25]

In contrast, in *Baker v. State*,[26] also decided late last year, the Vermont Supreme Court unanimously held that under the Common Benefits Clause of the Vermont Constitution, same-sex couples

> may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.[27]

In a separate concurring opinion in *Baker*, one of the Justices wanted to go even further.[28] The Justice was prepared to order entry of an injunction requiring the state to give the same-sex couples marriage licenses.[29] The majority would not take that leap, concluding, instead, that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont Law. That the State could do so through a marriage license is obvious. But it is not required to do so[.]"[30]

Will New Jersey be the next great battleground in the constitutional wars over the rights of same-sex couples to marry? With its long tradition of safeguarding individual rights under its state constitution,[31] its statutory protections under the LAD against

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[25] *See id.* at *8.

[26] No. 98-032, 1999 WL 1211709 (Vt. Dec. 20, 1999).

[27] *Id.* at *1.

[28] *See id.* at *29 (Johnson, J., concurring in part and dissenting in part).

[29] *See id.*

[30] *Id.* at 18.

[31] *See, e.g.*, Davis v. New Jersey Dep't of Law and Pub. Safety, Div. of State Police, No. L-002229-97, 1999 WL 1267750, at *15 (N.J. Super. Ct. July 7, 1999) (applying the New Jersey Constitution to racial discrimination action); State v. Pierce, 136 N.J. 184, 209, 642 A.2d 947, 960 (1994) (noting that the New Jersey Constitution "affords greater protection against unreasonable searches and seizures than the federal Constitution affords"); State v. Hempele, 120 N.J. 182, 223, 576 A.2d 793, 814 (1990) (holding that warrantless searches of garbage bags left on the curb violate the New Jersey Constitution); State v. Novembrino, 105 N.J. 95, 159, 519 A.2d 820, 857 (1987) (using the New Jersey Constitution to reject the federal "good faith" exception to search warrants issued without probable cause); Right to Choose v. Byrne, 91 N.J. 287, 293, 450 A.2d 925, 928 (1982) (analyzing abortion funding under the New

discrimination based on "affectional or sexual orientation" in "any place of public accommodation,"[32] and its recent recognition of adoptions by same-sex partners,[33] New Jersey would seem an appropriate jurisdiction for mounting such a legal challenge. In that event, the Court will do well to recall Justice Handler's words in *Dale* that "[a] homosexual orientation tells nothing reliable about abilities

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Jersey Constitution); State v. Alston, 88 N.J. 211, 227, 440 A.2d 1311, 1319 (1981) (concerning standing to challenge the validity of a car search); State v. Schmid, 84 N.J. 535, 568, 23 A.2d 615, 633 (1980) (finding that regulations of a private university violated a defendant's state constitutional rights by "evicting him and securing his arrest for distributing political literature upon its campus"); State v. Ercolano, 79 N.J. 25, 29-30, 397 A.2d 1062, 1064 (1979) (upholding privacy-based freedom from "unreasonable searches and seizures"); State v. Tropea, 78 N.J. 309, 313-16, 394 A.2d 355, 357-58 (1978) (addressing double jeopardy and fundamental fairness); State v. Saunders, 75 N.J. 200, 216-17, 381 A.2d 333, 341 (1977) (concerning the right of sexual privacy); *In re* Quinlan, 70 N.J. 10, 19-20, 40-41, 355 A.2d 647, 652, 663-64 (1976) (analyzing the right of choice to terminate life support systems as an aspect of the right to privacy under state constitution); King v. South Jersey Nat'l Bank, 66 N.J. 161, 177, 330 A.2d 1, 10 (1974) ("The power of the Court to enforce rights by the New Jersey Constitution, even in the complete absence of implementing legislation, is clear."); Robinson v. Cahill, 62 N.J. 473, 482, 508-09, 303 A.2d 273, 277, 291-92 (1973) (finding that equal protection under the New Jersey Constitution accorded a right to education).

[32] N.J. STAT. ANN. § 10:5-4 (West 1999); *see also* Dale v. Boy Scouts of Am., 160 N.J. 562, 589-94, 734 A.2d 1196, 1210-13 (1999) (finding that Boy Scouts of America is a place of public accommodation due to various factors, including its various locations, its openness to the public, and its close relationship with federal and state government bodies), *cert. granted*, No. 99-699, 2000 WL 21144 (U.S. Jan. 14, 2000); Frank v. Ivy Club, 120 N.J. 73, 104, 576 A.2d 241, 257 (1990) (holding that Princeton University eating clubs are places of "public accommodation" and, therefore, were prohibited from denying membership to women on the basis of their sex); Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 523-24, 391 A.2d 899, 903-04 (1978) (finding a public school to be a place of "public accommodation" and therefore covered under antidiscrimination laws); NOW, Essex County Chapter v. Little League Baseball, Inc., 127 N.J. Super. 522, 531, 318 A.2d 33, 37 (App. Div. 1974) (finding that a Little League baseball organization is a public accommodation because "[t]he statutory noun 'place' . . . is a term of convenience, not of limitation"), *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974); Fraser v. Robin Dee Day Camp, 44 N.J. 480, 487, 210 A.2d 208, 212 (1965) (finding a day camp to be a place of public accommodation that could not discriminate on the basis of race).

Given the New Jersey Supreme Court's broad interpretation of what constitutes a "place of public accommodation," a public office that issues marriage licenses could be deemed a "place of public accommodation" subject to the LAD provisions prohibiting discrimination based on "affectional or sexual orientation."

[33] *See In re* Adoption of Two Children by H.N.R., 285 N.J. Super. 1, 7-8, 12, 666 A.2d 535, 538, 541 (App. Div. 1995) (finding that a biological mother's same-sex partner could adopt the biological mother's children without terminating the biological mother's parental rights and that the adoption was in the children's best interests); *In re* Adoption of Child by J.M.G., 267 N.J. Super. 622, 625, 632 A.2d 550, 551 (Ch. Div. 1993) (holding that the adoption of child by a biological mother's lesbian partner was in child's best interests).

or commitments in work, religion, politics, personal and social relationships, or social activities."[34]

Justice Handler will be remembered for many great opinions. His *Dale* concurrence should be among them. It is a morality tale about how even to this day, in our courts and in the court of public opinion, "stereotypes" and "myths" continue to cloud how we see and treat one another. That is a life lesson learned over many years on the bench and imparted as parting wisdom by the conscience of the New Jersey Supreme Court.

[34] *Dale*, 160 N.J. at 647, 734 A.2d at 1243.