March 23, 2009

In Whose Best Interest? Florida’s Statutory Ban On Homosexual Adoption And The Arguments Set Forth In Support Of An Absolute Ban, Represent The Perceived Best Interest Of A Conservative Morality And Not Those Of The Children.

Michael England, Stetson University College of Law

Available at: https://works.bepress.com/michael_england/3/
In Whose Best Interest?

Florida’s Statutory Ban On Homosexual Adoption And The Arguments Set Forth In Support Of An Absolute Ban, Represent The Perceived Best Interest Of A Conservative Morality And Not Those Of The Children.

Michael England

TABLE OF CONTENTS

Introduction .................................................................................................................. 2
I. An Overview ............................................................................................................. 4
II. Historical Background ........................................................................................ 6
    A. Florida’s Historical Animus Against Homosexuals .................................... 6
    B. “Save Our Children” and the Florida Statutory ban .................................... 9
    C. A History of the Judicial Challenges to Florida’s Ban on Homosexual Adoption ........................................................................................................ 13
III. Arguments in Support of the Ban on Homosexual Adoption .................... 19
    A. “Moral Realism”: Homosexual Adoption Represents the End of Days .......................................................... 19
    B. Statistical Research … The Truth As It Is …… Or As We Want It To Be? .......................................................... 23
    C. Psychological Development and Sexual Identity ................................. 28
    D. The Perceived Parental Inability of Homosexuals Based Upon Their Sexual Orientation .......................................................... 43
    E. Homosexuality Is Immoral and Homosexual Adoption Will Have An Adverse Impact On Minority Children ........................................ 54
IV. Potential Options to an Absolute Ban ............................................................. 63
V. Conclusion ............................................................................................................. 67

1 J.D. Candidate, Stetson University College of Law. I would like to specifically thank, Rebecca Frank, Research Librarian for her invaluable assistance in gathering the numerous articles this project required and J. Catherine Bohl, professor Stetson University College of Law for unwavering support, assistance, and guidance with this project. It is my sincere hope that this paper is a reflection of the quality you bring to the College of Law.
The State of Florida’s goal concerning adoption is, absent a reunification with the child’s natural family, to afford the child an opportunity to be placed in a permanent, committed home that will serve as the “forever family” for the child (emphasis provided). In 2002, the goal of the Florida Department of Children and families reinforced this belief by stating its purpose was “to get kids into a good home, a loving home, a permanent home.” Florida Statute § 39.162(2) codifies the fact that Florida has recognized adoption as “the primary permanency option” for child who cannot be reunited with their biological parents. Few would argue that it is certainly within the child’s “best interest” to be removed from the foster care system and placed within an environment that will present the child with an opportunity to be nurtured and loved by parents who are fit to do so. It would seem to be of little concern whether the “parents’ providing the prospective home were a male and female or a partnership comprised of individuals of the same sex. One would naturally assume that parental ability coupled with domestic stability and would be enough to overcome the belief that sexual identity or orientation represents an egregious character flaw that prevents a homosexual individual from being able to satisfy the “best interest needs of the child.”

The State of Florida shares this view as it specifically concerns children seeking to be adopted within the State of Florida. Florida Statute § 63.042 (3) states that; “no person eligible to adopt under this statute may adopt if that person is a homosexual.”

---

3 Id.
4 Love vs. the Law, Rosie, April 2002 at 55. Quoting Owen Roach, a spokesperson for the Florida Dept. of Children and Families regarding the Department’s ongoing goal regarding foster children.
is painfully obvious that Florida’s statutory ban on the ability of homosexuals\(^8\) to adopt children is solely based upon the petitioner’s sexual orientation and not their ability to provide a loving, permanent home. Thus far, the statute has survived two significant constitutional challenges and in \textit{Lofton v. Kearney} the court determined that “homosexuals are not similar in all \textit{relevant} aspects to other non-married adults with respect to the Defendant’s purported “best interest of the child” (emphasis added).\(^9\) The Court is correct in holding that the “best interest of the child” is paramount and superior to all other interests concerning adoption. However, the court’s upholding the unsubstantiated position that homosexuality is indicative of parental \textit{inability} and/or \textit{non-fitness} is more closely aligned with the “best interests” of a morally conservative society, then those of the child.\(^10\)

The “best interest”\(^11\) standard defined in \textit{Lofton} has transformed the gay adoption ban into what many supporters of the ban feel is “a conclusive and irrebuttable presumption that a child never be adopted by a homosexual.”\(^12\) Supporters of the ban base their arguments upon several positions. One, that homosexual individuals lack the ability to provide for the psychological needs of the child as they specifically relate to

---

\(^8\) For the purposes of this article the term “homosexual” shall include both gay men and gay women (commonly identified as “lesbian” within many scholarly writings), although the case law in Florida (\textit{Seebol}, \textit{Cox}, and \textit{Lofton}) has specifically dealt with gay men as opposed to gay women.


\(^10\) See Shaista-Parfveen Ali, Comment, \textit{Homosexual Parenting: Child Custody and Adoption}, 22 U.C. Davis L. Rev. 1009, 1012 (1989) (recognizing that the best interest standard can often include the court’s subjective morality judgments); Judith A.. Lintz, Note, \textit{The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children}, 16 U. Dayton L. Rev. 471, 487-93 (1990); Joy A.. Schulenburg, \textit{Gay Parenting: A Complete Guide for Gay Men and Lesbians with Children. supra} note 56 at 100 (identifying the fact that in many instances, there is a judicial bias towards homosexuals and their ability to be parents).

\(^11\) See generally, Felicia E. Lucious, Note, \textit{Adoption of Tammy: Should Homosexuals Adopt Children?}, 21 S.U.L. Rev. 171,175 (1994)(noting that court’s have used the “best interest of the child” standard since 1988 regarding child placement decisions).

\(^12\) See generally, Judge’s Ruling Reopens Debate on Gay Adoption, available at http://www2tbo.com/content/2008/sep/11/me-gay-adoption-ban-unconstitutional/news-metro.
individual gender and sexual development of the child.\textsuperscript{13} Two, homosexuals are unable to adequately parent due to their homosexuality, particularly as it relates to the child’s health, safety, and social well being.\textsuperscript{14} Finally, homosexuals and the homosexual lifestyle are so morally abhorrent that it represents a discernable harm to the child.\textsuperscript{15} These arguments lack both legal and empirical support. In actuality, Florida’s statute prohibiting homosexual adoption and the arguments offered in support of it represent anything \textit{but} the “best interests of the child.”

\textbf{I. An Overview}

Since 1868, Florida has shown little tolerance for homosexuals and what may best be described as homosexual activity.\textsuperscript{16} This article will demonstrate that Florida’s ban on homosexual adoption, or a similar statute that is based solely upon the petitioner’s sexual orientation, is a representation of the “best interests” of a morally conservative society and not those of the child. The presentation is divided into four distinct parts.

Part I provides the reader with a roadmap of the salient topics in the article. This section provides the framework for the topic of homosexual adoption and the arguments in support of an absolute prohibition.

\textsuperscript{15} “Homosexuals flaunt their perverted sexuality and potentially represent a danger to children.” See \textit{infra} at ch. 11; A Cancer on the Soul of Society, Anita Bryant & Bob Green, \textit{At Any Cost}, p. 121-133, Fleming H. Revell Company (1978).
\textsuperscript{16} See \textit{generally}, Allan H. Terl, \textit{An Essay on the History of Lesbian and Gay Rights in Florida}, 24 Nova L. Rev. 794 – 801 (1999). “Each time rights for lesbians and gay men come into question, those opposed to such rights quickly remind us of the statutory criminality of such behavior, as though it were the exclusive domain of lesbians and gay men.” \textit{Id}. at 794. It is important to note that Florida has never been known as a hotbed for tolerance involving change to an “accepted” way of life. The state has a long, well documented history of intolerance towards both ethnic and “societal” minorities, as is documented in the late Prof. Terl’s essay.
Part II addresses the historical background on the treatment of homosexuals by the State of Florida from the time period prior to the 1970’s through Anita Bryant’s “Save Our Children.” This section will show that Bryant’s activities had a direct and major impact upon the subsequent absolute ban on homosexual adoption within the State of Florida. Part II identifies the three major cases involving the challenges to Florida’s statute, beginning with *Seebol* and concluding with *Lofton.*

Part III examines the arguments that have been offered in support of prohibiting homosexuals from adopting. This section will address some of the issues that Professor Wardle has often criticized those in support of homosexual adoption for not confronting. Part III begins with an analysis of the argument concerning “moral realism” and then provides a general overview on the value of statistical data in assessing the homosexual adoption issue. The larger arguments are divided into four separate categories; (i) those arguments based upon the perceived danger to the psychological development of the child by homosexual adoption, (ii) the perceived limitations and deficiencies in the parental ability and/or fitness of homosexual vs. heterosexual “parents”, and (iii) the perceived moral belief that homosexuals and homosexuality, in and of itself, represents a moral threat to the child.

---

17 Beginning in the 1950’s, the State of Florida actively sought to punish homosexuals as is evidenced by the following litany of cases; *State v. White*, 68 So. 2d 397 (Fla. 1953)(reversing the quashing of information by the lower court that specifically related to a crime identified by the then Florida Statute § 800.01 by which the defendant was charged); *Floyd v. State*, 79 So. 2d 778 (Fla. 1955)(reversing the denial of an appellate bond by the lower court based upon that court’s desire to prevent “a crime against nature”(i.e. homosexual relations) from occurring on public property); *Florida Bar v. Kimball*, 96 So. 2d 825 (Fla. 1957) (a civil rights attorney was arrested and subsequently disbarred for engaging in behavior that was contrary to good morals and Florida law, which forbade homosexual relations); not to mention the number of extra-judicial actions taken against educators (16 to be exact) during the Spring of 1959 for their “illegal” conduct/ behavior (Terl at 796)(2000)).

Part IV looks at alternatives to an absolute ban on adoption due to sexual orientation and not parental ability, alternatives such as the “Nexus Test” or the “Per Se Rule” which consider factors other than orientation in determining parental fitness, albeit in custody not adoption proceedings. This section seeks to provide an acceptable alternative to the current statutory ban that is based on nothing more than a discriminatory animus towards homosexuals.

In conclusion, the purpose of this article is to illustrate that current ban impermissibly burdens homosexuals and the ban, whether express or implied, can never realistically represent the “best interest” of the prospective adoptee child.

II. Historical Background

A. Florida’s Historical Animus Against Homosexuals.

History has shown that Florida’s attitude towards homosexuals can be classified as intolerant at best and openly hostile at worst. Florida, like many states, enacted anti-sodomy laws that were designed to curtail activities that the legislature deemed to be “unnatural and lascivious acts.” In a precursor to the 1977 crusade against homosexuals, the city of Miami enacted an ordinance restricting bar owners from either knowingly employing or serving homosexuals and prohibiting homosexuals from either patronizing or congregating at their establishments. In direct response to Florida’s sodomy statute, the Legislature sought to affirmatively repress the rights of “suspect” members of its citizenry by enacting the first of many Florida Investigative

---

19 Julie Shapiro, Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children, 71 Ind. L. J. 623 (1995), an article that deals with the issues of sexuality and its basis for use in the determination of custody when the issue of sexuality involves a lesbian or gay parent.
20 See generally, Terl citing language found in the 1917 Florida Statutes at Ch. 17-7361, § 1, 1917 Fla. Laws 211, 211 that originally accompanied the classification of sodomy as a “crime against nature”, until this phrase was repealed in 1974. See ch. 74-121, § 1, 1974 Fla. Laws 372, 372.
21 Id. at 795, see generally, Miami, Fla., Ordinance 5135 (1954) (codified at Miami, Fla., Code § 4-13 (1967).
Initially the purpose of the Investigative Committee was to address the growing crisis involving race relations within the state. The Investigative Committee soon found itself at legal odds with both the NAACP and African Americans, as a collective people, who were determined to fight repression by any means available. As a direct result of this opposition, the Committee sought to attack a class of citizen that it viewed as having little to no legal recourse or support among the general population in Florida. The Committee found Florida’s homosexual population to be such a class.

Florida’s homosexual population found itself within the equivalent of a legal “No Man’s Land”, on one hand they were unable to rely upon the popular support of a people who viewed their behavior as both “abhorrent and unnatural.” On the other hand, they recognized that in the era of the 1950’s there existed little legal protection for both their lifestyle and their personal freedoms. To combat the “menace” of homosexuality, the Committees engaged in legislative “witch hunts” utilizing questionable investigative procedures that would be more commonly identified with today’s paparazzi then a formal, legitimate investigative process. The end result of these “pop and flash” operations was that Florida’s education system was disparately impacted as teaching professionals were forced from their positions within both the Public School and the State University system due to their “undesirable” lifestyles.

---

23 See generally, Terl at 795 identifying the initial purpose for the first Investigative Committee.
24 Id. at 795.
25 Id. at 796.
26 See generally, Id. at 796 citing Ellen McGarrahan, Florida’s Secret Shame, Miami Herald, Dec. 8, 1991, Tropic at 9, “Traveling undercover, the spies went to parties, parks, public restrooms – anywhere and everywhere homosexual men and women were known to socialize Informants “lured people to places where [Investigative Committee] staff waited, hidden with cameras … at the appropriate moment, the [Investigative Committee] staff person would step out his hiding place with a camera and a flash bulb.”
27 Id. at 796.
The 1964 Legislative Investigative Committee first introduced the idea that "homosexuality should not be treated as an entity by existing laws, but rather as individual acts (that) are specified as illegal … sex offenses …" in the then, current Florida Statutes (emphasis provided). The Investigative Committee even went as far as to suggest the legislature begin to formulate a “Homosexual Practices Control Act” whose purpose would be to provide “established procedures and stern penalties [that] will serve both as encouragement to law enforcement officials and as a deterrent to the homosexual hungry for youth (emphasis provided).” The Investigative Committee was forced to cease operation in 1965, due to public outrage over the literary and photographic content in a report that summarized the Committee’s findings, a report that was ultimately banned from distribution by the State of Florida and ironically sold as pornography in the State of New York. The pamphlet, notoriously dubbed the “Purple Pamphlet”, featured photographs of “two nude men embracing and kissing and another man wearing only a pouch G string while in rope restraints”, as well as “twenty photographs of one or more naked or virtually naked boys apparently no more then ten years old (emphasis provided).” The 1964 report failed to achieve the desired response of motivating the citizens of Florida to confront the alleged “menace” that homosexuals

28 Id. at 798, citing Homosexuality and Citizenship in Florida, Report of the Florida Legislative Investigation Committee (Jan. 1964), supra note 30 (emphasis added).
29 Id. at 799, citing the 1964 Investigative Committee, showing the staunch desire of the Committee to impose a series of laws aimed at controlling the lives of a specific subset of individuals regardless of their civil and constitutional rights (as they existed at this time) (emphasis provided). It is important to note that prior to its dissolution, the Committee was actively seeking to introduce laws that were specifically designed to substantially restrict and control Florida’s homosexual population (known initially as the “Homosexual Practices Control Act for Florida”), including: mandating psychiatric examinations for those committed of a homosexual act with a minor, the creation of a central records repository for information on homosexuals arrested and convicted in Florida (with) these records open to public employment agencies (Homosexuality and Citizenship In Florida, Report of the Florida Legislative Committee (Jan. 1964), supra note 30.
30 See generally, Terl at 800, referring to both the public’s reaction to the Committee’s findings and its subsequent dissolution in 1965.
31 Id. at 797, describing the visual contents of the 1964 Investigative Committees report.
posed to them. Instead the public outcry was directed at the committee and not homosexuals, due to the graphic nature of the pamphlet’s material, and this reaction was of such a negative nature that the pamphlet was quickly withdrawn from distribution.\(^{32}\)

An article produced several years after the Committee’s dissolution identified the Committee’s work for what it truly represented; “a war on privacy, human rights, and fair play … They ruled lives, destroyed careers, poisoned institutions. They casually employed police state tactics, brow beating victims with threats and coercion.”\(^{33}\) If people thought that the dissolution of the Investigative Committee would signify a turn towards the tolerance of homosexuals within the state, they were sorely mistaken. The City of Miami and Dade County kept up the governmental pressure on the homosexual community and this pressure would reach its pinnacle with Anita Bryant and the “Save Our Children” campaign. The campaign would have a far reaching impact into the rights of homosexuals within not only Dade County but those who would later seek to adopt children within the State of Florida.

**B. “Save Our Children” and the Florida Statutory ban.**

>“Homosexuality is a fiery hell. Give us the strength to do battle.”\(^{34}\)

On January 18, 1977, the city of Miami passed an ordinance that banned discrimination in employment and housing based upon a person’s “affectional or sexual preference.”\(^{35}\) Almost immediately the ordinance became the subject of numerous attacks from the religious right, the most notable among them was singer, actress Anita

\(^{32}\) Id. at 799-800.

\(^{33}\) See generally, Terl at 800, quoting a newspaper article by Frank Trippett, *Gay-Bashing by Florida’s Good Ol’ Boys*, Miami Herald, July 25, 1993, at 1C.

\(^{34}\) See generally, *Battle Over Gay Rights*, Newsweek, June 6, 1977, at 16, quoting the invocation of an Evangelical minister at a meeting formed to oppose and repeal the Miami anti-discrimination ordinance.

Bryant. Bryant claimed to have been “moved by the “spirit of God” and she repeatedly held that her own religious beliefs held no tolerance for “homosexuality” within mainstream community. She based her opposition to homosexuals on two aspects. One, that homosexuality and the homosexual lifestyle were considered to be “wrong” within the eyes of Christianity. Two, that homosexuals represented a very cogent threat to the youth of America.

Indeed, the newly formed “Save Our Children” campaign focused upon the perceived threat that homosexuals sought to use the education system as a means to influence children towards a homosexual lifestyle and perhaps in extreme cases, to

---

36 Id. at 804.
37 See generally, Anita Bryant, The Anita Bryant Story: The Survival of Our Nation’s Families and the Threat of Militant Homosexuality, p. 13-4 of Chap. 1 entitled “God Put a Flame In My Heart” (Fleming H. Revell Company 1977), which described the origin of Bryant’s “revelation” during a prayer revival near her home in Miami in which the impending ordinance was discussed by the church’s pastor.
38 To put this issue into a historical perspective, it is important to note that America (as a nation) was nearing the end of a “sexual revolution” that had taken place during the 1960’s, in which the conservative values of the “World War II era” adults as they related to sex and intimacy were thrown aside. The youth of the 1960’s flouted their sexuality openly and proudly and it was during this time and into the early 1970’s that homosexuals began to emerge from the “closet” that the 1940’s and 50’s had mandated they stay in. To say that both the suddenness and bluntness of all of these activities (both homo and heterosexual) were too much for the traditionally conservative families of America would be a gross understatement.
39 Battle Over Gay Rights, Newsweek, June 6, 1977 at 17, Anita Bryant frequently used passages found in the Bible to illustrate God’s distain for homosexuality. Her favorite passage was Leviticus 20:13, which stated: “If a man also lie with mankind as lieth with a woman, both of them have committed an abomination: they shall surely be put to death: their blood shall be upon them.” Battle at 17.
40 See generally, Bryant at 25 which details her speech to the Mayor and the Miami Commissioners in which she asserts her “God given right to be jealous of the moral environment for my children … The people of Dade County can’t say no (to discrimination) in the areas of housing, employment, and education. But I can, and I do say no to a very serious moral issue that would violate my rights and the rights of all decent and morally upstanding citizens, regardless of their race or religion (emphasis provided).” Anita Bryant, The Anita Bryant Story; The Survival of Our Nation’s Families and the Threat of Militant Homosexuality, p. 25 (Fleming H. Revell Company 1977). It is also interesting to note the choice of words used to describe homosexuals as “militant” in nature. This form of wordsmithing has historically been used to describe those groups or individuals who have spoken out against a wrong, whether perceived or real, such as “militant blacks” to describe those in support of the 1960’s Civil Rights movement. Were homosexuals any more “militant” than those who fervently professed their opposition to the ordinance and would someone who seeks to correct what is an obvious injustice (i.e. “separate but equal” or woman’s suffrage) be defined as a “militant” according to Bryant’s definition?
41 Id. at 41. The slogan created by Anita Bryant’s husband, Bob Green to identify those individuals who supported the efforts to defeat Miami’s ordinance through petition and referendum.
molest children. Bryant frequently used the slogan “Homosexuals cannot produce, so they must recruit” to portray homosexuals as predators whose sole purpose was to replenish their ranks from among the nation’s innocent and impressionable youth because of their inability to procreate. The purpose of this campaign tactic was to influence the female vote within the Miami-Dade County area, a constituency that had ironically voted in favor of the initial anti-discrimination ordinance. Bryant’s local crusade ultimately brought the issue of homosexuality and the rights of homosexuals to the forefront of America’s attention during 1977, and Florida, specifically Dade County, became ground zero for both supporters and opponents alike.

American society faced a myriad of issues including, the concept that homosexuality was a lifestyle based solely upon choice and the question of whether homosexuals sought to influence children through proselytizing and if so, should they their ability to educate and work with young children be either limited or restricted. As a result of Bryant’s intense pressure and public exposure, the ordinance was submitted to the voters at referendum and it was repealed on June 7, 1977. Anita Bryant called it a

44 http://stonewall-library.org/anita/panel1.html (accessed on Sept. 28, 2008). See generally, Anita Bryant’s attempt to influence the female constituency of Miami who had voted in support of the initial ordinance.
45 Battle Over Gay Rights, Newsweek, June 6, 1977 at 17, describing the mobilization and unification of both the homosexual and heterosexual communities on both sides of the issue. Ultimately, Bryant’s actions in Miami served to galvanize the homosexual community into a recognized political force that has actively presented and defended itself.
46 Battle Over Gay Rights, Newsweek, June 6, 1977 at 21. Bryant states that “I don’t hate homosexuals. I love homosexuals. It’s the sin of homosexuality I hate.” Indeed this was a continuous contention for Bryant that homosexuality was a chosen lifestyle and not genetic in nature (as is still hotly contested to this very day). To Bryant (and those in opposition to homosexual rights), it would seem to be as simple as the choice one makes when determining their wardrobe or their career path.
47 See generally, Id. at 17.
48 Terl at 805. It would take a concerted effort from multiple groups over the span of several years to undo the acts of Anita Bryant and the “Save Our Children” in the Miami-Dade County area, in order to present an ordinance prohibiting discrimination on the basis of sexual identity that the Commission would pass in December 1998. William E. Adams, Jr. A Look at Lesbian and Gay Rights in Florida Today: Confronting the Lingering Effects of Legal Animus. 24 Nova L. Rev. 751, 756 (2000).
victory for “God and decency” and she signified that this was a vote for the “normal majority” (emphasis provided). In reality, it was a victory for the conservative right’s ability to limit and control those activities they deemed to be undesirable, and this would not be the last time the normal majority spoke out against homosexuals in Florida.

As a direct result of Bryant’s campaign, the Florida legislature through Senator Curtis Peterson introduced legislation in the Florida Senate banning both homosexual adoption and marriage. Throughout the hearings, several senators commented that the homosexual issue had reached a fever pitch due to Bryant’s campaign in South Florida and the resulting media and national attention it was receiving. The Florida Legislature further stigmatized homosexuals, when it passed a House amendment that permitted the public disclosure of the reasoning behind the denial of an application for adoption. The Senate went out of its way to protect the interests of heterosexual prospective parents against sexual identity based stigmatization by passing an additional amendment that required the court dismissing the petition for adoption to state with specificity the reasons for doing so. It is important to note that at no time during these proceedings did the discussion focus upon the “best interests of the child”, as opposed to those of the voting constituency, although Senator Chamberlin did note that there was a “lack of compatibility” between homosexuals and the “best interests of the child” (emphasis

---

49 *Id.* at 805.
51 *Id.* at 1302, describing the comments of Senators George Firestone and Don Chamberlin regarding the homosexual issue at that time and thus (in the opinion of Justice Barkett) tying the homosexual adoption issue to the antidiscrimination issue in Miami-Dade County and permitting a review under the principles established by the U.S. Supreme Court in *Romer*.
52 *Id.* at 1303 quoting the tape recording of the Florida House of Representatives proceedings, May 30, 1977 (copy of original in the Florida State Archives). The stated intent of the amendment was to “protect” heterosexual prospective parents whose applications were denied for reasons other than sexual orientation.
53 *Id.* at 1303 quoting the tape recording of the Florida Senate proceedings, May 31, 1977 (copy of original in the Florida State Archives) that was codified as Fla. Stat. § 63.142(3)(b) (2003) at that time.
Despite Senator Chamberlain’s observations, both the House and Senate passed the Peterson bills on May 31, 1977 and on June 8, 1977; the Governor signed the Peterson bills into law. Senator Peterson stated that the bills would serve as a message to homosexuals that; “We’re really tired of you. We wish you would go back into the closet.” With the passage of the bill into statutory law, homosexuals were barred from adopting children in the state of Florida solely based upon their sexual orientation and not their ability to provide a stable, permanent home for a deserving child. Ultimately, the “best interests of “normal” society” forced the “best interests of the child” into a closet from which they have yet to emerge.

C. A History of the Judicial Challenges to Florida’s Ban on Homosexual Adoption.

“The question ... is whether the reality of private biases and the possible injury they may inflict are permissible considerations ... We have little difficulty concluding they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Privates biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

The majority of the legal challenges to Florida’s statutory ban on homosexual adoption have centered on an individual’s constitutional right to privacy, equal protection, and due process. As Florida’s legal history will show, the courts have

54 Id. at 1303, citing to conversations that were recorded during the Florida Senate Judiciary Civil Committee proceedings, May 3, 1977. Senator Chamberlin did, in fact, attempt to block the bill.
55 Id. at 1303, referring generally to the Florida Times Union, June 1, 1977 article “Gay Bills Pass Both Chambers.”
56 Id. at 1303, referencing the Florida Times Union, June 1, 1977 article which quoted Senator Peterson and including the statement “that the problem in Florida is that homosexuals are surfacing to such an extent that they’re beginning to aggravate the ordinary folks, who have rights of their own.” The dissent in Lofton points to these comments and the Legislative history as prima facie evidence that Florida’s statute is unconstitutionally upon animus towards homosexuals and not (as claimed) representative of the “best interest” of the child in Florida.
58 See Seebol v. Faerie, 16 Fla. L. Weekly C52 (16th Cir. Ct. Mar.15,1991)(holding that Florida’s statute did violate Mr. Seebol’s state constitutional rights concerning equal protection, due process, and privacy); Cox v. Health and Rehab. Serv., 656 So. 2d 902 (Fla.1995)(upholding the Appellate Court’s decision that the statute was constitutional as applied to an individual’s privacy and due process rights, but remanded for further discussion on the equal protection issue); Lofton v. Kearney, 358 F. 3d 804 (11th Cir. 2004)
permitted a more liberal linking between the statute’s purpose and the “best interest of the child.” The end result, however, has only helped to strengthen a statute that simultaneously fails to meet the “best interest of the child” and limits the constitutional rights of homosexuals in Florida.

Ed Seebol, a single, gay man with a substantial and respectable reputation within his community challenged the Florida statute in September 1990. Mr. Seebol sought to adopt a “special needs” child but the local Department of Health and Rehabilitative Services (HRS), which presided over adoption petitions, denied his application specifically because of his stated sexual orientation. Mr. Seebol challenged the grounds for HRS’ denial of his petition and the 16th Judicial Circuit of Monroe County held that the Florida statute prohibiting adoption by homosexuals was both unconstitutional and it specifically violated Mr. Seebol’s equal protection, due process, and privacy rights.

(affirming the lower court’s decision which held Florida’s statute to be constitutionally valid against equal protection, due process, and privacy challenges).

59 See Cox v. Health and Rehabilitative Services, 627 So. 2d 1210 (Fla. 2d Dist. Ct. App. 1993)(evidentiary support offered by the plaintiffs to the trial court lacked “sufficient” credibility and objectivity to support its position); Lofton v. Kearney, 358 F. 3d 804 (11th Cir. 2004)(plaintiff’s failed to identify homosexuals as a “suspect class” entitled to strict scrutiny by the court, defendants are only required to have a rationale basis between the statute and its intent, which the court concluded protecting adoptive children from homosexuals and their lifestyle was indeed a valid purpose).

60 Terl at 821, referencing the article ACLU/ Florida Sues HRS Over Denial of Adoption Bid by ‘Ideal’ Gay Applicant Due to Sexual Orientation, The Weekly News, October 3, 1990 at 10. Ed Seebol’s reputation was both “substantial and respected” throughout the Key West community and he served as the executive director of AIDS Help, Inc.

61 “Special Needs” children are those considered to be difficult to place for adoption because of factors that may include racial background, physical or mental disability, or the fact that the child is older. Cox v. Fla. Dept. of Health and Rehab. Serv. 656 So. 2d 902 (Fla. 1995).

62 The Department of Health and Rehabilitative Services (hereafter referred to as “HRS”) which subsequently became the Department of Children and Families.

63 Terl at 822, referencing the letter of denial from Carmen Dominguez Frick, District Legal Counsel, HRS District XI, to Edward Seebol (May 10, 1990)(on file with the author’s estate).

64 Seebol v. Farie, 16 Fla. L. Weekly C52 (16th Cir. Ct. Mar. 15, 1991). It is interesting to note that Mr. Seebol filed his application as a homosexual individual and not as a partner in a homosexual relationship. It could be argued that this was one of the reasons that the State did not vigorously pursue an appeal in this instance.
Neither the agency nor the State appealed the Court’s decision and consequently this ruling is considered to be precedent in Monroe County only.

The next challenge took place in Sarasota when a homosexual male couple sought to adopt a special needs child and were denied by HRS because they disclosed their homosexuality to the agency. Unlike the Seebol case, HRS actively defended its position in this case. The agency argued that if homosexuals were permitted to adopt, it would deprive a child of an “opposite sex role model” thereby “limiting the child’s choice of a sexual preference” and causing the child to suffer from an inability to relate to members of the opposite sex. Additionally, the agency argued that parents who were actively open homosexuals were not in the child’s best interest. The trial court followed the ruling in Seebol and held that the statute violated the plaintiff’s state constitutional rights as they applied to equal protection, due process, and the right to privacy.

HRS immediately appealed the ruling to the Second District Court of Appeals which overturned the circuit court ruling that held the statutory prohibition against homosexual adoption to unconstitutional. The court criticized both the trial court’s failure to take further testimony on the sexual orientation issue and the trial court’s reliance upon literary evidence that was “questionable” in the eyes of the appellate court.

---

66 Id. at 1220. This premise is based upon the belief that a child will align with the sexuality of the parent and that a “two parent/ opposite sex” combination is the optimal environment for a developing child.
67 Id. at 1220. One must assume that the “preference” alluded to in the HRS argument refers to a child’s preference for one parent (male or female) over another and that same sex couples would deprive or “limit” (as they argued) a child’s developmental options and opportunities.
68 Id. at 1210.
69 Id. at 1220.
The American Civil Liberties Union of Florida (ACLU) appealed the case to the Florida Supreme Court, which ultimately upheld the Appellate Court’s ruling regarding the statute’s constitutionality concerning privacy and due process but remanded the equal protection issue to the trial court for further proceedings. In its ruling, the Court reasoned there was no evidence that showed adoption by homosexuals was not detrimental to the child and that conversely the argument that adoption by homosexuals adults may promote the welfare of the child was flawed.

For homosexuals seeking to adopt in Florida, Lofton may be viewed as the judicial equivalent of Roe v. Wade or Brown v. Topeka Board of Education because of the far-reaching impact the decision would have on Florida’s homosexual population. The plaintiffs consisted of a pair of highly recognized homosexual foster parents who sought to challenge Florida’s prohibitory statute on homosexual adoption. Steven Lofton and Roger Croteau were pediatric nurses who were certified as long-term foster parents for three children who were born HIV positive. Lofton and Croteau both cared for the children and in light of their work and dedication as foster parents, they received the Outstanding Foster Parenting Award from the Children’s Home Society of Florida in 2002.

---

70 Id. at 1213. The court specifically notes the lower court’s acceptance of “unrebutted and overwhelming evidence” that illustrates a homosexual’s ability to raise children. The court then goes on to question the articles submitted by the plaintiff, Charlotte Patterson’s Children of Lesbian and Gay Parents in Child Development (specifically the Court found the article deals with natural and not adopted children of homosexuals) and Mary B. Harris & Parlene J. Turner’s Gay and Lesbian Parents in Journal of Homosexuality (specifically the Court questioned both author’s lack credible expertise in the area and the reputation and objectivity of the journal itself) in support of its (the plaintiff’s) position.

71 American Civil Liberties Union of Florida (hereafter referred to as “ACLU”).

72 Cox, 656 So. 2d at 903.

73 Id. at 903.


One of the children they were fostering was cleared for adoption on May 19, 1994 and in September of that same year, Lofton and Croteau applied to adopt Baby Doe. They were automatically disqualified from adopting under the homosexual adoption provision because of his sexual orientation.

Lofton and Croteau challenged the statute based upon the arguments that they, as homosexuals, had a constitutionally protected right to familial privacy, intimate association, family integrity, and due process and Florida’s current statute violated those rights. The Court recognized that, even in foster families, strong emotional bonds may develop between the foster parent and child. However, in spite of this emotional bond, the foster system was held to be a product of the state and thus it did not possess the characteristics of the traditionally recognized family and thus it was permissible for the state to “intrude” into the realm of the family. The court went on to hold that the statute was able to survive Lofton’s constitutional challenges because the statute served what it characterized as the legitimate interest in protecting the welfare and safety of children and it represented the “best interest of the child”, as perceived by both the court and the State.

---

77 Id. at 220. The award is currently known as the Lofton-Croteau Award and it is given in recognition of stellar foster parenting. *Love vs. The Law*, Rosie, April 2002 at 52.
79 Id. at 1375. Baby Doe’s actual name is “Bert” and he still currently resides with the Lofton and Croteau in Oregon. *Love vs. The Law*, Rosie, April 2002 at 50.
81 *Lofton v. Kearney: Discrimination Declared Constitutional In Florida*, St. Louis U. Pub. L. Rev. 199, 222 (2002). See Note 200 (showing the court’s recognition that the relationship between the Plaintiffs and their foster children was “as close as those between biological parents”).
Lofton and Croteau appealed the lower court’s decision to the Eleventh Circuit, but the Appellate Court reaffirmed the lower court’s decision and held that adoption was not a “fundamental right” to which Constitutional guarantees applied and the State did have a legitimate purpose in restricting homosexual adoption because it was, in the eyes of the Eleventh Circuit, within the “best interest of the child” to do so.\(^8\) The decision was appealed to both the Florida and United States Supreme Courts; unfortunately both benches declined to grant certiorari and the issue is considered mute. Had these same Florida courts heard either the *Roe* or *Brown* cases, their outcomes might have been substantially different.

In *Roe*, the court may have held that the “best interests of the unborn child” could permit the state to intrude upon a woman’s right to personal autonomy and thus the state’s interest in protecting the unborn child outweighs any constitutional concerns involving privacy. Similarly in *Brown*, the court might have held the concept of “separate but equal” provided access and opportunity for minorities and that the perceived discriminatory practices utilized by the state were not, in actuality, state authorized repression of a class of people based upon their race.\(^9\) Simply put, the state judiciary needs to undo the prior decisions that have upheld and reinforced a law that unconstitutionally discriminates based upon sexual orientation and represents anything but the “best interests of the child.”

---

\(^8\) *Lofton v. Kearney*, 358 F. 3d 804, 827 (11th Cir. 2004).
\(^9\) In no way, does the author wish to imply that had the example cases been heard within Florida that the issues presented within them would have ultimately turned out any differently than history shows they have. They were merely used to illustrate a point (or issue) that is no less important to homosexuals seeking to adopt, a sit was to women seeking “personal autonomy” or minorities fighting against blatant, repressive state sponsored discrimination.
III. Arguments in Support of the Ban on Homosexual Adoption.

A. “Moral Realism”: Homosexual Adoption Represents The End of Days?

“In the United States today, we have more than our share of the nattering nabobs of negativism.”

One of the most common arguments brought up against the “right of homosexuals to adopt”, is that it simply does not represent the “best interest of the child.” Those who support an absolute prohibition claim that most of the arguments offered in opposition to a ban reflect the interests and concerns of the petitioner and not the child. Certain individuals have used the phrase “moral realism” to embody the “best interests of the adoptive child.” “Moral Realism”; however, is nothing more than a conservatively based preference for a legal standard that mandates a “family” consists of a mother and father who are “legally” married to one another (emphasis provided). It is based upon the concept that “marriage” and subsequently the “traditional family” is designed to propagate and extend the future of “civilization.”

Hopefully, one would recognize that the “purposes” of marriage involve more than child bearing and the term “traditional family” has significantly evolved throughout history.

The idea that the purpose of marriage is to ultimately bear children to advance civilization is a frightening thought, and one that is likely based upon a eugenically inclined thought process. Heinrich Himmler, leader of the SS, voiced a similar belief in 1937, albeit without intertwining marriage and procreation together.

---

86 http://www.cognitivedistortion.com/?cd=quotes&aid=57 (Accessed on October 19, 2008), quoting a portion of a speech by Vice President Spiro T. Agnew addressing the media.
87 Lofton v. Kearney, 358 F. 3d 804 (11th Cir. 2004).
88 Lynne Marie Kohm, Moral Realism and The Adoption of Children By Homosexuals, 38 New Eng. L. Rev. 643, 660 (2003). Addressing and clarifying that those arguments made in support of homosexual adoption are based upon the interests of the petitioner and not the adoptive child.
89 Id. at 663.
90 Id. at 663.
91 Id. at 663. “Traditional Family” within the framework of “Moral Realism” can only consist of a “mother and father” along with their “children” (typically considered but not necessarily biological in origin).
92 Id. at 644.
“If you take into account the facts that I have not yet mentioned, namely that with a static number of women, we have two million men too few on account of those who fell in the war, then you can well imagine how this imbalance of two million homosexuals and two million war dead, or in other words a lack of four million people capable of having sex has upset the sexual balance sheet of Germany, and will result in catastrophe … I would like to develop a couple of ideas for you on the question of homosexuality. There are those homosexuals who take the view: what I do is my business, a purely private matter. However, all things which take place in the sexual sphere are not the private matter of the individual, but signify the life and death of the nation, signify world power … (emphasis provided).”

By attempting to intrinsically link marriage with procreation and the survival of civilization, supporters of the statutory ban echo Himmler’s “anti-homosexual”, survival of the state rhetoric. Marriage with the singular goal of procreation is in actuality an independent, ancillary result of the marriage, and similar arguments utilizing this thought process have been questioned. The birth of a child to either a married couple or an unmarried individual, or the failure of either to do so, is not so stringently tied to our survival that civilization mandates it must occur. The personal desire to marry can encompass a myriad of personal reasons and the list is far too exhaustive to attempt within this work. Suffice it to say there are couples who marry that possess neither the desire nor the ability to have children. Individuals who enter into a marriage that does not produce children do not weaken the traditional “ideals of marriage”, nor will the marriage pose a threat to the future of civilization. Additionally, any claim that attempts to link the survival of civilization to the “best interests of the child” is tenuous at best.

There are no empirical studies that show marriage is a necessary precursor to the survival

---

93 Nazi Policy Towards Homosexuals: Homosexuals and the Holocaust, located at www.frank.mtsu.edu/~baustin/homobg.html (Accessed Nov. 13, 2008) (In fact the U.S. Supreme Court in Lawrence held that an individual’s sexual conduct was a private matter that should be free from State intervention 67 years later).
94 Goodridge v. Dept. of Pub. Health, 798 N.E. 2d 941, 962 (Mass. 2003). See also at 312, Chief Justice Marshall’s comments that; “Marriage is a vital social institution. The Exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.” Noting there is no preference given to heterosexual marriages and procreation is noticeably absent.
of a civilization. These beliefs are subjectively based upon what is perceived to be the “good of society” and as such they bear little relation to the “best interest of the child.”

The concept of what the “traditional family” compromises has become outdated and nearly obsolete in today’s society. Moore v. City of East Cleveland helped to redefine the image of the “traditional family” into something less rigidly identified as a “mother and father with their biological children.” Homosexuals, both as natural and adoptive parents, signify a continuation of the Supreme Court’s definition of the “family” that was established in Moore. An individual, who has been thoroughly screened to determine his or her fitness and ability to provide a safe, healthy, and permanent home for a child should be afforded the opportunity to form a family. It is the right to have the opportunity to do so and not merely an opportunity that places the petitioner in an advantageous position when compared to his or her heterosexual, parental counterparts that is important to focus upon. The emphasis needs to be placed on the word “family” and not “traditional.” The studies that have been done show that differences between children raised by homosexual vs. heterosexual parents are minimal. Some studies even show that children raised within a “nontraditional” family may have an advantage over

---

95 Troxel v. Granville, 530 U.S. 57, 55 (2000). In the opinion, Justice O’Coner takes note of the fact that composition of families varies greatly among households, and in 1996 children living with one parent accounted for “28% of all children under age 18 in the United States.” see generally at 76, Justice Kennedy’s dissent alludes to the fact that “For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality ....”


97 Moore, supra note 96, at 431, in the opinion by Justice Powell identifying the substantive due process right to live together as a family did not extend only to the nuclear family (emphasis provided).

their peers.\textsuperscript{99} Thus “moral realism’s” arguments with a preference for the “traditional” family do not have merit.

Modern law has traditionally recognized three possible categories of parent: biological, step, and adoptive.\textsuperscript{100} Homosexuals and heterosexuals alike are now able to “procreate” through the use of artificial reproductive technology, with the result being that the child will have at least one biological parent.\textsuperscript{101} This revelation, such as it is defeats the claim that only a marriage between a man and a woman is capable of producing a child that ultimately leads to the propagation of civilization. In the year 2000, our “civilization” has been shown to consist of over 150,000 same-sex couples who were raising at least one child in their homes.\textsuperscript{102} Aside from the current economic turmoil, “civilization” is not imploding upon itself. Contrary to the claims of the “moral realists”, society and with it “civilization” as a whole has continued to evolve and hopefully will prosper into the future. This evolution signifies that “the Cleavers”\textsuperscript{103} as we knew them, can no longer be viewed as the single definition of the term “traditional family.” A society that permits qualified and desiring homosexuals to adopt a child and provide them with a stable and loving home is not the “end of days.” Homosexual parents, be it biological or adoptive means, must now be included within the definition of “family.”

\textsuperscript{99} Latham, \textit{supra} note 98, at 233.
\textsuperscript{100} Latham, \textit{supra} note 98, at 224, referencing the three potential parental categories that the courts consider when addressing custody issues.
\textsuperscript{101} Latham, \textit{supra} note 98, at 224, alluding to the advances in technology involving medically assisted reproduction.
\textsuperscript{102} Latham, \textit{supra} note 98, at 223, citing a 2000 statistical study showing the number of children raised in same-sex households. See also \url{http://www.census.gov/cgi-bin/ipc/idbagg} (Accessed October 26, 2008) that shows the world’s population has grown from 6,548,696,975 in 2006 to 6,706,992,932 in 2008.
\textsuperscript{103} Latham, \textit{supra} note 98, at 231, citing Molly Cooper, Note, \textit{Gay and Lesbian Families in the 21\textsuperscript{st} Century: What Makes a Family?}, 42 Fam. Ct. Rev. 178, 178 (Jan. 2004) and her reference to the “Cleavers” as the representation of the “traditional” family model.
The opposition to an absolute prohibition also encompasses more than a desire by homosexuals, as a subset of the population, to force a change in the law. This argument is too broad in nature and fails to recognize the individualized nature of adoption. It is the desire of the individual to provide a loving and stable home to a child who is most certainly in need of one, regardless of their own sexual orientation. This family is not “traditional” within the context of a conservative society, but it is a family capable of offering the same potential that is found within the “traditional” context. That potential is a permanent and loving familial environment that will permit the child to develop and realize opportunities that the foster care system currently prevents. Homosexual adoption, or marriage for that matter, does not represent the dreaded “end of days” or the decline of our civilization. Homosexual adoption, and the stability and love that it offers truly represents the “best interest of the child” and the opportunity for the continued advancement of our civilization.

B. Statistical Research: The Truth As It Is … or As We Want It To Be?

Opponents and supporters of homosexual adoption point to empirical studies to bolster their respective positions. It is true that research, when done objectively and properly, can have a significant impact on the outcome of an issue. The two arguments involving the use of statistical research concern two main issues. One, that the research that is currently available lacks any significant volume thus the objectivity and quality of this research is less than optimal. Two, the misinterpretation and misuse of the available research to state the opinion of those who seek to support their position.

Gays seeking to become parents and homosexuals in general, face social prejudice and discrimination to such a degree that it is likely to influence the manner in which
psychological research is conducted and the outcomes that are produced. The prevailing presumption that favors a heterosexually based family unit often results in an outcome that inaccurately reinforces the position that healthy child development is dependent upon a married, heterosexual couple. The central issue of the majority of prior research focused upon the increased likelihood of “harm” to the child in the homosexual vs. heterosexual family. Consequently, the majority of the research that has been done by the proponents of homosexual adoption definitively stressed the absence of “harm” to the child in their research. This stressed absence has led to criticism among opponents, who cite a lack of objectivity and favoritism among researchers.

Opponents, most notably Professor Wardle, point out that the body of research that exists is flawed to such a degree that any outcomes must be seriously questioned, if not outright rejected. Professor Wardle also repeatedly points out that the majority of contemporary research based upon the impact of sexual orientation is rarely critical of homosexual parenting. The majority of his writings attempt to attack and discredit any

105 Stacey, supra note 104, at 160.
106 Stacey, supra note 104, at 160.
107 Stacey, supra note 104, at 161.
108 See generally Lynn D. Wardle, The Potential Impact of Homosexual Parenting on Children, 1997 U. Ill. L. Rev. 833, 839 (1997) (showing methodologically flawed and inadequate social sciences ignored increased development of homosexual orientation in children, emotional, and cognitive disadvantages caused by absence of opposite sex parents and economic security). Professor Wardle criticizes the small sample sizes used. Id. at 846. (showing most studies involve samples of a few dozen test subjects); id. at 847-8 (relying on samples of convenience recruited from affinity groups that might not be a true representation); id. at 847 (showing same-sex couples compared to heterosexual unmarried parents might not have partner living with them rather than a married couple); id. at 848 (controlling for other variables that may influence parenting success or child well being, such as income or education); id. at 849 (showing a current lack of longitudinal studies); id. at 850 (showing a lack of consideration regarding the subsequent sexual orientation of children). Prof. Wardle also notes that little concern is shown over the differences between homosexual and heterosexual parenting (differences he contends that surely must exist) Id. at 857.
109 Stacey, supra note 104, at 161.
research showing the positive potential that a prospective homosexual parent might possess. Indeed, Professor Wardle often selectively uses the same research he considers “inadequate” to reinforce and support his argument that the sexual orientation of a homosexual parent harms the child. In two of Professor Wardle’s articles concerning the implications of homosexual adoption, he refers to studies conducted by Paul Cameron, whom Professor Wardle calls “one of the most controversial and oft-criticized psychological researchers.” Paul Cameron’s research was of such a controversial nature that several professional groups, including the American Psychological Association, have either dropped him from their membership or questioned the body of his research involving homosexuals and their impact upon children. It would seem that some of the sources Professor Wardle has used are just as flawed, controversial, and suspect as that which he seeks to discredit.

The main problem with the majority of the current research is that homosexual adoption may only be considered to be a “hot button” legal topic for the past 18 years. In fact, when Florida’s cases involving homosexual adoption were decided, most of the research was either in its primacy or had not yet been fully developed. However, this “lack of depth” must be balanced against the immediate “best interest of the child.”

---


113 http://psychology.ucdavis.edu/rainbow/html/facts_cameron_sheet.html (Accessed October 12, 2008) (identifying Prof. Paul Cameron’s “questionable” research history within the field of sociology and psychology), and Stacey, *supra* note 101, at 161 showing that even though Cameron’s research was found to be flawed, it is still cited in amicus briefs, court decisions, and policy hearings.

114 See Stacey, *supra* note 104, 161 showing Prof. Wardle’s use of controversial materials from books by such authors as David Popenoe, Barbara Dafoe Whitehead, and David Blankenhorn.
The goal of adoption is to remove children from a foster system that has been shown to be detrimental and place them into a permanent home environment that enables them to flourish.\textsuperscript{115} This balancing test implies that research needs to be effectively utilized by the adoptive parent to supplement their fitness evaluation. Research should not be the determining factor, but it should remain one of several criteria that the State officials need to review and consider \textit{in conjunction} with the individual’s personal merit and parental ability. Only when this is done objectively, can a fair and impartial decision be rendered and the value of research maximized.

Research concerning homosexuals, as it applies to their parental fitness and the current assumption that presumes their sexual orientation must preclude them from adopting, has shown that children raised by homosexual parents can and do thrive.\textsuperscript{116} Opponents focus upon the specifics of the wording “no difference” when referring to the impact that homosexual vs. heterosexual parents have upon the development of the child.\textsuperscript{117} Research has shown that there are differences in the parenting styles of homosexuals and heterosexuals.\textsuperscript{118} It is both reasonable and logical to assume that there are differences between homosexual and heterosexual parents.\textsuperscript{119} The question that needs to be \textit{objectively considered} is whether there is a \textit{direct} correlation between the \textit{difference} and a \textit{realistic harm} to the adoptive child that is due to the petitioner’s sexual orientation.

The current body of research suggests that quite often the difference lies within the

\begin{footnotes}
\item[115] Love, supra at note 4, p. 55.
\item[117] Wardle, supra note 112, at 555 (citing to Cameron’s research that shows there is a difference between homosexual and heterosexual parents) and 550 (citing that the study conducted by Stacey & Biblarz as showing a “notable difference” between children raised by “lesbigay” and heterosexual parents as it related to “sexual orientation, gender-appropriate activities, and homoerotic behaviors.”).
\item[118] Stacey, supra note 104, at 168.
\item[119] Stacey, supra note 104, at 176.
\end{footnotes}
individual as a person and not as a result of their sexual orientation. These differences have not been conclusively proven to represent deficits that will impact or impair the “best interests of the child.”

The second issue arises when individuals, typically those opposed to homosexual adoption, misrepresent data to show homosexuals to be outside the “best interest of the child.” This position is evident in the argument regarding the increased likelihood that homosexual parents tend to abuse their children, even though the available data fails to prove this assumption. To further illustrate the potential for misrepresentation, consider the following argument:

“[t]he lowest rates of child abuse occur when children live with both biological parents who are married to each other … therefore homosexual parenting by nature decreases the child’s possibility of avoiding abuse.”

This argument is fundamentally flawed and represents an extreme deviation from logical thinking. The argument is solely based upon the belief that since same-sex couples are incapable of biologically producing a child and therefore resembling the “traditional” family that a child is at an increased risk of being abused. The entire premise of this argument attempts to establish a direct correlation between biological reproduction, the assumed superiority of the heterosexual family, and the assumed decreased probability of

---

120 Diana Baumrind, Commentary on Sexual Orientation: Research and Social Policy Implications, 31 Dev. Psych. 130, 133 (1995), showing that differences should not imply deficits and that the need for convincing empirical evidence is required to support the theory that alternative family structures can produce happy, competent, and moral adults.
121 Goodridge at Note 93, 979. In Justice Sosman’s dissent he alludes to the danger of misrepresentation; “Interpretation of the data gathered by those studies (on the ramifications of raising a child in a same-sex household) then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences.”
123 Kohm, supra note 88, at 657.
124 Kohm, supra note 88, at 657.
This quixotic rationalization is but one example of a deliberate attempt by the “moral majority” to bedazzle the courts and the adoption agencies with an argument based upon statistical smoke and mirrors. This argument has no direct connection between homosexuals and their ability to be fit parents.

In the final analysis, research should be presented to the court’s to rebut the arguments that homosexual adoption represents harm to the development and the “best interest of the child.” The greater body of research that exists shows that homosexual adoption is an acceptable and positive option for those children mired within the foster care system. Research that is questionable in nature and representative of only a small sample of a larger population can potentially be misused and presented, by either side, solely for the purpose of clouding the objective judgment of the judiciary. Therefore, research should be reviewed by the court at arm’s length for both validity and objectivity. Research should merely be one, but not the deciding, factor when determining the potential fitness and parental ability of a homosexual petitioner/parent.

C. Psychological Development and Sexual Identity

The Florida courts and opponents of homosexual adoption have presented three concerns involving the influence that homosexual parents may have on a child’s

125 Kohm, supra note 88, at 657.
126 See generally, Mark Strasser, Adoption and the Best Interests of the Child: On The Use and Abuse of Studies, 38 New Eng. L. Rev. 629, at 632 (studies show children thrive in homes with same-sex parents); id. at 633 (children thrive with two parents, but not necessarily parents of a different sex).
127 Wardle, supra note 108, at 555 (citing the questionable outcomes and opinion’s of Prof. Cameron); and generally, Lynne D. Wardle, The “Inner Lives” of Children In Lesbigay Adoption: Narratives and Other Concerns, 18 St. Thom. L. Rev. 511, 520 (2005) (citing two personal narratives illustrating the danger and negative impact that exposure to a homosexual parents lifestyle had upon two children); Id. at 521 (describing the emotional trauma that a mother’s sexual relationship had upon her child); id. at 522 (showing the propensity of homosexuals to molest children); id. at 525 (showing that exposure to a parent’s homosexuality resulted in an increased sexual promiscuity by the child). Margaret F. Brinig, Promoting Children’s Interests Through a Responsible Research Agenda, 14 U. Fla. J. L. & Pub. Pol’y 137, 148 (2002) (citing the criticisms of the studies conducted by Susan Golombok and Fiona Tasker, specifically as they relate to sample size, participant selection, and the composition of the control group).
psychological development. Experts stress that it is “well established that children’s social and emotional development are fostered within the context of parent-child relationships.128 The primary concern relates to the potential psychological “impairment” of the child’s sexual identity as a direct result of the parents homosexuality. All of these arguments focus upon the child and basically provide an assumption that the petitioner’s sexual orientation will always impair the development of the adoptive child. Sexual identity issues are broken into three separate aspects; the gender identity of the child, gender role behavior, and sexual orientation.129 The issue presented by the social stigmatism of the child is given its own argument.

Opponents of homosexual parenting and adoption have voiced concerns over the future sexual identity of children that are raised by homosexuals.130 They point to studies that show children raised by homosexual parents are “more likely to exhibit curiosity toward members of the same sex” than children raised by heterosexual parents.131 If these studies are to be believed, and they should not, it would seem to lend support to the position held by the “Save Our Children” campaign. This position held that homosexuals were “actively recruiting and seeking to seduce children” over to the homosexual way of life.132 Of course, these same individuals fail to consider or recognize the potential for natural curiosity that is quite typical in the development of all children. Sexual identity is such a broad topic that it has been divided into three additional sections; gender identity, gender role behavior, and sexual orientation.

---

131 Wardle, *supra* note 108, at 852, citing Paul Cameron’s studies involving the “flawed” studies conducted by the Amer. Psych. Assoc., etc.
132 *Battle, supra* note 42, at 20.
Gender Identity

Gender Identity is defined as the child’s self identification as either a male or female. The primary concern is that a child raised by homosexual parents will become confused as to their own sexual identity and this “confusion” will result in harm to the child’s development. The majority of studies show that this is not the case. Studies that have been done on more than 300 children up through the year 2002 show no evidence of gender identity confusion, a desire to be the opposite sex, or an engagement in cross-gender behavior. In fact, the gender identity of most children has been shown to be firmly established and highly resistant to change by the age of three.

One theory concerning this outcome is based upon the belief that the modeling of gender stereotypes, rather than the presence of same-sex parents promotes the gender development of the child. A female child raised by a lesbian mother would not be expected to adopt a lesbian identity merely by exposure to and the observation of her mother. This theory would seem to imply that it is the environment and the choice made by the child, not the influence of the parent’s sexual orientation that impacts the internal sexual identity of the child. This theory is supported by the fact that there were

133 Lesbian & Gay Parenting, supra note 129, at 8.
134 Wardle, supra note 108, at 853 suggesting that “homosexual parenting may have some effect upon children in relation to … developmental issues surrounding their sexuality.”
138 Golombok, supra note 137, at 4.
no differences observed in the preference for toys, games or other forms of peer social interaction in the children of lesbian vs. heterosexual parents.\textsuperscript{139}

An alternative theory focuses upon the cognitive mechanisms involved in gender development.\textsuperscript{140} This theory is also premised upon the assumption that gender stereotypes, not parents, are the primary source of a child’s gender-related information.\textsuperscript{141} The child will seek out information that is consistent with his or her own developing sexual orientation, and he or she will value and identify with those characteristics that are consistent with \textit{his or her views} (emphasis provided).\textsuperscript{142} It would seem to imply that the child’s gender development comes from within the child themselves and not as a result of exposure to one particular lifestyle or orientation. The emphasis shifts from the parent’s sexual orientation to that of “society” and the directional “drift” of the child.\textsuperscript{143}

These two theories show that the sexual orientation of the parent does not exert an overwhelming or determinative influence on the child’s ultimate gender identity. The gender stereotypes throughout the child’s world, including their peer associations, influence the behaviors that the child, and not the parents or quire possibly society, will deem to be “appropriate.”\textsuperscript{144} There is no specific definition for what “gender appropriate behavior” may be defined as and in today’s progressive world such a definition might quickly become outdated or subject to the personal biases of the interpreter.\textsuperscript{145} Research seems to indicate that it is the child who will gravitate toward a particular social

\begin{itemize}
\item \textsuperscript{139} \textit{Technical}, supra note 135, at 342.
\item \textsuperscript{140} Golombok, supra note 137, at 4.
\item \textsuperscript{141} Golombok, supra note 137, at 4.
\item \textsuperscript{142} Golombok, supra note 137, at 4.
\item \textsuperscript{143} Golombok, supra note 137, at 4.
\item \textsuperscript{144} Amity Pierce Buxton, \textit{The Best Interest of Children of Gay and Lesbian Parents}, in The Scientific basis of Child Custody Decisions, 328, 331 (Robert M. Galatzer-Levy & Louis Kraus, eds. 1999).
\item \textsuperscript{145} \textit{Technical Report}, supra note 135, at 341 showing that children may benefit from the equal division of labor that is prevalent in lesbian households.
\end{itemize}
orientation based upon their internal recognition of “gender appropriate” and not the alleged influential pull of their parent’s sexual orientation.

Opponents of homosexual adoption are quick to point to the fact that some children raised in homosexual households have experienced “feelings of attraction” towards members of the same sex. These same individuals fail to point out these studies show the numbers to be very similar between homosexual and heterosexual families. This tends to reinforce the fact that curiosity in developing adolescents is a natural occurrence and not the product of more insidious forces. There is no empirical evidence available that can conclusively show that the sexual orientation of the parent resulted in the child’s attraction to a member of the same sex. An argument that is based upon this premise is flawed and is likely offered to cloud the judgment of the court.

Opponents often fail to consider the potential harm that a heterosexual couple represents to a homosexual child. The argument that sexual orientation is influential is two sided in nature. There is ample evidence that society is prejudiced against homosexuals and homosexual conduct, and it is logical to assume that this hostility would extend into parenting and the “traditional family.” A homosexual child that is “forced” to adopt a lifestyle and belief system that goes against their character is highly likely to be harmed. This harm is even more realistic than that claimed by those seeking to prevent homosexuals from adopting. History is replete with examples of society’s intolerant and often violent rebuttal of homosexuals and homosexuality. It would seem

---

148 Terl, supra note 16, Prof. Terl’s entire article is laden with objective proof that homosexuals in Florida have been the target of an ongoing political and social animus. This animus is very likely to extend into the private context of the family.
that the homosexual individual would be better suited to permit the homosexual child to develop in an optimal environment, then the “traditional, ideal family.”149 This argument is based on the fact that a homosexual parent is much more sensitive to the issues surrounding society and homosexuality then their heterosexual counterparts.150 If we apply the same system to these cases, then the whole concept of adoption would be thrown awry and the future for all children within the foster care system would be bleak. This assumption is based upon the premise that the already lengthy adoption procedure would increase to an even further degree and that these additional impedances would dissuade more individuals from seeking to adopt.

The sexual orientation of a parent does not influence the gender identity of a child. An adoption determination needs to be based upon objective criteria that are applied to individual petitioners on a case by case basis. The evaluator needs to look at the “best interests of the child” and seek to determine if there are any factors, outside of a general sexual orientation issue, that represent a “harm” to the growth and development of the child. To date, there is no evidence that conclusively shows a homosexual parent’s ability to influence the gender identity of a child.151 Nor is there conclusive proof that a parent’s homosexual orientation results in such a likelihood of harm to the child that an absolute prohibition is justified.

**Gender-Role Behavior**

Gender-Role Behavior is defined as “the pattern of masculine or feminine behavior of an individual that is defined by a particular culture and that is largely

---

149 Stacey, supra note 104, at 178.
150 Stacey, supra note 104, at 178.
151 Lesbian & Gay Parenting, supra note 127, at 9.
determined by a child’s upbringing.”\textsuperscript{152} This concept is closely aligned with the gender identity of the child. The formation of gender roles is a “more gradual, flexible process” that is influenced by a variety of factors: “parental reinforcement, social pressure, and modeling and imitation of the parents, peers, and television characters.”\textsuperscript{153} Opponents focus solely upon the sexual orientation of the parent and argue that it will dominate the child’s ability to engage in “acceptable” gender-role behavior; i.e. gender specific occupations and interests.

A study has shown that the daughters of lesbian have expressed an interest in male-dominate careers.\textsuperscript{154} Girls with lesbian parents tended to dress “less feminine” for school and other social activities.\textsuperscript{155} The daughters of lesbian mothers were reported to have engaged in more “rough and tumble” behavior with their peers than those found in the “traditional” family.\textsuperscript{156} All of these behaviors are perfectly acceptable activities for a developing child to engage in. The issue ultimately boils down to one of potential “harm” to the child. It is not logical to conclude that because the child of a homosexual parent seeks to pursue a non-traditional career, it was the direct result of the parent’s sexual orientation or that this non-traditional pursuit will result in “harm” to the child.\textsuperscript{157} A non-traditional career for a child might consist of one in the field of medicine or law, this choice is not likely to be the result of the parent’s orientation but the shift in the trend of the individual to pursue newer career paths.\textsuperscript{158}

\textsuperscript{153} Warring, supra note 111, at 292 n. 180.
\textsuperscript{154} Buxton, supra note 144, at 343-44.
\textsuperscript{155} Buxton, supra note 144, at 343-44.
\textsuperscript{156} Lesbian & Gay Parenting, supra note 129 , at 9.
\textsuperscript{158} Buxton, supra note 144, at 344.
A parent’s sexual orientation has not been conclusively proven to impact a child’s gender-role behavior to such a degree that it represents a “harm” to the child. The child may engage in alternative behavior; i.e.; more physical play, but this is not directly tied to the sexual orientation of the parent.\textsuperscript{159} Research in the area of gender identity has shown that this is more likely the product of the child’s peer association and extra-familial environment.\textsuperscript{160} If anything, it may be shown to offer a potential benefit to the child to a greater degree than might be found in the heterosexual family unit. The sexual orientation of a parent does not negatively impact the development of their child’s; biological or adoptive, gender-role behavior.

\textbf{Sexual Orientation}

Sexual Orientation is defined as “one's natural preference in sexual partners; predilection for homosexuality, heterosexuality, or bisexuality.”\textsuperscript{161} Those who argue against homosexual adoption claim that the sexual orientation of the parent(s) is an influential factor in the child’s future sexual orientation. The “social constructionist” belief system holds that there is nothing inherent or pre-determined regarding sexual orientation but that is it determined by the individual’s environment.\textsuperscript{162} However, most if not all current homosexual individuals have been raised by two heterosexual parents in a “traditional” family environment.\textsuperscript{163} These parents may not be accepting of their child’s sexual orientation or lifestyle but the fact remains that a “traditional” heterosexual marriage

\textsuperscript{159} \textit{Lesbian & Gay Parenting}, supra note 129, at 9.
\textsuperscript{160} Golombok, \textit{supra} note 137, at 4 presenting two theories regarding the development of a child’s gender identity.
\textsuperscript{161} \url{http://dictionary.reference.com/browse/sexual+orientation&} (Accessed on October 26, 2008).
\textsuperscript{162} Warring, \textit{supra} note 111, at 287.
\textsuperscript{163} Shaista Parveen-Ali, \textit{Homosexual Parenting: Child Custody and Adoption}, 22 U.C. Davis L. Rev. 1009, 1017 (1988) quoting an article from the N.Y. Times stating the chairman of the Amer. Psychological Assoc. Comm. believes that ‘people who worry about their child’ sexual orientation inevitably will follow that their parents should remember that most people who are homosexual were \textit{raised by heterosexual parents and surrounded by heterosexual role models as they were growing up} (emphasis provided).”
produced an individual who identifies with homosexuality. This factor alone should be enough to show that it is the individual and not the external stimulus provided by the parent’s sexual orientation that determines the sexual orientation of the child. As in gender identity, there is considerable debate as to whether homosexuality is immutable from birth or a “choice” that is developed through life. 164 None of these studies are conclusively determinative as to “why” an individual adopts or manifests a particular sexual orientation of “if” an individual is born with a predisposition towards a specific orientation.

A great deal of emphasis has involved the issue of whether homosexuality, itself is either an immutable trait or the lifestyle of “choice” that may be affirmatively entered into by a heterosexual individual. “Immutability” is defined as: “not mutable; unchangeable; changeless.” 165 Thus a homosexual should be considered and, in fact, is a homosexual from the moment they are born. “Choice” is defined as one of the following: “the act of choosing; selection … a person or thing chosen, a variety from which to choose, or an alternative.” 166 Those who unfavorably view homosexuals and homosexuality, Anita Bryant included, often claim that homosexuality is a “choice” that was consciously made by the individual. This simple view cheapens and dilutes exactly what “choice” means. The California Supreme Court dealt with the “immutability v. choice” issue in the In re Marriage Cases. In its ruling the Court held that although gender is considered to be an immutable trait, immutability was not required in order for the characteristic to be considered a suspect classification for the purpose of equal

164 Baumrind, supra note 120, at 130, discussing several theories regarding sexual orientation or “preference” (as the author prefers).
protection (emphasis provided).  The Court went further to hold that “Because a person’s sexual orientation is so integral an aspect of one’s identity, it not appropriate to require a person to repudiate or change in order to avoid discriminatory treatment (emphasis provided).” Sexual orientation whether it is based upon biological or physiological considerations needs to be considered as such a deeply ingrained personal characteristic that it is either “unchangeable or changeable only at unacceptable costs … (emphasis provided)” As of 2008, the California looks beyond the terms “immutable” and “choice” and has rightly begun to focus on the specific “nature” involved with the characteristic in question. Sexual Orientation needs to be considered as a characteristic, chosen or otherwise, that is of such an intrinsic nature that to alter it would result in substantial harm to the individual.

The argument favoring orientation through influence is based upon the belief that homosexuals are constantly seeking to subvert children towards a homosexual orientation, classified as “recruiting” by Anita Bryant. This argument is particularly weakened in light of the advancements in reproductive technology that are available to homosexuals in today’s world. It is based upon the assumption that homosexuals desire their children to be homosexual, and this argument is most certainly incorrect. It would be highly illogical for a homosexual parent, who has faced and endured the level of hostility and animus present in today’s society, to desire that his or her child be

167 In re Marriage Cases, 43 Cal. 4 the 757, 841 (Ca. 2008).
166 Marriages, supra note 167, at 842 (quoting the holdings in Hernandez-Montiel v. I.N.S, 225 F. 3d 1084, 1093 (9 the Cir, 2000)).
170 Battle, supra note 42, at 20.
171 Latham, supra note 98, at 224.
subjected to the same hostilities. This argument also assumes that a homosexual parent has the ability and means to effectively influence a child towards their own orientation (emphasis provided). It should be noted that opponents have been unable to explain why heterosexual parents can produce a homosexual child, if the child indeed imitates the orientation of his or her parents. If parental influence were all that was required to determine their child’s sexual orientation than society should consist of only heterosexual individuals. In all of the studies done through 2000, the majority of children of homosexual parents, lesbian or gay, described themselves as heterosexual. This seems to imply that there are no elevated rates of homosexuality among the children of homosexuals. Given the difficulty found in the “nature vs. nurture” argument, it can not be conclusively held that a parent’s sexual orientation will influence that of their child. Therefore, a homosexual petitioner can not have their sexual orientation to be viewed as a barrier to adoption. A concern based upon this assumption can be construed

---

173 Ali, supra note 163, at 1017 n. 51 citing an example given in the N.Y. Times, Jan. 21, 1987, §n3, at 1, col. 1. “The Chairman of the American Psychological Association’s Committee on Lesbian and Gay Concerns, stated, “People who worry that child’s sexual orientation inevitably will follow that of their parents should remember that most people who are homosexual were raised by heterosexual parents and surrounded by heterosexual role models as they were growing up (emphasis provided).” One gay father summed up this quotation when he commented, see also Comment, Assessing Children’s Best Interests When a Parent is gay or Lesbian: Toward a Rational Custody Standard, 32 U.C.L.A. L. Rev. 852, 883 n. 200 (1985), “My straight parents failed to make me straight, so there’s no reason to believe I’d succeed in doing the reverse with (my son), even if I wanted to.”

174 Rivera, supra note 172, at 211. “In terms of rationality this claim (that the child will become gay) probably is the most ludicrous. Who are the parents of gay human beings? … Obviously, the way to prevent homosexuality is to prevent heterosexual childbearing or child rearing (emphasis provided).”


176 Lesbian & Gay Parenting, supra note 127, at 10, referencing Huggins (1989) showing that none of the 36 adolescents of (1/2) heterosexual and (1/2) homosexual parents identified themselves as homosexual, Golombok & Tasker (1996, 1997) showing that 25 young adults reared by heterosexual and homosexual mothers did not identify themselves as non-heterosexual. Note that Golombok’s studies involved smaller sample groups and they must be viewed with caution and not taken conclusively, similar to those studies showing that approximately 90% of all male children of gay fathers identified themselves as gay (Bailey 1995).

as holding homosexuality is a “condition” that should be controlled or avoided.\textsuperscript{178} A ban that is based, even to small degree, on the belief that homosexual orientation can be passed to the child is logically flawed and lacks empirical support.\textsuperscript{179}

Indeed many of the available studies show that the children of homosexual parents did not identify themselves as either homosexual or express the desire to be homosexual.\textsuperscript{180} A 1993 study done by Javaid involving 26 children between the ages of six and twenty-five, of lesbian mothers and 28 children of heterosexual mothers found that nearly all of the boys and the majority of the girls desired marriage and children, while none of them expressed a desire to be homosexual.\textsuperscript{181} Typically, studies have shown that the percentage of children raised by homosexuals who identified themselves as homosexual ranged between zero to nine.\textsuperscript{182} These results would seem to imply and reinforce the argument that sexual orientation is more a product of heredity than observation. If this were the case, then it would serve to significantly undermine the argument that homosexuality is an immoral or improper choice.\textsuperscript{183}

The same argument regarding the potential harm that a heterosexual petitioner can present to a homosexual child is even more appropriate in this context. History has shown the stigma and prejudice society has regarding homosexuals. It is highly logical that a heterosexual family would actively seek to either suppress their child’s homosexual desires by impressing their own beliefs regarding the “immorality” of homosexuality.\textsuperscript{184} If such an incident were permitted to take place, and it quite possibly may, then the child

\textsuperscript{178} Latham, supra note 98, at 229.
\textsuperscript{179} Cates, supra note 177, at 30.
\textsuperscript{180} Warring, supra note 111, at 282 n. 127 – 143.
\textsuperscript{181} Warring, supra note 111, at 282 n. 131.
\textsuperscript{182} Warring, supra note 111, at 284 n. 145.
\textsuperscript{184} Cooper, supra note 157, at 178.
would most certainly be at risk from the dangers of suicide, running away from home or the other manners of harm that Professor Wardle alluded to in his works.\textsuperscript{185}

A parent’s sexual orientation has not been found to influence the sexual orientation of his or her child. A homosexual petitioner for adoption should have his or her petition considered on the objective merits they present and not the subjective bias of a flawed and inconclusive argument.

\textbf{Social Stigmatism}

The claim that the child, whether they are adoptive or biological, of homosexual parents is less likely to be “accepted” and possibly even ridiculed by society is another argument posited for prohibiting homosexual adoption.\textsuperscript{186} This concern, however, is not strong enough to stand on its own and support an absolute prohibition on homosexual adoption.\textsuperscript{187} Research has shown that the incidents of harassment and teasing of children based upon the sexual orientation of their parents does not occur to such a degree that would make it a certainty.\textsuperscript{188} When a child was subjected to teasing and bullying from his peers, the incidents were categorized as “minor and transitory.”\textsuperscript{189} Studies show that

\begin{flushleft}
\textsuperscript{185} Wardle, \textit{supra} note 108, at 854.
\textsuperscript{186} \textit{Bottoms v. Bottoms}, 457 S.E. 2d 102, 108 (Va. 1985) (custody was awarded to a maternal grandmother due to the concern that the mother’s “active” lesbianism would impose a burden on the child from the resulting “social condemnation” attached to the homosexual lifestyle and would likely impact the social relationships with peers and the community)(quoting \textit{Roe v. Roe}, 324 S.E. 2d 691, 699 (Va. 1985)); \textit{Jacobson v. Jacobson}, 314 N.W. 2d 78, 81 (N.D. 1981) (custody given to heterosexual father due to the potential “danger” present to the child from the “slings and arrows of a disapproving society” as a result of the mother’s lesbian lifestyle).
\textsuperscript{187} Ali, \textit{supra} note 163, at 1020-21.
\textsuperscript{188} Nancy D. Polikoff, \textit{This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families}, 78 Geo. L.J. 459, 568 n. 588 (1990) (citing a 1989 survey that found 80% of the daughters and more than 80% of the sons of lesbian mothers reported that they were liked “much more”, “somewhat more”, or “as much” by their heterosexual peers as other children in their school class, compared to 75% of the daughters and more than 80% of the sons of heterosexual mothers); Marc E. Elovitz, \textit{Adoption By Lesbian and Gay People: The Use and Mis-Use of Social Science Research}, 2 Duke J. Gender L. & Policy 207, 215 n.47 (1995) (citing a study conducted in 1979 that found 5% of the children living with a known homosexual parent surveyed had experienced harassment from their peers).
\textsuperscript{189} Elovitz, \textit{supra} note 188, at 215.
\end{flushleft}
children with homosexual parents enjoy nearly the same high quality friendships and exhibit the same degree of social competence as their heterosexual counterparts.\textsuperscript{190}

Modern courts, with the exception of Florida, no longer view stigma as a determinative factor in custody decisions were the homosexuality of one of the parents is involved.\textsuperscript{191} Courts are encouraged to view stigma as only one factor of many involved in custody decisions, and the same consideration should be given to homosexual adoption petitioners.

In \textit{Palmore v. Sidoti}, the Supreme Court held that a custody decision that was based upon the perceived harm to the child from societal stigma was unconstitutional.\textsuperscript{192}

\textit{Palmore} involved a Florida custody battle between two biological, \textit{white} parents following a divorce. The court initially awarded custody to the mother, who subsequently married a \textit{black} man.\textsuperscript{193} The court then granted the biological father’s subsequent custody petition based solely upon the belief that the social stigma associated with being the child of an interracial marriage.\textsuperscript{194} The Supreme Court unanimously reversed the lower court’s decision and in Justice Burger’s opinion stated:

“\textit{The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect} (emphasis provided).”\textsuperscript{195}

\begin{itemize}
  \item \textsuperscript{190} Julie Mooney-Somers & Susan Golombok, \textit{Children of Lesbian Mothers: From the 1970’s to the New Millennium}, 15 Sexual & Relationship Therapy 121, 122 (2000) (children of lesbian mothers were no more likely to be teased or bullied … as their heterosexual counterparts); Devon Brooks & Sheryl Goldberg, \textit{Gay and Lesbian Adoptive and Foster Care Placements: Can They Meet the Needs of Waiting Children?}, 46 Soc. Work. 147 (2001).
  \item \textsuperscript{191} \textit{S.N.E. v. R.L.B.}, 699 P. 2d 875, 879 (Alaska 1985) (reversing the decision of the lower court transferring custody from a lesbian mother to a heterosexual father).
  \item \textsuperscript{192} \textit{Palmore v. Sidoti}, 466 U.S. 429 (1984) (holding “the law cannot, directly, or indirectly give (other peoples’ biases and prejudices) effect …” and stating “the Constitution cannot control such prejudices, but neither can it tolerate them (emphasis provided)).”
  \item \textsuperscript{194} Wishard, \textit{supra} note 193, at 417.
  \item \textsuperscript{195} \textit{Palmore, supra} note 57, at 434.
\end{itemize}
These rulings have all dealt with the rights of a biological parent but the individual seeking to adopt is no less competent or able to provide the same positive environment as their biological peers and will be assuming a position that is legally identical to the biological parent. The potential for stigma is no greater than that faced by a biological child and the fitness and ability to successfully guide an adopted child is no less that of a biological parent. The children, be they biological or adopted, of homosexual parents are said to possess an increased understanding of prejudice, greater freedom to change and seek alternatives, and for the most part are more tolerant of differences and intolerant of discrimination.\footnote{Buxton, \textit{supra} note 144, at 346.} It is reasonable to assume that a qualified homosexual petitioner would be able to develop similar qualities within the adoptive child. A more tolerant and open child is certainly more desirable to society than one laden with biases and prejudices.

The social stigmatism that may be associated with a homosexual petitioner is a valid concern as it relates to the “best interests of the child”, yet the \textit{Palmore} court has shown it to still be unconstitutional. Florida’s denial on the right of homosexuals to adopt based upon the fear of social stigmatism to the child has effectively legalized a private societal bias.\footnote{Wishard, \textit{supra} note 193, at 417.} A fear of stigmatism is not enough to support an absolute prohibition that fails to consider all of the factors and merits that each individual petitioner possesses. A ban based upon societal stigma runs afoul of \textit{Palmore} and like \textit{Palmore} is unconstitutional.
D. The Perceived Parental Inability of Homosexuals Based Upon Their Sexual Orientation.

In Loyalty to Their Kind, They Cannot Tolerate Our Minds. In Loyalty To Our Kind, We Cannot Tolerate Their Obstructions.  

Those opposed to permitting adoption by homosexuals point to three main arguments in support of their position. One, the homosexual lifestyle lends itself to an unstable environment that is not present within the “traditional” married family. Two, homosexuals have a higher tendency to sexually abuse children. Three, the threat of HIV and AIDS places the child at higher risk than will be found in the traditional family. All of these arguments lack empirical support and represent a continued oppressive animus towards a section of the population deemed to be “undesirable.” These arguments focus upon the ability of the homosexual as an individual to provide the same stable parenting qualities that are claimed to be present and superior in heterosexual families.

Parental Inability and Instability Based Upon Homosexuality

The opponents of homosexual adoption assert the opinion that the homosexual lifestyle, by its very nature, is incapable of providing the ideal, stable environment that is necessary for the optimal development of the child. The belief is that a heterosexual, married family is a superiorly situated arrangement that affords the child with a male and

---

199 Lofton, supra note 50, at 1298, citing Justice Barkett’s dissent that “no evidence to show that homosexuals are incapable of providing the permanent family life sought by Florida.” and “it is not marriage that guarantees a stable, caring environment for children but the character of the individual caregiver (emphasis provided).”
200 Elovitz, supra note 188, at 216 (noting that the prevailing opinion that there is a link between same-sex orientation and child sexual abuse).
201 Ali, supra note 163, at 1019
202 Lofton, supra note 50, at 1296.
a female authority figure to aid in his or her childhood development and socialization.\textsuperscript{203} In \textit{Lofton}, Florida stressed the vital role that \textit{dual-gender} parenting plays in the development of a child’s sexual and gender identity, as well as being able to provide a \textit{heterosexual} role model.\textsuperscript{204} Critics also continue to view the homosexuality as a mental illness that results in the individual suffering from both mental and emotional instability.\textsuperscript{205} However, none of these arguments are supported by objective, empirical research and therefore they may not be considered as valid concerns.

Marriage may not be used as an indicator to determine either the fitness of the individual parent or their ability to meet the responsibilities associated with child rearing. There are no established criteria, nor can there possibly be, that can be applied to those individuals seeking to enter into a marriage. All kinds of people are capable of entering into marriage even if they would not be deemed to acceptable adoptive parents. There is no way, aside from personal intuition, to identify potential character flaws that an individual may possess and thus marital continuity is far from being classified as a certainty.

In her dissent, Justice Barkett took exception to the Court’s holding that a married, heterosexual home represented a superiorly stable environment to the child.\textsuperscript{206} She correctly notes that “it is not marriage that guarantees a stable, caring environment for children but the character of the caregiver” (emphasis provided).\textsuperscript{207} In today’s society, divorce has reached such enormous proportions that it is frequently referred to as an

\textsuperscript{203} \textit{Lofton}, supra note 50, at 1296.
\textsuperscript{204} \textit{Lofton}, supra note 50, at 1296.
\textsuperscript{206} \textit{Lofton}, supra note 50, at 1298.
\textsuperscript{207} \textit{Lofton}, supra note 50, at 1298.
“epidemic.” In 2004, Justice Barkett noted that “50% of all first marriages for men under the age of 45 and 44 – 52% of first marriages for women in the same age range were likely to end in divorce.” In 2003, Florida was ranked sixth in the nation with the highest divorce rate. In a year in which the nation experienced an overall decrease in the rate of divorce, Florida led the nation in divorces with 66,712 in 2007. This alarming fact drives home Justice Barkett’s point that marriage does not equate to an advantageous stability when it comes to child development. Supporters of the stable, heterosexual family truly fail to appreciate the instability and impact that divorce has on the entire family.

Divorce has often been labeled as a tragedy that has a profound impact on the children of the family. It is estimated that children from “divorced or re-married families are two to three times more likely to be referred for psychological help at school than their peers in intact families.” These statistics show that marriage is far from stable and certain and that children within this supposedly optimal environment can and often do suffer significant harm when the marriage ends. It would appear that children who are placed within a supposedly stable, heterosexual home have the potential to be “harmed” due to the current instability that is associated with marriage and divorce.

The prevalence of divorce among heterosexual couples in today’s society does not demonstrate a superiorly stable environment for children when compared to the homosexual, non-traditional family. As early as 1978, research has shown that “gay and

209 Lofton, supra note 50, at 1299.
210 Lofton, supra note 50, at 1299.
213 Id. quoting a portion of Judith Wallerstein’s book, “The Unexpected legacy of Divorce”.

45
lesbian couples can and do form life-long commitments…”214 These relationships possess the same fundamental qualities that are found within the traditional marital environment. In 1978, almost 30% of gay men and nearly 75% of lesbians studied in the San Francisco Bay area classified themselves as being in a committed relationship.215 This trend continued into the next decade and in 1987, it was show that “40 to 50% of gay males are coupled in long term committed relationships, and that 75% of lesbians are similarly so committed.”216 There is no reason to assume that this trend has not continued into the new millennium and therefore there is no valid justification for favoring the heterosexual over the homosexual family aside from a personal bias.

The second argument regarding the instability of the homosexual individual deals with the assumption that homosexuality, in and of itself is an illness.217 This argument asserts that an individual who is incapable of being mentally and emotionally stable will naturally lack the necessary fitness to parent a child, due to their “illness.”218 Therefore, an individual who is homosexual is psychologically unfit and incapable of being a stable and positive parent to an adoptive child. Naturally, courts would be likely to place a greater emphasis upon this when they are faced with a decision regarding the adoption of a child vs. parental custody. In custody decisions, the parent is likely to have formed a relationship with the child through both biological and psychological means. However, in adoption proceedings the petitioner, for all intents and purposes, is considered a

217 Susoeff, supra note 205, at 870.
218 Nadler v. Superior Court, 255 Cal. App. 2d 523 (1967) quoting the trial judge’s explanation that unrestrained visitation may be considered if the “lesbian mother took therapeutics (emphasis provided).”
stranger. In 1980, the American Psychiatric Association removed homosexuality from the list of recognized mental illnesses.\textsuperscript{219} Courts have been slow to recognize or accept this modern medical view of homosexuality.\textsuperscript{220}

Homosexuals are no more likely to suffer from psychopathology than a heterosexual person might.\textsuperscript{221} Yet, medical and social science have continued to propagate the current anti-gay “mental illness” stereotypes that still exist within our culture. Many of the early studies used samples and methods that produced highly distorted results.\textsuperscript{222} Courts have held that a homosexual parent is incapable of forming a true parental bond with their child.\textsuperscript{223} Some Courts have gone as far as to insinuate that “substituting two male homosexuals for ‘parents’ does violence to both the literal definition of parents and the traditional concept of what a family is.”\textsuperscript{224} The court system has continually failed to specifically cite what that “violence” specifically is and how an individual’s homosexuality represents a legitimate harm to the child. These arguments mirror those given in support of prohibiting homosexuals from adopting and are based upon private societal bias and not objective empirical research.

Today, a growing body of research has shown that homosexuals are just as likely to be emotionally and socially well-adjusted as their heterosexual counterparts.\textsuperscript{225} A study conducted at UCLA’s Gender Identity Clinic revealed two things; (i) that lesbian

\begin{itemize}
\item \textsuperscript{219} American Psychiatric Association, D.S.M. III: Diagnostic and Statistical Manual for Mental Disorders 281-82, 380 (3d ed. 1980).
\item \textsuperscript{220} Susoeff, supra note 205, at 870 n. 120 referencing the traditional historical beliefs that homosexuals suffered from a “mental illness” and the courts subsequent reliance upon these beliefs to base their rulings in custody matters.
\item \textsuperscript{221} Mark Freedman, Homosexuality and Psychological Functioning 65 (1971); Ashley Montagu, A Kinsey Report on Homosexualities, 12 Psychol. Today 62, 66 (1978) (“Homosexuals appear, on the whole to be as psychologically well adjusted as heterosexuals”).
\item \textsuperscript{222} Susoeff, supra note 205, at 871 n. 122 illustrating the flawed procedural methods used in early research.
\item \textsuperscript{223} In re Davis, 1 Fam. L. Rep. (BNA) 2845, 2846 (Wash. Super. Ct. 1975).
\item \textsuperscript{224} Id. at 2846.
\item \textsuperscript{225} Susoeff, supra note 205, at 871 referencing studies showing “convincing evidence that homosexuality is not a criterion predictor of psychopathology.”
\end{itemize}
mothers as a whole had a greater interest in breast feeding their child than their heterosexual counterparts, which has been interpreted to be a greater capacity for emotional bonding, and (ii) these same mothers exhibited an increased concern in providing male figures for their children than their counterparts (emphasis provided).226

Research involving lesbian mothers has shown a “remarkable absence of distinguishing features between the life styles, child rearing practices” from their heterosexual counterparts.227 Indeed as early as 1976, the American Psychiatric Association (APA) adopted a resolution which states: “The sex, gender identity, or sexual orientation of natural or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases (emphasis provided).”228 Thus, it is logical to conclude that a homosexual family is no more likely to offer an unstable environment than their heterosexual counterparts due to the prevalence of divorce in today’s society. It is also logical to conclude that homosexuality is not a mental illness that is likely to prevent a homosexual from forming an adequate, loving, and stable emotional bond with a child. Any evaluation into parental fitness must evaluate the petitioner as an individual and be free of any of the historical bias that has unfairly held homosexuals to be “less than ideal” parents.

The Distorted Threat of HIV and AIDS

The argument that children of homosexual parents have an increased risk of HIV infection has diminished significantly within the past few years but it deserves attention

nonetheless. HIV and AIDS have had a significant impact upon the homosexual community in North America; in 2005 the male homosexual community reported an infection rate of 71% among male adults and adolescents.\(^{229}\) During the 1980’s, the media labeled AIDS, the “scourge of the gay community” and it came to be viewed as a “homosexual problem.”\(^{230}\) However, the “scourge” has transformed into an epidemic and the effects are not limited exclusively to the homosexual community. In 2005, high-risk heterosexual contact was the source of 80% of those newly diagnosed infections among women in North America (emphasis provided).\(^{231}\) Ongoing research shows that HIV and AIDS are not the exclusive problem of the homosexual community. Nor should a prospective homosexual petitioner be considered to represent an increased health risk to the adoptive child based solely upon their sexual orientation.

Most courts within the United States require a showing of the direct danger of AIDS infection to the child before they will alter a parents custody or visitation rights, due to the fact that ordinary household contact does not permit transmission of the disease.\(^{232}\) HIV is spread by sexual contact with an infected person, by sharing needles and/or syringes with someone who is infected, or, less commonly, through transfusions of infected blood or blood clotting factors.\(^{233}\) In the first instance, the parent would have to engage in sexual conduct with their child, i.e. potentially sexual abuse, but, as will be shown shortly, there are no credible studies available that show homosexual parents are more likely to sexually abuse their children than heterosexual parents. The second

\(^{229}\) http://www.cdc.gov/hiv/topics/msm/resources/factsheets/msm.htm
\(^{230}\) http://www.time.com/time/magazine/article/0,9171,1048461,00.html
\(^{231}\) http://www.cdc.gov/hiv/topics/women/resources/factsheets/women.htm
\(^{233}\) http://www.cdc.gov/HIV/resources/factsheets/transmission.htm
method of transmission would seem to indicate that the infected parent would actively engage in drug use with their child, and as with sexual abuse, there are no reliable studies that show homosexuals to have a higher incidence of a) drug use and b) shared drug use with their children.

Hopefully, one would see the irrationality of such a conclusion should it ever be offered. Finally, if the child of an infected parent were to require an emergency transfusion there are a multitude of safe alternatives that can be pursued to save his or her life. It would be understandable for the parent to be both concerned and desirous to assist the child but this desire would be logically offset by the realization that safer alternatives do exist.

The state of Utah opined that same-sex couples are unable to provide permanent homes because homosexuals tend to have a decreased life expectancy.\textsuperscript{234} To support its position concerning the state interest in preventing homosexual adoption, the State relied upon two studies that claimed a) “gay sex can be deadly behavior”, “40% of gay men never use condoms during … intercourse”, and “30% of all twenty year old homosexuals will be HIV positive or dead by the time they reach thirty”\textsuperscript{235} and b) “that even without HIV infection, homosexual behavior shortens life expectancy.”\textsuperscript{236} The State, however, fails to define why gay sex is deadly beyond the assumption that all gay sex must result in the infection of HIV. It fails to show that even with 40% of gay males not using condoms there are 60% who do, if their research methods are to be trusted. A bright line, threshold number is not reliable because often the manner in which the number is

\textsuperscript{235} State of Utah Brief, supra note 234, at 25-6.
\textsuperscript{236} State of Utah Brief, supra note 234, at 26.
determined is arbitrary and will, in time, become obsolete. Utah relies upon the research that was conducted by Paul Cameron and his methods have been labeled as “suspect” by both the psychological and legal communities\textsuperscript{237}, and these facts alone should give one pause to consider the validity of any argument upon which they are based.

Professor Wardle aligns one of his arguments against homosexual adoption with Paul Cameron’s skewed analysis. He correctly assumes that the death of a parent would result in severe trauma for children\textsuperscript{238}, but his analysis of the issue begins to run awry from that point. Relying upon Paul Cameron’s research, Professor Wardle makes the assertion that homosexuals who engage in homosexual behavior have a significantly shorter life expectancy than their heterosexual counterparts and therefore the likelihood of parental death during the child’s early years is significantly higher for homosexuals\textsuperscript{239}. This analysis is incorrect on many levels.

First, the conclusion is based upon research that was conducted by a highly suspect individual in a highly suspect manner, to wit the questionable research of Paul Cameron. Second, research and education have become highly developed concerning the study of HIV and AIDS and the homosexual community, in particular, has sought to educate and protect themselves\textsuperscript{240}. Finally, it is impractical to conclude that the homosexual “lifestyle” of a parent places them at a greater risk for premature death than

\textsuperscript{237} Baker v. Wade, 106 F.R.D. 526, 537 n. 31 (N.D. Tex. 1985) (the court holding that “charges of unethical conduct against Paul Cameron included his continuing misrepresentation of Kinsey data and other research sources on homosexuality; inflammatory and inaccurate public statements about homosexuals; and his fabrications to a Nebraska newspaper about the supposed sexual mutilation of a four year old boy by a homosexual” (citing Dr. James K. Cole; Psychology, Homosexuality, and Human Rights in Lincoln, Nebraska, at http://www.qrd.org/qrd/religion/anti/cameron/memorandum (last visited Oct. 4, 2003))).

\textsuperscript{238} Wardle, supra note 108, at 865.

\textsuperscript{239} Wardle, supra note 108, at 865.

\textsuperscript{240} See generally How Effective Is AIDS Education? Located at http://www.princeton.edu/~ota/disk2/1988/8820/882004.PDF (identifying education as one of several factors that has helped to effect a change within the homosexual population and their lifestyle practices) (Accessed on Nov. 9, 2008).
their heterosexual counterparts who are employed in high risk employment; i.e. fire fighting and law enforcement. The research conducted in the 2005 Center for Disease Control (CDC) has shown that HIV and AIDS represent a continued threat to the heterosexual community, as well as the homosexual community. In fact, due to their prolonged awareness of the threat posed by HIV and AIDS, homosexuals are likely to possess an increased awareness and actively seek to avoid behavior that increases the potential for transmission of the disease.

Professor Wardle expresses a concern that children raised by homosexuals will engage in same-sex sexual activity that is typically associated with among other things HIV infection due to highly promiscuous behavior with multiple sex partners or premature sexual activity. However, this generalized statement may also be applied to the potential behavior of promiscuous heterosexual adolescents. The dangers described by Professor Wardle are not unique to homosexual adolescents and homosexuals, be they adults or adolescents should not unduly bear a burden that is equally applicable to heterosexuals. Professor Ball correctly points out that “there other more direct and effective public policy proposals available than recommending a rebuttable presumption that parenting by gays and lesbians is inconsistent with the best interests of children.”

An argument that claims homosexual petitioners are less than desirable parents for adoptive children based upon the threat of HIV and AIDS infection or the likelihood of premature death due to the disease are unfounded and unsupported by the research available today.

\[241\] http://www.cdc.gov/HIV/resources/factsheets/transmission.htm


\[243\] Wardle, supra note 108, at 854.

\[244\] Warring, supra note 111, at 291.
Sexual Abuse

One of the most oft cited concerns regarding homosexual adoption, is the claim that homosexuals are more likely than heterosexuals to sexually abuse children.\textsuperscript{245} This flawed correlation between homosexuality and pedophilia is due society’s inability to distinguish \textit{sexuality} from the \textit{sexual acts or activities}.\textsuperscript{246} Indeed, research shows that most child molesters are actually \textit{heterosexual males}, and only 14\% of molestation cases involved \textit{homosexual males} (emphasis provided).\textsuperscript{247} Additionally, 82\% of the offenders that were identified as the \textit{heterosexual partner of a close relative of the child}\textsuperscript{248}, while 74\% of those male victims were abused by an adult male who was involved in a \textit{heterosexual relationship} with the child’s mother (emphasis added).\textsuperscript{249} The “homosexuals are pedophiles” argument has been rebuked by the research that has been done on the area and custody or adoption placement decisions should give them minimal consideration. Aside from Paul Cameron’s skewed, biased, unreliable, and agenda based research on the matter, which has been severely criticized, there exists no basis to conclude that homosexuals have a predilection for sexually abusing their children.

Therefore, based upon the results of the research available to both the courts and adoption placement agencies, the following conclusions must be considered when evaluating a potential placement issue.

\textsuperscript{245} Susoeff, \textit{supra} note 205, at 881 n. 183 (1985) citing a study by the American Humane Association, Children’s Division, \textit{Protecting The Child Victim of Sex Crimes Committed By Adults} 216-7 (V. DeFrancis ed. 1969) that concluded 97\% of sex offenses against children are committed by males and 90\% of victims are female.


\textsuperscript{249} Charlene Gomes, \textit{Partners as Parents: Challenges Faced by Gays Denied Marriage}, 63 Humanist 14 (2003) (finding that only 2\% of these molesters could “possibly” be classified as homosexual).
One, homosexuals and the homosexual lifestyle, absent objective individual evidence to the contrary, is no less stable an environment than is found in a heterosexual, married home.

Two, that homosexuality can not be considered to be a “mental illness” that is likely to cause the homosexual parent to suffer either mental or emotional instability, particularly when contrasted with their heterosexual counterparts.

Three, homosexuals and the homosexual lifestyle do not automatically guarantee that the petitioner is more likely to contract or infect the child with HIV or AIDS than would a heterosexual petitioner. Individual, objective research into the individual and his or her lifestyle practices is required before a valid decision can be rendered by the reviewing agency.

Four, without further individual evaluation, a homosexual petitioner is no more likely to sexually abuse a child than a heterosexual petitioner would. In fact, the research has shown that heterosexual males have been involved in the majority of sexual abuse cases. Thus an absolute ban based upon these arguments must be considered invalid and the Florida Courts must determine the Statute to be unconstitutional.

E. Homosexuality Is Immoral and Homosexual Adoption Will Have An Adverse Impact Upon Minority Children.

“Immoral Because They’re Bad, Bad Because They’re Wrong . . .”\(^\text{250}\)

When all else fails, opponents of homosexual adoption insist upon making two additional arguments in an attempt to validate their position. One is that no matter what the evidence may show, homosexuality is simply immoral and children should not be

exposed to it. The other argument implies that, if the state permits homosexuals to adopt, it will have a disparately adverse impact upon minority children, because they comprise the majority of the children within the foster care system today. 251 Both of these arguments lack empirical support and the first one is based upon nothing more than an attempt to impose personal moral convictions upon society, while the latter would hold that nothing less than an “ideal environment” is suitable for adoptive children.

The Immoral Homosexual

The preceding section devoted to Florida’s historical animus has shown that the State of Florida has long viewed homosexuality as immoral and at one time even abhorrent. 252 Those opposed to homosexuality in general and the homosexual in particular repeatedly turn to the Bible to show that both are immoral. They specifically refer to the following passage to emphasize the inherent “evil” that homosexuality represents:

“The man who lies with a man in the same way as with a woman: they have done a hateful thing together; they must die, their blood shall be on their own heads.” 253

Any arguments against homosexual adoption that are solely based upon a Biblical basis may be classified as the “Sodom and Gomorrah” argument. In the book of Genesis, the cities of Sodom and Gomorrah were destroyed as punishment for the sin and corruption present there. 254 Moralists have been quick to determine these actions as a specific condemnation of homosexuality, but many theological scholars now question that

---

252 See generally Terl, supra note 35, at 794 (describing sodomy, which is not in and of itself a homosexual act as a crime “against nature” and the act as “unnatural and lascivious”).
253 Leviticus 18:22.
254 Genesis 19:5.
Dr. Derrick Bailey has shown that God’s actions indicate the cities were destroyed to punish the sin of idolatry or paganism and not sodomy. These moralists opine that if homosexuals are permitted to adopt and children are then subjected to the immorality of homosexuality, it is one step closer to the destruction of a God fearing civilization. This is simply not true.

It is important to note that many activities that were encouraged throughout the Bible have been held to be illegal in today’s society. The most notable of these is slavery. The Bible addresses slavery as such:

“The servants you have, men and women, shall come from nations round you; from these you may purchase servants … they shall be your property, and you may leave them as inheritance to your sons after you, to hold in perpetual possession.”

One would be loathe to argue that since the Bible authorizes the possession of servants or slaves as they are recognized in today’s society, society should honor the dictate set forth in Leviticus.

Intrinsic moral beliefs must be supported by consistent fair reason and they must be applied without prejudice and rationalization. It is clearly obvious that any argument based upon the general immorality of homosexuality is the product of a personal code and not based upon either empirical evidence or judicially based law. For this reason, the religious based condemnation of homosexuality that is held by the individual cannot be imposed upon society as a whole. As Professor Polikoff points

256 Derrick Sherwin Bailey, Homosexuality and the Western Christian Tradition, 3 – 5 (Longman Green and Co. 1955) (It is also important to note, as is argued later, that sodomy is not an act that is exclusive to the homosexual population).
257 Leviticus 25:44-45.
258 Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood To Meet The Needs of Children in Lesbian-Mother and Other NonTraditional Families, 78 Geo. L. J. 459, 549 n. 498 (1990).
259 Polikoff, supra note 258, at 549.
out, the diversity in biblical interpretations prohibits a universal religious conviction that homosexuality is immoral.\textsuperscript{260} Furthermore, a legal scholar has held that “[a] pluralistic society committed to religious toleration cannot defend a public policy supported by \textit{nothing but contested religious faith} (emphasis provided).”\textsuperscript{261} It must therefore be determined if an argument that is based upon religious tenets is nothing more than a subterfuge for the hatred of homosexuals.

Professor Polikoff advances two secular justification arguments that have been used to uphold the concept of homosexuality as being immoral. These arguments concern the criminal law and social norms.\textsuperscript{262} The fact that some of the sexual practices found among homosexuals constituted a crime in twenty-five jurisdictions does not definitively prove the morality issue found in homosexuality.\textsuperscript{263} In those states that held sodomy to be an illegal activity, the statutes failed to establish a correlation between the act and the morality of a homosexual.\textsuperscript{264} In fact, sodomy and homosexuality cannot be exclusively equated.\textsuperscript{265} Sodomy was originally held to be “a capacity for sin inherent in \textit{everyone} (emphasis provided).”\textsuperscript{266} The act was and is not the exclusive behavior of homosexuals. Not to be overlooked, the term “homosexuality” was not recognized by the medical profession until the late nineteenth century.\textsuperscript{267} However, by instilling the belief

\begin{flushleft}
\textsuperscript{260} Polikoff, \textit{supra} note 258, at 549.
\textsuperscript{261} Polikoff, \textit{supra} note 258, at 550 n.511 (citing \textit{Law, Homosexuality, and the Social Meaning of Gender}, 1988 Wis. L. Rev. 187, 213 (1988)).
\textsuperscript{262} Polikoff, \textit{supra} note 258, 551.
\textsuperscript{263} Polikoff, \textit{supra} note 258, at 551 n. 512.
\textsuperscript{264} Polikoff, \textit{supra} note 258, at 551.
\textsuperscript{265} Polikoff, \textit{supra} note 258, at 551.
\end{flushleft}
that sodomy and other deviant sexual activities were sinful, society has helped to maintain the ideal of the traditional patriarchal family, i.e. dual gendered families.\(^{268}\)

In terms of social norms, homosexuality is considered to violate the norms that mainstream society has established as being acceptable and proper. However, many so-called social norms that were observed in the past are now considered to be immoral. For example those norms that held that segregation; i.e. “separate but equal”, to be an acceptable public practice or social norm within the South are most certainly immoral and illegal today.\(^{269}\) As Professor Polikoff points out, the mere fact that these norms are socially accepted and subsequently codified into law does not make them moral.\(^{270}\) There must be more than acceptance and practice behind the determination of morality, and the majority should not be able to enforce their private bias upon the whole of society.

Indeed, the United States Supreme Court in *Lawrence* held the following, in regard to the legislation of morality by the majority:

“[f]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family …. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. Our obligation is to define the liberty of all, not to mandate our own moral code.”\(^{271}\)

“The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice …”\(^{272}\)

The Court’s statements are particularly in line and applicable to those arguments made regarding the alleged immorality and subsequent danger that a homosexual petitioner


\(^{269}\) Polikoff, *supra* note 258, at 553 n. 524.

\(^{270}\) Polikoff, *supra* note 258, at 553.


\(^{272}\) *Id.* at 577.
would represent to an adoptive child. An argument based upon a religious belief cannot be used to mandate the moral code of society, and thus be offered to support a prohibitive ban on homosexual adoption. Given the holding in *Lawrence*, it is apparent that any argument against homosexual adoption that is based upon a religious belief or societal view that homosexuality is immoral cannot be permitted to stand.

**Homosexual Adoption: Should The Child’s Ethnicity or The Opportunity For A Permanent, Stable Home Be Considered The “Best Interest”?**

According to the data collected in the 2000 U.S. Census, forty-six percent of the estimated 547,000 children in the foster care system were African American.\(^\text{273}\) This percentage represented a population that was three to four times greater than their proportion found in the child population of the United States.\(^\text{274}\) These numbers have modestly changed since the 2000 Census and in 2004 it was estimated that the number of African American children in foster care was 34% or almost two times the number found in the general child population of the United States.\(^\text{275}\) This has raised a concern among ethnic groups, such as the National Association of Black Social Workers (NABSW), that due to an absence of African American petitioners African American children who are placed with suitable Caucasian families are at risk of “cultural genocide.”\(^\text{276}\)

“We affirm the inviolable position of Black children in Black families where they belong physically, psychologically and culturally in order that they receive in total sense of themselves and develop a sound projection of their future. Black children in white homes

\(^\text{273}\) Hawkins-Leon, *supra* note 251, at 1231.  
\(^\text{274}\) Hawkins-Leon, *supra* note 251, at 1231.  
\(^\text{276}\) Hawkins-Leon, *supra* note 251, at 1238.
are cut off from the healthy development of themselves as Black people, which development is the normal expectation and only true humanistic goal.”

Genocide is an extremely violent descriptive term to apply to transracial adoption and it seems to imply that the petitioner in a transracial adoption will always seek to alter or eliminate the ethnicity and culture of the adoptive child. This broad assertion is both biased and dangerous. Although it has never been directly asserted, there is concern that should homosexual adoptions be permitted, it will have a significantly adverse impact on African American children. It has also been indirectly asserted that if homosexual adoption were permitted, it would unfairly subject African American children to an experimental process. It cannot be argued that African American children are disproportionately represented in the U.S. foster care system. It is desirable to place either an African American child or any child within an environment that will permit the “total” child to develop psychologically, physically, and if possible ethnically. However, the concept that a qualified homosexual petitioner is somehow less adequate or a source of potential harm to an African American child is without serious merit.

It is necessary to review what a state, including Florida, considers to be the ultimate goal of adoption. Originally, adoption was to occur only when every aspect of the adoption was “ideal” or in other words, everything was a perfect or close to perfect match between the adoptive child and the petitioner’s. An “ideal adoption”, as they came to be known, existed when the child’s personal characteristics matched those of the

278 http://encarta.msn.com/dictionary_1861674894/genocide.html (Accessed Nov. 24, 2008). “Genocide” is defined as the “murder of entire ethnic group: the systematic killing of all the people from a national, ethnic, or religious group, or an attempt to do this.”
279 Hawkins-Leon, supra note 251, at 1232.
adoptive parents in every way possible, including physical attributes, religion, intellectual ability, and other characteristics that were deemed as important.\textsuperscript{281} This concept closely mirrors some of the arguments offered in support of ethnic adoptive matching in today’s society. This stringent standard held that it was better to leave a child within an institutional setting rather than place the child within a setting that did not possess the characteristics of the child.\textsuperscript{282} Ultimately, this method was found to be just as inadequate as the institutional system that provided for these children.

In today’s society, the focus of adoption has been to provide the child with a permanent home.\textsuperscript{283} The emphasis has shifted from focusing upon the ideal setting to one that concerns itself with the suitability of the home.\textsuperscript{284} The Multi-Ethnic Placement Act of 1994 (MEPA) specifically prohibits child placement agencies from “categorically denying to any person the opportunity to become an adoptive or foster parent, solely on the basis of race, color, or national origin of the adoptive or foster parent, or the child involved.”\textsuperscript{285} By focusing more on the overall environment and not specific stringent, superficial requirements, non-traditional petitioners were able to provide suitable homes for children locked in the foster care system.\textsuperscript{286}

Permitting homosexuals to adopt, does not constitute an experiment that will have an adverse impact upon African American children. As previously stated, the goal is to provide the child with a permanent home or in other words a forever family. An African

\textsuperscript{281} Joan Heifetz Hollinger et al, Adoption Law & Practice, §1.01(1), at 1-5 (2000).
\textsuperscript{282} Hollinger, supra note 281, at §3.06(1), 3-40.
\textsuperscript{283} Hollinger, supra note 281, at §3.06(1), 3-40.
\textsuperscript{284} Hollinger, supra note 281, at §3.06(1), 3-40.
\textsuperscript{285} Hawkins-Leon, supra note 251, at 1242 n. 103 Pub. L. No. 103-382, § 553(a)(1), 108 Stat. at 4056 (citing the MEPA’s restriction’s on placement due to race, etc.).
American child or any other child locked within the foster care system wants a permanent, stable home where he or she will be loved, feel a semblance of safety, and enjoy permanent stability. A homosexual petitioner, who is objectively screened and found to be able to provide this environment, should be permitted to do so.

Advocates of ethnic matching, advance the argument that any petitioner other than the ethnicity of the child will either deprive the child of the opportunity to experience their ethnic culture or will seek to suppress and deny the child access to their respective ethnic culture. That it will, in fact, not be in the “best interest” of the child to be adopted by either a non-ethnically compatible or homosexual parent. This is not the case with a homosexual petitioner. A homosexual petitioner, who has been the subject of or witnessed prejudice and bias, is better suited to meet the needs of child of a different ethnicity. The prospective parent is likely to encourage the child to grow and develop within the child’s ethnic background because the child’s ethnic background symbolizes the purest instance of diversity. The child’s ethnic background represents a cultural diversity and the homosexual parent will be more inclined to promote and encourage this diversity within the family. They would also be more willing and able to protection the child from bias and discrimination because they have either experienced or witnessed similar behavior due to their sexual orientation. Indeed, because of society’s ongoing animus towards homosexuals, a prospective homosexual parent would qualify as a superior match for an African American child than the traditional Caucasian family.

---

287 Evall, supra note 277, at 376 n. 163.
288 Leslie Doty Hollingsworth, Symbolic Interactionalism, African American Families, and the Transracial Adoption Controversy, 44 Soc. Work. 443, 444 (1999) (citing the potential negative impact that MEPA and IEAA will have on the “best interest” of the African American child).
Finally, the most appropriate example concerning the absence of harm to an African American child is found in the foster family of Lofton. Three of the five children cared for by Roger Croteau and Steve Lofton are considered to be “special needs” because of their existing HIV infection and they are African American. Bert, the subject child of Lofton, is an African American child who has repeatedly expressed a desire to remain with his current family. The claims made by opponents concerning a harm to the children is anywhere but evident in this “non-traditional” transracial family. Bert has been shown to be a happy, well adjusted ten year old boy. There is no evidence that he has undergone any harm as a result of exposure to Lofton and Croteau’s sexual orientation or their different ethnic background. It is unreasonable to assume that should Lofton and Croteau be permitted to adopt these children, that “ethnic genocide” will naturally occur or that the child will be harmed merely as a result of the parent’s sexual orientation and ethnicity. This is one case but it is a compelling argument for homosexual adoption by a “non-traditional” transracial family.

In conclusion, a properly screened homosexual family does not represent a form of harm to the cultural and ethnic development of an African American child. The “non-traditional” family represents both tolerance and acceptance while providing the child with an acceptable, stable, and permanent home.

Part IV. Potential Options to an Absolute Ban.

An absolute ban on homosexual adoption, including Florida’s statutory prohibition, is discriminatory against homosexuals based upon their sexual orientation.

---

289 See generally, Love, supra note 4.
290 Love, supra note 4, at 55 (quoting Steve Lofton as saying: “In his own mind, Bert already thinks he’s adopted … he’s a happy, well-adjusted boy.”).
291 Love, supra note 4, at 55.
and unconstitutional. The Florida Supreme Court should promptly hold the statute to be unconstitutional and permit homosexual petitioners to be evaluated in the same manner as their heterosexual counterparts. Currently, there are two major forms of review that courts have used to determine if the sexual orientation of a parent will result in harm to the child. These are known as the Per Se Rule and the Nexus Test. Historically, courts have one or the other in cases involving custody issues between biological parents but they can also be applied to adoption cases. Indeed, there should be a form of review that is part of an agencies evaluation of a petitioner. However, the review should not be the sole factor in determining the fitness of the petitioner.

**Per Se Rule**

The Per Se Rule dictates that parents, or in this instance the petitioners, that are identified within a particular category will not be permitted to get custody.\(^{292}\) This form of review is nearly a mirror image of the current statutory restriction found in Florida. When utilized, this method of review permits the court to implicitly or explicitly hold that exposure to a homosexual orientation is never in the “best interest of the child.”\(^{293}\) This standard always holds the heterosexual parent to be the best or the superior option for the development of the child.\(^{294}\) Historically, courts have held that those homosexuals who publicly identify themselves and act in accordance with their sexual orientation to be within a disadvantaged category that precludes custody.\(^{295}\) This manner of review would be extremely prejudicial towards a homosexual seeking to adopt and would basically place him or her in the same position the Florida statute currently does. Due to the

\(^{292}\) Shapiro, *supra* note 19, at 637.
\(^{293}\) Shapiro, *supra* note 19, at 637.
\(^{294}\) Shapiro, *supra* note 19, at 637.
\(^{295}\) Shapiro, *supra* note 19, at 638.
growing body of empirical evidence that shows no support for these past assumptions, courts have been moving away from the Per Se Rule towards the Nexus Test.

**Nexus Test**

Since the mid to late ‘70’s, the courts have moved from the application of the Per Se Rule towards the usage of the Nexus Test. The Nexus Test requires the court to consider the homosexuality of the parent when assessing the individual’s fitness as a parent. 296 The test requires that a nexus exist between the parent’s sexual orientation and harm to the child before the parent’s sexual orientation is considered to be relevant to a custody determination. 297 The test requires an individualized determination of custody on a case by case basis and one result does not dictate the outcome of future decisions. The Nexus Test, when applied consistently and objectively, would appear to be the most appropriate form of review for potential adoption cases. The primary danger found in the Nexus Test is when the petitioner’s *identity* and not their *conduct* becomes the focus of review for either the agency or the court. 298 Typically, a court, or in a case involving adoption the agency, reviews petitioner’s sexual activity and the presence of a non-related third party to determine if a nexus exists and sexual orientation should be considered.

Direct exposure to the parent’s intimate sexual conduct can potentially be detrimental to the child’s best interests. 299 The reviewing party must identify and separate intimate sexual conduct, exposure that may result in harm to the child, and simple gestures of affection, exposure that may enhance the child’s understanding of

---

296 Shapiro, *supra* note 19, at 635.
297 Shapiro, *supra* note 19, at 636.
299 Shapiro, *supra* note 19, at 666.
human relationships and positively impact the child’s well-being.\textsuperscript{300} The point, at which conduct differentiates from gestures of affection, and the ability to objectively evaluate the difference, remains a weak point of the Nexus Test. An adoption agency and the State of Florida must move beyond the societal prejudices that hold any manner of affection between same-sex individuals to be harmful to the child and immoral to society.

Exposure of the child to a new person who will have significant contact with the child is an appropriate situation for the court to consider. Typically, in adoption, the petitioner is already situated within a relationship prior to the petition process but \textit{Seebol} involved a single homosexual male petitioner. The adoption agency and the court should be able to properly consider the characteristics of the new person or the existing partner. Exposure to characteristics that may place the child at risk, such as drug use are appropriate areas of concern but other areas, such as race and religion do not provide a basis for a generalized concern on the part of the agency.\textsuperscript{301} If the agency, or in the alternative the court, cannot establish that exposure to the new partner is detrimental to the child than they should not intervene on that basis.

The Nexus Test must require that the concept of “harm” be \textit{narrowly} and \textit{specifically} identified.\textsuperscript{302} The harm must be consistent with current social science research that demonstrates no general identifiable harm is present simply due to the parent’s sexual orientation. Mere exposure to the parent’s or the petitioner’s social interactions with individuals of the same sexual orientation is not indicative of harm to the child.\textsuperscript{303} Social research suggest that any concern for the “best interest of the child”

\textsuperscript{300} Shapiro, \textit{supra} note 19, at 666.  
\textsuperscript{301} Shapiro, \textit{supra} note 19, at 667.  
\textsuperscript{302} Shapiro, \textit{supra} note 19, at 667.  
\textsuperscript{303} Shapiro, \textit{supra} note 19, at 667.
should encourage courts to foster situations where: (1) the child is aware of the sexual identity of his or her parents or the petitioners; (2) the parent or petitioner is open and comfortable with his or her sexual identity; (3) the child and parent or petitioner are part of the homosexual community and know other children of homosexuals; (4) the child is able to other external parties concerning his or her parent’s sexual identity; and (5) the parent or petitioner is open and emotionally intimate with a long-term partner, if the partner is in the familial home.\textsuperscript{304} The burden for proving the existence of harm should be born by the agency or the State and the court should only accept a narrow interpretation of harm. Harm, as has been previously mentioned, should not be considered to be the social stigma that is a result of the parent’s sexual orientation. The individual moral beliefs of the agency or the court should not be permitted to constitute harm.\textsuperscript{305}

V. Conclusion

Florida’s current absolute ban represents the “best interest” of a conservative majority that has consistently exhibited an overt, oppressive animus towards homosexuals. It is at odds with Florida’s stated desire to remove children from the foster system and provide them with a stable, permanent home. The current research shows that sexual orientation should not be considered as an exclusive or non-rebuttable factor that justifies a ban on homosexual adoption. The concept that holds the traditional family to be superior because marriage and the ability to procreate provide stability are not valid considerations for banning homosexual adoption. Research has been consistently misused to provide alleged empirical support that homosexuals and homosexuality

\textsuperscript{304} Shapiro, \textit{supra} note 19, at 667.

\textsuperscript{305} Shapiro, \textit{supra} note 19, at 668.
represent a harm that requires the Legislature to protect the State’s children. In opposite, the majority of the research that has been done shows that sexual orientation is no longer a valid consideration for prohibiting homosexuals from adopting.

The children, whether they are biological or adoptive, of homosexual families have been found to exhibit many of the same positive developmental and psychological patterns that are found in their heterosexual parent counterparts. Children exposed to the homosexual orientation of their parents did not exhibit an inability to identify themselves according to gender. This has been shown to be an internal process that is unlikely to be influenced by external factors, such as the sexual orientation of the parent. Children raised by homosexual parents did not necessarily adhere to stereotypical gender role behavior but these deviations have not been found to represent a form of harm to the development of the child. Children raised by homosexual parents were also no more likely to develop into homosexuals as a result of their parent’s sexual orientation.

Opponents consistently fail to explain how a homosexual child can be the product of a traditional homosexual family. Finally, although a child raised by homosexual parents may experience a certain degree of social stigmatism, the Court in *Palmore* held that the stigmatism must present a real and actual harm to the child. Any other perceptions of generalized, potential harm based on stigmatism are considered to be unconstitutional.

A homosexual parent or petitioner is no longer considered to be emotionally or mentally unstable as a result of their homosexuality. The research has shown homosexuality is not a disease or illness and homosexuals exhibit the same psychological tendencies as their heterosexual counterparts. The threat of HIV and AIDS infection is also no longer a viable argument to support a ban on homosexual adoption. The gay
community is not as lurid and toxic an environment as opponents portray it to be. Homosexuals are no more likely to sexually abuse children than their heterosexual counterparts. This argument confuses the act of sodomy as an exclusive activity of the homosexual community and studies have shown this to be untrue.

Finally, two other arguments are considered to be invalid. One, a homosexual cannot be precluded from adopting based upon the misconception of immorality. Courts have held that specific religious beliefs may not be successfully applied to society as a whole. Individual bias is not enough to justify a ban. Two, the implication that African American children will be disparately harmed or involved in a grand experiment if homosexuals are permitted to adopt is without significant merit. Adoption is no longer concerned with “ideal” matching, and race, like sexual orientation, should not be the sole factor upon which the adoption decision is made. Modern adoption involves finding the most suitable, stable and permanent home for the adoptive child. The children cared for by Lofton and Croteau are perfect examples of the ability of homosexual, transracial individuals to meet the needs of an African American child. Adoption is not an experimental process in which the child assumes the place of a laboratory animal. It is a discernable process that ultimately seeks to place the child within a familial environment that permits optimal physical and psychological development.

Florida’s ban is not only unconstitutional because it discriminates solely upon the basis of sexual orientation but it results in a degree of harm to the children currently within the State’s foster care system that a homosexual parent would never be capable of. The time has come to undo the injustice that was legislatively invoked in 1977 and to begin an objective process that evaluates the individual based upon their merits and not
their sexual orientation. If Florida truly is concerned with the “best interest of the child”,
then it will change its current statutory policy and permit qualified homosexual
petitioners to have the opportunity to provide the stable, permanent, forever home that it
claims to seek for its foster children. To do otherwise is to distort the true intent of the
“best interest” standard into a perverse ongoing system that harms both willing
individuals and children deserving of love and stability.

Professor Wardle ended one article with a quotation from William L. Pierce
which essentially reiterated the preference for the traditional heterosexual family over
other non-traditional family models. The statement closed with the phrase; “When in
doubt, don’t.”, implying that since non-traditional families are considered to be “less
optimal” they should always be prohibited from adopting. It is my opinion that the
words of Dr. Martin Luther King Jr. when combined with the research available today
completely rebut Mr. Pierce’s blanket objection. “How Long? Not Long, because no lie
can live forever (emphasis provided).” The arguments offered by the opponents of
homosexual adoption have been shown to be lies that seek to discriminate against
homosexuals not because the arguments are based upon the “best interest of the child”
but instead are based the “best interest” interest of a conservative majority that views
them as “immoral and wrong.”

306 Lynne D. Wardle, Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-
Principles in which he argues that “There should be no placement of children, whether for foster care or
adoption, with same-sex couples or with individuals who may in the future team up with a partner of the
same-sex …” (emphasis added)).
308 http://www.stanford.edu/group/King/publications/speeches/Our_God_is_marching_on.html (citing Dr.
Martin Luther King Jr.’s “Our God Is Marching On!” speech from Mar. 25, 1965) (Accessed on Nov. 27,
2008).