

ADOPTION BY LESBIAN AND GAY PEOPLE: THE USE AND MIS-USE OF SOCIAL SCIENCE RESEARCH

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In the past twenty years, openly lesbian and gay people have joined in the evolving national dialogue, within the law and elsewhere, about adoption. This Article considers the adoption dialogue, addressing in particular the facts and beliefs that sometimes form (both by informing and misinforming) the dialogue.

Part I of this Article describes the ways in which lesbian and gay people confront adoption's legal structures. Part II discusses the findings of social science research on parenting by lesbian and gay people. Part III reviews and analyzes some of the responses to this research. The Conclusion considers the nature of the discussions regarding the research and suggests a mode of reconstruction.

I. THE LEGAL STRUCTURES OF ADOPTION

The legal process of adoption intersects with the lives of lesbian and gay people in a variety of ways. The most common are (1) second parent adoptions in which a lesbian or gay person adopts the child of a partner, and (2) traditional adoptions, in which a lesbian or gay person adopts a foster child or a child whom the adoptive parent has previously not cared for.¹

The traditional form of adoption extinguishes the parental rights and obligations of the biological or legal parent so that the adoptive parent becomes the sole parent. Second parent adoption, however, leaves the parental rights of one legally recognized parent intact and creates a second legally recognized parent for the child. These adoptions have become fairly routine among children of heterosexual step-parents, though typically pursuant to

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1. Some lesbian and gay people have turned to adoption in an attempt to create the privileges and duties of a legal relationship between romantic partners. These "adult adoptions" have frequently been disallowed as outside of the scope of adoption laws, which are typically narrowly construed. *See, e.g., In re Robert Paul P.*, 471 N.E.2d 424, 427 (N.Y. 1984) (denying adult adoption between two gay men, stating that the use of adoption to establish a family relationship between gay sexual partners was "a cynical distortion of the adoption function" (quoting *In re Adult Anonymous II*, 452 N.Y.S.2d 198, 203 (App. Div. 1982) (Sullivan, J., dissenting))). *But see, e.g., 333 E. 53rd St. Assocs. v. Mann*, 503 N.Y.S.2d 752, 754 (App. Div. 1986), *aff'd*, 512 N.E.2d 541 (N.Y. 1987) (allowing adoption of one elderly woman by another for purposes of establishing succession rights to rent-controlled apartment).

statutes limited to married couples.² Still, second parent adoptions by lesbian and gay co-parents have been allowed by courts in a number of jurisdictions, including the highest courts of Massachusetts and Vermont.³

In permitting such adoptions, some courts explicitly relied on the beneficial effects on the child of having legal ties with both caretakers. These include both the strengthening of the emotional familial bond through the legal recognition of the actual family structure and the guarantees of support, such as health insurance and inheritance rights, provided by the legal recognition of a parent-child relationship. For example, in *In re Adoption of Evan*,⁴ the court noted that the adoption would provide Evan with important legal rights and "significant emotional benefit to Evan from adoption which is perhaps even more crucial than the financial."⁵ The court also explicitly recognized the transformative potential of legal recognition, stating that:

the adoption brings Evan the additional security conferred by formal recognition in an organized society. As he matures, his connection with two involved, loving parents will not be a relationship seen as outside the law, but one sustained by the ongoing, legal recognition of an approved, court ordered adoption.⁶

Not all courts have permitted second parent adoptions by lesbian or gay people.⁷ Those that have denied second parent adoptions have done so through constrained readings of the adoption statutes, holding that the statutory language does not provide for the adoption of a child by an unrelated adult without extinguishing the parental rights of the current legal parent. This is exactly the absurd result noted and avoided by some of the courts that have allowed these types of adoptions.⁸ None of the cases denying these adoptions relied on any finding or presumption of harm to the child arising from the fact that the person seeking to adopt is lesbian or gay or in a same-sex relationship with the already-recognized parent. At the same time, these courts have not addressed the consequences of their rulings for

2. See, e.g., VA. CODE ANN. § 63.1-233 (Michie 1987).

3. *In re Adoption of a Minor Child (C)*, No. 1-JU-86-73 P/A (Alaska First Jud. Dist. Feb. 6, 1987); *In re Adoption of a Minor (T) & (M)*, Nos. A-269-90 & A-270-90 (D.C. Super. Ct. Fam. Div. Aug. 30, 1991); *In re Petition of E.S. & R.L.*, No. 90 Coa 1202, 1994 WL 157949 (Ill. Cir. Ct. Cook County Mar. 14, 1994); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *Adoption of Susan*, 619 N.E.2d 323 (Mass. 1993); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993); *In re Adoption of Caitlin & Emily*, 1994 WL 149728 (N.Y. Fam. Ct. Monroe County Jan. 6, 1994); *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992); *In re Adoption of E.O.G. & A.S.G.*, 14 Fiduc. Rep. 2d 125 (Pa. C.P. York County Apr. 28, 1994); *In re Adoptions of B.L.V.B. & E.L.V.B.*, 682 A.2d 1271 (Vt. 1993); *In re Adoption of R.C.*, No. 9088 (Vt. P. Ct. Addison Dist. Dec. 9, 1991). *But see In re Adoption of Bruce M.*, No. A-62-93 (D.C. Super. Ct. Fam. Div. Apr. 20, 1994) (denying gay couple's co-parent adoption petition); *In re Angel Lace*, 516 N.W.2d 678 (Wis. 1994) (denying lesbian couple's co-parent adoption petition), *motion for recons. denied*, Sept. 21, 1994.

4. 583 N.Y.S.2d 997 (Sur. Ct. 1992).

5. *Id.* at 999.

6. *Id.*

7. See, e.g., *In re Adoption of Bruce M.*, No. A-62-93 (D.C. Super. Ct. Fam. Div. Apr. 20, 1994); *In re Angel Lace*, 516 N.W.2d 678 (Wis. 1994), *motion for recons. denied*, Sept. 21, 1994.

8. E.g., *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993).

lesbian and gay parents, who cannot enjoy the legal benefits of marriage.⁹ When a court denies a second parent adoption, the non-related partner loses all custody and visitation rights despite having acted as a parent since the child's birth.

There are no statistics as to the number of second parent or traditional adoptions by lesbian and gay people. Even if the social service agencies which typically facilitate adoptions and the courts which approve them attempted to keep such records, their accuracy would be questionable because of the likelihood that lesbian and gay people do not reveal their sexual orientation when adopting. This is not surprising given that many do not reveal their sexual orientation in areas of their lives where there is generally greater acceptance of lesbian and gay people, such as employment. Because of unfounded myths and stereotypes about lesbian and gay people, in conjunction with the courts' broad discretionary powers in the area of child rearing and adoption, it is even less likely that lesbian and gay people seeking to adopt will be open about their sexual orientation.

Two states, Florida and New Hampshire, have enacted statutory bans prohibiting adoption by lesbian and gay people.¹⁰ These statutes prohibit *any consideration* of a lesbian or gay person as an adoptive parent. Such a per se rule is remarkable because the central tenet of adoption is serving the best interests of the child; therefore, it is rare to have laws that exclude entire groups from being adoptive parents.¹¹

In 1987, the New Hampshire Supreme Court, which at the time included now-United States Supreme Court Justice David Souter, held the New Hampshire statute constitutional.¹² One trial court in Florida declared the Florida statute unconstitutional,¹³ while an appellate court in another district

9. In addition to disallowing second parent adoption, the Wisconsin Supreme Court has denied co-parents the right to seek visitation with the child against the wishes of the legal parent. See *In re the Interest of Z.J.H.*, 471 N.W.2d 202 (Wis. 1991). Therefore, there is no way for lesbian or gay couples in Wisconsin to affirm and protect the relationships between both members of the couple and the child.

10. FLA. STAT. ANN. § 63.042(3) (West 1985 & Supp. 1995); N.H. REV. STAT. ANN. §§ 170-B:4; 170-F:6 (1994).

11. For example, in Florida, many convicted felons are not prohibited from being considered as adoptive parents. FLA. ADMIN. CODE ANN. r. 10M-8.0053 (1994).

12. *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987). It is interesting to note that this case was presented to the court as a certified question of the New Hampshire House of Representatives. Thus, the court did not have before it a particular adult person who wished to offer a lifetime's worth of caring and support to a particular child who was waiting to be adopted. Compare this with the courts' descriptions of Tammy and Evan, children thriving under the care of their respective sets of mothers. See *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992). See also Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 514 (1992) (arguing that telling stories about lesbian and gay lives is essential to litigation on behalf of lesbian and gay people). But lest it appear that true stories always carry the day, courts have ignored the reality of family lives in denying second parent adoption and second parent visitation. See, e.g., *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *In re Angel Lace*, 516 N.W.2d 678 (Wis. 1994), *motion for recons. denied*, Sept. 21, 1994.

13. *Seebol v. Farie*, No. 90-923-CA-18 (Fla. Cir. Ct. Mar. 15, 1991), *reprinted in* State Dep't of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1221 app. A (Fla. Dist. Ct. App.

upheld the statute as constitutional.¹⁴ The issue is now on appeal to the Florida Supreme Court.¹⁵

There are other prohibitions on adoption by lesbian and gay people which are not as straightforward as statutory bans, but similarly unfounded and unfair. In practice, states may find that lesbians and gay men do not meet the criteria for adoptive parents. For example, in *In re Pima County Juvenile Action B-10489*,¹⁶ the Court allowed the adoption agency to consider the prospective parent's sexual orientation as making him unfit to adopt. Moreover, even in those states without statutory bans or judicial rules that effectively ban adoption, lesbian and gay people may be denied the opportunity to adopt by placement agencies and courts which rely on pretextual factors to reject them.

Both statutory and implicit bans on adoption by lesbian and gay people raise a variety of legal questions. Depending on the legal theory used to challenge a statutory ban, the appropriate inquiry may be whether such a ban is rationally related to an important governmental interest or whether the ban is based solely on prejudice against lesbian and gay people. No matter what the specific contours of the question, there is a powerful body of social science research demonstrating that all of the fears surrounding childrearing by lesbian and gay people are groundless. Courts which have upheld the statutory bans and supporters of the bans have responded to this research in a variety of ways.

II. THE SOCIAL SCIENCE RESEARCH

Over the past fifteen to twenty years, a body of social science research has developed addressing the issue of children raised by lesbian and gay people.¹⁷ The research has evaluated both the skills of the parents and the effects on the children. Looking beyond these questions, the research has

1993) (holding that a ban on adoption by homosexuals violates the right to privacy under the Florida Constitution and rights to equal protection and due process of law under the Florida and Federal Constitutions). The Florida Attorney General did not appeal the *Seebol* decision and, as a result, it is binding only on Florida's 16th Judicial Circuit.

14. *State Dep't of Health and Rehabilitative Servs. v. Cox*, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993), *review granted*, 637 So. 2d 234 (Fla. 1994) (holding that a ban on adoption by homosexuals does not violate the Florida Constitution's guaranteed rights to privacy, due process or equal protection, and is not unconstitutionally vague).

15. I am co-counsel with Nina Vinik, Esq., of the American Civil Liberties Union of Florida for petitioner-appellant James Cox in his challenge of the Florida statute.

16. 727 P.2d 830, 834 (Ariz. Ct. App. 1986).

17. I use the term "lesbian and gay people" throughout this essay. When writing about lesbian and gay issues in non-lesbian and gay publications, and particularly in legal periodicals, there has developed a standard "footnote 1" which explains the use of the terms lesbian and gay, as opposed to homosexual. I am loathe to continue this tradition because of its assumption that the rejection of the term homosexual must forever be explained and justified. In the context of the social science research discussed in this article, however, it is necessary to note that I generally use the term "lesbian and gay people" and specify lesbians or gay men only when necessary. While more of the social science literature discussed herein involves lesbians, the arguments made against adoption are used equally against lesbians and gay men.

tackled some of the assumptions and fears that people have about lesbian and gay people with regard to childrearing, such as the concern that children of lesbian and gay parents are likely to be sexually molested or are likely to become lesbian or gay themselves. The results of this research are remarkable: No study has shown any harm to children raised by lesbian or gay parents.

A. The Parenting Skills of Lesbian and Gay Parents

The research suggests that lesbian and gay parents have parenting skills that are at least equivalent to those of heterosexual parents.¹⁸ Studies of lesbian mothers illustrate a remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data of lesbian mothers and heterosexual mothers.¹⁹ One study found lesbian and heterosexual mothers to be similar in maternal interest and child-rearing practices.²⁰ Another study concluded that the majority of the lesbian mothers studied saw themselves as intimately involved in parenting and that the lesbian mothers as a group appeared more concerned for their children's long-range development than the heterosexual mothers as a group.²¹ Similarly, a study comparing gay and non-gay fathers detected no discernible differences in parenting style and found that the two groups of men shared a similar development orientation toward their role as fathers.²²

B. Children Raised by Lesbian and Gay Parents

Scientific studies investigating the psychological effects on children raised by a lesbian or gay parent conclude unanimously that there are no significant differences in the psychological health of these children compared with children raised by a heterosexual parent. A review of the research on gay parenting published in the leading journal of developmental psychology concluded that:

There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. . . . [N]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to

18. One study found that lesbian mothers score significantly higher than heterosexual fathers on the Parent Awareness Skills Survey (PASS), which measures the sensitivity and effectiveness with which a parent responds to typical childcare situations. David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEV. PSYCHOL. 105, 111 (1995).

19. See Beverly Hoeffler, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536, 543 (1981); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, *supra*, at 545, 550.

20. Kirkpatrick et al., *supra* note 19, at 546.

21. Judith Ann Miller et al., *The Child's Home Environment for Lesbian vs. Heterosexual Mothers: A Neglected Area of Research*, J. HOMOSEXUALITY, No. 1 1981, at 49, 55.

22. Jerry J. Bigner & R. Brooke Jacobsen, *Adult Responses to Child Behavior and Attitudes Toward Fathering: Gay and Nongay Fathers*, J. HOMOSEXUALITY, No. 3 1992, at 99, 109.

date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.²³

These studies of children of lesbian or gay parents explore the issues of sexual identity, psychological development, and relationships with peers and adults. The research indicates that these children develop similarly to children raised by heterosexual parents with respect to all three of these areas.

Sexual identity is a broad term that encompasses an individual's gender identity, gender role behavior, and sexual orientation. Gender identity relates to identification as male or female. Gender role behavior relates to behavior that conforms to cultural norms of femininity and masculinity. Sexual orientation relates to attraction to individuals of a particular gender.

The research shows that the gender identity of children raised by a lesbian mother does not differ from the gender identity of children raised by a heterosexual mother.²⁴ The studies typically attempt to determine whether the child identifies psychologically as a male or female and whether the child is happy with the biological sex to which he or she belongs.²⁵ The children of a lesbian mother are as likely as the children of a heterosexual mother to identify psychologically as a member of their biological sex and to be content with that status.²⁶

With regard to gender role behavior, the research finds no significant influence exerted by a parent's sexual orientation. Most boys raised by a lesbian mother show gender role behavior ordinarily regarded as characteristically masculine, and most girls raised by a lesbian mother show gender role behavior ordinarily regarded as feminine.²⁷ Furthermore, children raised by a lesbian mother show no significant differences in gender role behavior when compared with children raised by a heterosexual mother.²⁸

23. Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992); see also Barbara M. McCandlish, *Against All Odds: Lesbian Mother Family Dynamics*, in GAY AND LESBIAN PARENTS 23, 24 (Frederick W. Bozett ed., 1987); Fiona L. Tasker & Susan Golombok, *Children Raised By Lesbian Mothers*, 1991 FAM. L. 184, 187 (reviewing studies and reaching same conclusion for lesbian mothers).

24. Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551, 568 (1983); Julie S. Gottman, *Children of Gay and Lesbian Parents*, in HOMOSEXUALITY AND FAMILY RELATIONS 177, 189 (Frederick W. Bozett & Marvin B. Sussman eds., 1990); Kirkpatrick et al., *supra* note 19, at 551; Richard Green, *The Best Interests of the Child with a Lesbian Mother*, 10 BULL. A.A.P.L. 7, 14 (1982) [hereinafter Green (1982)].

25. Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 179, 179-81 (1986) [hereinafter Green et al. (1986)].

26. See, e.g., *id.* at 179-81 (comparing the children of lesbian mothers and children of heterosexual mothers from rural and urban areas in 10 states).

27. See, e.g., Golombok et al., *supra* note 24, at 562; Gottman, *supra* note 24, at 181; Hoeffler, *supra* note 19, at 542; Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment Self-Concepts, and Sex-Role Identity*, in LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH AND CLINICAL APPLICATIONS 156, 169 (Beverly Greene & Gregory M. Herek eds., 1994) [hereinafter Patterson, *Baby Boom*].

28. See, e.g., Patterson, *Baby Boom*, *supra* note 27, at 169; Golombok et al., *supra* note 24, at 568; Gottman, *supra* note 24, at 189; Green (1982), *supra* note 24, at 14; Green et al. (1986),

The research also shows that being raised by a lesbian or gay parent does not increase the likelihood that a child will become lesbian or gay.²⁹ There is no evidence that children develop their sexual orientation by emulating their parents.³⁰ Numerous studies find that children who are raised by a lesbian or gay parent do not differ in any significant way with respect to their sexual orientation when compared with children who are raised by a heterosexual parent.³¹ The scientific consensus is that sexual orientation is not within social or parental control and is formed at a very early age, long before adolescence.³² The fact that most lesbian and gay people were raised by heterosexual parents demonstrates that, as they mature, children develop sexual orientation independently from their parents.³³

In other aspects of personal identity not related to sexual identity, the research shows no difference between children of lesbian and gay parents and children of heterosexual parents. There is no significant difference in the level of psychological disturbance of children raised by a divorced lesbian mother and children raised by a divorced heterosexual mother.³⁴ Similarly, there are no significant differences between the two groups in the presence of such behavioral and emotional problems as hyperactivity, unsociability, emotional difficulty, and conduct problems.³⁵ A study tracing such behavioral issues through to adulthood found no differences between individuals raised by a lesbian mother and those raised by a heterosexual mother.³⁶

supra note 25, at 176, 179 (finding that the daughters of lesbians were more likely to prefer less sex-typed activities and to express an interest in becoming a lawyer, doctor, engineer, or astronaut than daughters of heterosexual mothers, but concluding that sex role behavior of the daughters of lesbians fell within normal limits); Hoeffler, *supra* note 19, at 542; Kirkpatrick et al., *supra* note 19, at 551. Scientists have replicated the finding of no difference in numerous studies, using a variety of measures to assess gender role behavior. The measures used include sex-typed play activities, toy preferences, choice of television programs, peer relationship choices, garment preferences, and child, parent, and teacher interviews. Gottman, *supra* note 24, at 180 (summarizing the research).

29. I do not address here the issue of what role a likelihood that a child will turn out to be lesbian or gay should play (if any such likelihood should ever be shown to exist).

30. Carol Warren, *Homosexuality and Stigma*, in *HOMOSEXUAL BEHAV.: A MODERN REAPPRAISAL* 123, 137-38 (Judd Marmor ed., 1980).

31. See, e.g., Golombok et al., *supra* note 24, at 564; Green (1982), *supra* note 24, at 13-14. For example, in a study of the sexual orientation of the adult daughters of lesbian mothers, the research showed that these daughters did not differ significantly in sexual orientation from the daughters of heterosexual mothers. The two groups also did not differ significantly in gender identity. Gottman, *supra* note 24, at 188-89.

32. See also Judd Marmor, *Overview: The Multiple Roots of Homosexual Behavior*, in *HOMOSEXUAL BEHAV.: A MODERN REAPPRAISAL* 3 (Judd Marmor ed., 1980).

33. See Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 *AM. J. PSYCHIATRY* 692, 696 (1978) [hereinafter Green (1978)] (reporting normal behavior and typical aspirations among the subject children); Green (1982), *supra* note 24, at 14 (finding no significant gender identity differences for the boys or the girls in either the heterosexual or lesbian set of families). See also Hoeffler, *supra* note 19, at 542-43 (noting no significant differences in the acquisition of sex-role traits between the children of lesbian and heterosexual mothers and hypothesizing that children's peers have the greatest influence on their sex-role development).

34. Golombok et al., *supra* note 24, at 570; Kirkpatrick et al., *supra* note 19, at 551.

35. Golombok et al., *supra* note 24, at 565, 570.

36. Gottman, *supra* note 24, at 177.

Two of the more recent studies in this area focus on children raised since birth by a lesbian mother.³⁷ In one study, the children of the lesbian mothers did not differ with respect to social competence or behavioral problems compared with children from the general population.³⁸ Another study found no differences in overall cognitive and behavioral functioning, social competence, school performance, or developmental progress between children raised by a lesbian mother and her same-sex partner and children raised by married heterosexual parent families.³⁹

Several studies compare the self-esteem and self-concepts of children raised by a lesbian mother to those of children raised by a heterosexual mother. A study of adolescents finds no differences in self-esteem or self-concept between children of divorced mothers living with a same-sex partner and children of divorced mothers living with an opposite-sex partner. The self-esteem and self-concept of both groups were within the normal range.⁴⁰ Moreover, a study of children raised from birth by a lesbian mother in a lesbian household finds no difference between those children and children raised by a heterosexual mother on self-concept scales that measure aggression, sociability, or desire to be the center of attention.⁴¹ This same study finds that children raised by lesbian mothers "reported greater feelings of joy, contentedness and comfort with themselves than did children of heterosexual mothers."⁴² The research also suggests that there is no difference in the overall level of intellectual development of children raised by a lesbian mother as compared with children raised by a heterosexual mother.⁴³

Research on peer and adult relationships illustrates that children of lesbian or gay parents develop relationships similar to those of children raised by heterosexual parents. Studies suggest that children raised by a lesbian mother have peer relationships that are substantially equivalent to those of children raised by a heterosexual mother. This research shows no significant differences between these two groups of children in terms of self-ratings of popularity, mothers' ratings of their children's popularity and leadership qualities, blind assessments of the children's popularity, and overall social adjustment and choice of friends.⁴⁴

37. Earlier studies focused primarily on children who were the product of a heterosexual relationship but were later being raised by a gay or lesbian parent. The data from those earlier studies is indistinguishable from the results of more recent research centering on children who have never lived in households where there is a heterosexual parent. Furthermore, the diversity of experience among the subjects of these studies parallels the experience of adoptive children, some of whom would join the adoptive parent later in life, others of whom might be placed with the adoptive parent while in infancy.

38. Patterson, *Baby Boom*, *supra* note 27, at 156.

39. Flaks et al., *supra* note 18, at 109-10, 113.

40. Sharon Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, J. HOMOSEXUALITY, Nos. 1/2 1989, at 123, 131.

41. Patterson, *Baby Boom*, *supra* note 27, at 167.

42. *Id.* at 168.

43. Green et al. (1986), *supra* note 25, at 174.

44. See, e.g., Gottman, *supra* note 24, at 179-83; Golombok et al., *supra* note 24, at 564-67.

Children of lesbian mothers have also been found to have healthy and positive relationships with adults. One study finds that, as a group, lesbian mothers are more concerned than divorced heterosexual mothers that their children have positive relationships with men.⁴⁵ Accordingly, children of lesbians, especially children of lesbians who are sharing a household with their partner, are more likely to include male relatives in their activities on a regular basis and to have more men in their lives as family friends.⁴⁶

The research shows that fears of harm to children from social stigma associated with the sexual orientation of the parent are unfounded. One study shows that only about five percent of the children studied who had lived with an openly lesbian or gay parent experienced harassment by other children.⁴⁷ Where children do experience harassment, the incidents generally are infrequent and consist of relatively minor verbal teasing, such as name-calling.⁴⁸ Such experiences have not been shown to have any significant impact on the children involved.⁴⁹ Indeed, given the data showing no differences in psychological adjustment between children of gay and lesbian parents and children of heterosexual parents, any such teasing clearly has no significant long-term effects on the children.

Of course, many children are teased because of some way in which they or their families are different from the norm. Teasing may be based on a child's physical appearance, race, religion, economic status, or any number of other factors. Just as black or Jewish parents help their children to cope with the bigotry inflicted on them because of race or religion, so can lesbian and gay parents guide and assist their children in adjusting to the world's imperfections and unfairness.⁵⁰

C. Common Myths About Lesbian and Gay Parents

Despite the evidence discussed above, negative attitudes towards lesbians and gay men, especially with respect to parenting, persist. This section

45. Kirkpatrick et al., *supra* note 19, at 549.

46. *Id.*

47. Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 548 (1979). See also Green (1978), *supra* note 33, at 695-96 (showing that in seven lesbian mother families in which issue of teasing was discussed, three children reported being teased and 18 children did not experience teasing; in all three cases, the teasing was minor and transitory).

48. See Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, J. HOMOSEXUALITY, Nos. 1/2 1989, at 137, 143; Green (1978), *supra* note 33, at 695-96.

49. See Green (1978), *supra* note 33, at 695 (illustrating that children's reactions to name-calling directed at mothers were rather matter-of-fact and ranged from defensiveness to obliviousness); Steve Susoeff, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 877-80 (1985).

50. In fact, as one court recognized:

It is just as reasonable to expect that they [children in the custody of a lesbian mother] will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979).

addresses two of the more common stereotypes—that homosexuality is a mental disorder and that there is a connection between sexual orientation and child sexual abuse—and shows them to be without merit.

Lesbian and gay people are no more prone to suffer from psychopathology than are heterosexual people.⁵¹ In 1973, the American Psychiatric Association (APA) removed homosexuality from its list of mental disorders.⁵² Following the APA's lead, other scientific bodies adopted resolutions which rebut persistent myths regarding the mental and emotional status of gay people.⁵³ In the context of parenting and, specifically, adoption, the APA has long decreed that a parent's sexual orientation should not be a bar. The APA adopted a resolution in 1976 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."⁵⁴ Any suggestion that lesbians and gay men are unfit to adopt and raise children because they suffer from a mental disorder is unfounded.

There is also no evidence supporting the second myth, that lesbian or gay parents are more likely to sexually abuse their children or to allow others to molest their children.⁵⁵ In fact, research on the sexual abuse of children shows that offenders are disproportionately heterosexual men.⁵⁶

51. See, e.g., 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."); Andrea K. Oberstone & Harriet Sukoneck, *Psychological Adjustment and Life Style of Single Lesbian and Single Heterosexual Women*, 1 *PSYCHOL. WOMEN Q.* 172, 183 (Winter 1976) (concluding there are no major differences found in the overall psychological adjustment of lesbians compared to heterosexual women).

52. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 380 (3d ed. 1980). This action was taken after the APA's Nomenclature Committee reviewed the most recent research on homosexuality and reported, in the words of one commentator, that there was "not one objective study, by any researcher, in any country, that substantiates the theory of homosexual pathology." Charles Silverstein, *Even Psychiatry Can Profit From Its Past Mistakes*, J. *HOMOSEXUALITY*, No. 2 1976-77, at 153, 157 (emphasis added).

53. For instance, the National Association for Mental Health and the U. S. Surgeon General have both recognized that a same-sex sexual orientation in and of itself constitutes no form of mental or emotional illness. CALIFORNIA COMMISSION ON PERSONAL PRIVACY, *REPORT OF THE COMMISSION ON PERSONAL PRIVACY* 361-63 (1983). The APA has encouraged mental health professionals to take the lead in removing the stigma of mental illness which historically has been associated with homosexuality. John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1979*, 35 *AM. PSYCHOL.* 501, 532 (1980).

54. John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1976*, 32 *AM. PSYCHOL.* 408, 432 (1977) (emphasis added).

55. A. Nicholas Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 4 (Ann W. Burgess et al. eds., 1978) ("[T]he belief that homosexuals are particularly attracted to children is completely unsupported by our data."). See also JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 16 (1980) (explaining that accusations of child molestation have historically been made against disfavored minorities vulnerable to such "propaganda," be they gay people, Jews or others); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *LAW & SEXUALITY* 133, 156 (1991) (reviewing the literature relating to adult sexual orientation and molestation of children and concluding that gay men are not more likely than heterosexual men to molest children).

56. See Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 *PEDI-*

Similarly, incest statistics show that the vast majority of cases of parent-child incest involve heterosexual fathers and their daughters.⁵⁷

These studies show that the myths of homosexuality as a mental disorder and of a connection between sexual orientation and child sexual abuse are just that, myths. They do not provide a basis for denying adoption by lesbian or gay people.

III. RESPONSES TO THE SOCIAL SCIENCE RESEARCH

Courts often look to social science research to either reach or justify their decisions. Some courts have used the research on children of lesbian or gay parents to deny adoptions by lesbian or gay people, while others have used the research to grant these adoptions. Opponents of adoptions by lesbian or gay people often misrepresent social science data by claiming that the studies are flawed, by providing alternative, unscientific, and biased studies, or by making unfounded allegations and quoting statistics without support. Some opponents challenge these adoptions by questioning whether the research should be used at all, even when it shows no harm from being raised by a lesbian or gay parent.

A. Courts

Although courts often use social science research to support their decisions in granting or denying adoptions by lesbian or gay people, judicial response to this body of research has been inconsistent. Different courts in New Hampshire and Florida, the two states in which statutes ban adoptions by lesbian or gay people, have used social science research to hold these statutes both constitutional and unconstitutional.

The New Hampshire Supreme Court, in *In re Opinion of the Justices*,⁵⁸ denied that a prohibition on adoption by lesbian and gay people would violate federal and state constitutional guarantees. On the equal protection claim, the court found a rational basis for the prohibition in the concern that adoptive parents provide role models for their children. The court noted that:

Although opponents of the bill have cited a number of studies that find no correlation between a homosexual orientation of parents and the sexual orientation of their children, the source of sexual orientation is still inadequately understood and is thought to be a combination of genetic and environmental influences.⁵⁹

ATRICS 41, 44 (1994) (finding that a child is 100 times more likely to be sexually abused by the heterosexual partner of a relative than by a gay adult); SAM HOUSTON STATE UNIV., CRIMINAL JUSTICE CENTER, RESPONDING TO CHILD SEXUAL ABUSE: A REPORT TO THE 67TH SESSION OF THE TEXAS LEGISLATURE 22 (1980) (illustrating the vast majority of sex crimes committed by adults upon children are heterosexual, not homosexual).

57. See HUMAN DEVELOPMENT SERVICE, NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 27-29 (1982).

58. 530 A.2d 21 (N.H. 1987).

59. *Id.* at 25.

The court discounted the weight of the social science research and relied instead on unproven speculation. There was no evidence showing that children of lesbian or gay parents are harmed by their environment, yet the court relied on this assumption in its ruling.

In Florida, a trial court and an appellate court have ruled on the constitutionality of the state's ban on adoptions by lesbian or gay people. In *Seebol v. Farie*,⁶⁰ a trial court held the ban unconstitutional, while in *State Dep't of Health and Rehabilitative Services v. Cox*⁶¹ an intermediary appellate court ruled that the ban did not violate constitutional guarantees.

The court in *Seebol v. Farie* held that Florida's statutory ban violates the Florida and federal constitutions. The court relied on social science research, noting that studies of children raised by lesbian or gay parents show normal behavioral development:

Mental health experts have found the incidence of same-sex orientation among the children of homosexual parents as randomly and in the same proportion as found among children in the general population. [citation omitted]. Psychiatrists have found that children adopt sexual orientations independently from their parents, [citation omitted] and that homosexual men and women do not learn sexual preference by watching the sexual preference of their parents.⁶²

For the court, these studies dispelled the myth that children of lesbian or gay parents develop differently than children of heterosexual parents. If there is no harm to these children, the only rationale for the statute is one of prejudice.

In *Cox*, the trial court found that Florida's ban violated the Florida and federal constitutions. As in *Seebol*, the court relied explicitly on the social science research, presented by the plaintiffs, which demonstrated that there was no significant difference in a child's development whether the child was raised by a lesbian or gay parent or a heterosexual parent.⁶³ The court re-

60. No. 90-923-CA-18 (Fla. Cir. Ct. Mar. 15, 1991), reprinted in *State Dep't of Health and Rehabilitative Servs. v. Cox*, 627 So. 2d 1210, 1221 app. A (Fla. Dist. Ct. App. 1993).

61. 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993), review granted, 637 So. 2d 234 (Fla. 1994).

62. *Seebol*, reprinted in *Cox*, supra note 61, at 1222 (citations omitted).

63. The court relied on evidence which showed that:

[R]elative to children raised by a heterosexual person, children raised by a homosexual person:

- a) are no more likely to become homosexual,
- b) are no more likely to develop sexual identity problems, (appropriately identifying themselves as male or female),
- c) are no more likely to develop gender identity problems (choosing activities and occupations regarded by society as appropriately masculine or feminine),
- d) are no more likely to be sexually abused (nearly all pedophiles are male, and the overwhelming majority of pedophile attacks are heterosexual),
- e) are no more likely to develop the usual childhood difficulties in their behavior, personality, self concept, locus of control, moral judgment, relationships with their parents and friends, or intelligence, and
- f) are no less likely to develop normally in all these areas.

Cox v. State Dep't of Health and Rehabilitative Servs., No. 91-3491 CA-01, slip op. at 3 (Fla. Cir. Ct. Mar. 5, 1993), rev'd, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993), review granted, 637 So. 2d 234 (Fla. 1994).

jected the State's contention that the scientific studies are "inconclusive on the issue of the impact of a parents [sic] sexual orientation on that of the child."⁶⁴ The court noted further that the article relied on by the State for this argument contained no empirical support and that "[a]ll other studies before the Court including those filed by the State, support the findings of fact."⁶⁵

The appellate court reversed, holding the statute constitutional and addressing the social science research in a much different manner.⁶⁶ The court erroneously concluded that since the studies were not done on adopted children, they were irrelevant or unpersuasive in the adoption context. The court also mistakenly assumed that the (presumably heterosexual) children of lesbian or gay parents will not be able to benefit from the experiences of these parents with regard to dating members of the opposite sex.⁶⁷

While it is true that these studies have not involved lesbian or gay adoptive parents, there is no reason to believe that the lesbian or gay sexual orientation of adoptive parents has any different effect on the child than the lesbian or gay sexual orientation of a non-adoptive parent. It is both reasonable and appropriate to draw conclusions about the parenting skills of lesbians and gay men in the adoption context on the basis of available evidence concerning parenting skills in the context of parents raising their biological children. Common fears about allowing lesbians and gay men to adopt focus on lesbian and gay people's alleged inability to be good parents, not on their inability to be good *adoptive* parents. Thus, the concern is not about how lesbian and gay parents will deal with issues such as how to tell the child about the adoption, whether to allow contact with the natural parents, or how to cope with a child's incomplete or missing medical history, all of which are issues specific to adoption. The concerns are much more basic: Can a lesbian or gay man nurture a child, promote healthy development, and serve as a useful role model—the very issues addressed by the parenting studies described above. Although caring for an adopted child presents some additional challenges to any parent, the studies show that lesbians and gay men are no less suited to meeting parenting challenges than are heterosexual adoptive parents.

The Cox court hypothesized that a rational basis for the Florida statute⁶⁸ might be the fear that adoptive children, whom the court surmised would be predominantly heterosexual, needed parents who could serve as heterosexual role models and "assist the child in the difficult transition to heterosexual adulthood."⁶⁹ The court's opinion ignores the large numbers of heterosexual role models available in society generally, while also ignoring similar needs of lesbian or gay adoptive children.⁷⁰ Moreover, the court's

64. *Id.* at 4.

65. *Id.* at 5.

66. State Dep't of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1213 (Fla. Dist. Ct. App. 1993), *review granted*, 637 So. 2d 234 (Fla. 1994).

67. *Id.* at 1220.

68. FLA. STAT. ANN. § 63.042(3) (West 1985 & Supp. 1995).

69. Cox, 627 So. 2d at 1220.

70. See Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L. Q. 347, 361-62

rationale bears no relation to the available body of evidence regarding the sexual identity of children raised by lesbian and gay parents.

The court also assumed that lesbian and gay parents would be unable to educate their heterosexual children about relationships with the opposite sex by "telling stories about their own adolescence and explaining their own experiences with the opposite sex."⁷¹ Relevant research about the experiences of lesbians and gay men reveals that they were not lacking in heterosexual experiences during their childhood and adolescent years.⁷² In addition, no data suggests that homosexual dating and courtship are so dissimilar from heterosexual mating rituals that experience with the former cannot inform the latter. In fact, the research analyzing the actual experiences of children of lesbian and gay parents does not show any role-modeling problems.⁷³

The courts in New Hampshire and Florida which upheld statutory bans against adoption by lesbian and gay people speculated or assumed that children would be harmed by having a lesbian or gay parent. In so doing, these courts discounted, distorted, or disregarded empirically sound social science research.

B. Opponents of Adoption by Lesbian and Gay People

1. *Attacking the Research.* Opponents of adoption by lesbian and gay people have vigorously responded to the body of social science research. For example, in the *Cox* case, the Rutherford Institute of Charlottesville, Virginia filed an amicus brief with the Florida Supreme Court in support of the statutory ban against adoption by lesbian and gay people. The Rutherford Institute argued both that the social science evidence relied on by the plaintiff and amici in support of plaintiff is flawed,⁷⁴ and that other "impartial" evidence shows that it can never be in the best interest of children to be adopted by lesbian or gay people.

By way of evidence, the Rutherford Institute offers outrageous allegations about lesbian and gay people without providing any citation whatsoever. For example, the Rutherford Institute's brief claims that, "[t]wenty nine per cent of children raised by a homosexual parent reported sex with the homosexual parent."⁷⁵ In addition, the brief states that, "Masters and Johnson report a seventy one percent success rate in therapy for homosexuals

(1991).

71. *Cox*, 627 So. 2d at 1220.

72. ALAN P. BELL ET AL., *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* 188 (1981).

73. *See id.* 216-24.

74. The Rutherford Institute's criticisms of the peer-reviewed social science articles supporting plaintiff's claims include the fact that some of the studies compared children of lesbians with children of heterosexual single mothers, as opposed to heterosexual father and mother families. Brief of the Rutherford Institute *Amicus Curiae*, in Support of Respondent at 2, *State Dep't of Health and Rehabilitative Servs. v. Cox*, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993) (No. 82, 927), *review granted*, 637 So. 2d 234 (Fla. 1994). Of course, for purposes of determining whether or not the sexual orientation of a parent affects a child, a child of a *single* lesbian mother is best compared to a child of a *single* heterosexual mother.

75. *Id.* at 11.

wanting to change their orientation, and thousands of homosexuals have been freed through therapy."⁷⁶ The Institute does not support either of these allegations with a citation.

Where they do provide citations, the Institute refers to publications that the public could not locate; for example, books not found in public libraries or bookstores and listed without reference to a publisher. Other citations refer to affidavits, interviews or "books in press" that are similarly unavailable.

When it does rely on social science data, the Rutherford Institute misrepresents the research. For example, the Rutherford Institute Brief claims that "thirty one percent of child abuse victims were homosexually attacked."⁷⁷ In fact, of the two articles cited for this proposition, one states that only four percent of all male perpetrators were known homosexuals⁷⁸ and the other article does not even discuss homosexual attacks.⁷⁹ A 1993 study by the University of Colorado Health Sciences Center investigating similar claims found that only 0.7 percent of the children studied were abused by someone identifiable as potentially homosexual.⁸⁰

The Rutherford Institute Brief relies upon people whose research supported their own agenda of "converting" lesbian and gay people into heterosexuals.⁸¹ The Institute argues from the starting point that "[c]ontrary to

76. *Id.* at 18.

77. *Id.* at 34 (citing Carole Jenny et al., *Developmental Approach to Preventing the Sexual Abuse of Children*, 78 PEDIATRICS 1034 (1986); Mary J. Spencer & Patricia Dunklee, *Sexual Abuse of Boys*, 78 PEDIATRICS 133 (1986)).

78. Spencer & Dunklee, *supra* note 77, at 135.

79. See Carole Jenny et al., *supra* note 77.

80. Carole Jenny, *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 44 (1994).

81. The Rutherford Institute Brief relies on discredited researchers such as Dr. Paul Cameron, who has been reprimanded by both the courts and the general scientific community. A federal district court has described Dr. Cameron's testimony as "a total distortion" of data regarding homosexuality. *Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985). In *Baker*, Dr. Cameron made a sworn statement that "homosexuals are approximately 43 times more apt to commit crimes than is the general population . . . [and that] homosexuals abuse children at a proportionately greater incident than do heterosexuals." *Id.* These assertions are similar to those made by the Rutherford Institute Brief submitted in the *Cox* case. Brief of the Rutherford Institute *Amicus Curiae*, in Support of Respondent, *supra* note 74, at 35-39. The Fifth Circuit Court of Appeals dismissed Dr. Cameron's statements in holding that there was "no historical or empirical basis" disclosed for Dr. Cameron's "speculative evidence." *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1330 (5th Cir. 1984).

The scientific community has similarly criticized and exiled Dr. Cameron:

[He] resigned from the American Psychological Association to avoid an investigation into charges of his unethical conduct as psychologist. The charges of unethical conduct against Dr. 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.

Baker v. Wade, 106 F.R.D. at 536-37, n. 31. Dr. Cameron was also censured by the American Sociological Association which adopted a resolution charging him with "consistently misinterpret[ing] and misrepresent[ing] sociological research on sexuality, homosexuality, and lesbianism." Herek, *supra* note 55, at 152 (quoting *Sociology Group Criticizes Work of Paul Cameron*, J. STAR (Lincoln, Neb.), Sept. 10, 1985, at 1). Also, in 1984 the Nebraska Psychological Associ-

allegations submitted by briefs on behalf of the Petitioner, homosexuality is a psychiatric psychopathological condition."⁸² The Institute supports this statement by claiming that the American Psychiatric Association's removal of homosexuality as a disorder in 1972 was merely a "political decision" and "was an abandonment of many who suffer and need treatment, which, when sought, can be *very successful and present a favorable prognosis* to ones who have often surrendered in despair."⁸³ In addition, the Institute claims that, "Homosexuality is not an alternative sexuality, but an emotional disorientation caused by arrested or blocked emotional development in the stream of heterosexuality."⁸⁴ These statements ignore the medical establishment's acceptance of homosexuality in addition to the majority of the social science research demonstrating that children adopted by lesbian or gay people develop similarly to children of heterosexual parents.

Proponents of the "conversion" position include Dr. Joseph Nicolosi, whom the brief describes as a specialist "who counsels homosexuals who want to recover their heterosexual identities," as well as the "National Association of Research and Treatment of Homosexuality (NARTH), a professional organization formed in 1992 to protect the right of homosexuals to seek therapy designed to restore heterosexuality."⁸⁵ The research of Dr. Nicolosi and NARTH members supports the Rutherford Institute's views. The Institute concludes its brief by stating that the court should "encourage Petitioner to remove himself from the homosexual lifestyle."⁸⁶ It is thereby apparent that the Rutherford Institute is attacking not just adoption by lesbians and gay people, but lesbian and gay identity itself.

2. *Ignoring the Research.* An alternative response to social science research is not to argue that it is flawed or otherwise inaccurate, but rather that it is besides the point. At first it seems counterintuitive to suggest that research about children raised by lesbian and gay parents is irrelevant to the determination of whether lesbian and gay people should be allowed to adopt. But the history of the Florida ban suggests that such evidence was considered irrelevant in enacting the ban, and the current arguments in favor of such statutory bans explicitly employ this notion.

The Florida statute was enacted in 1977 despite the fact that there had been no study commissioned regarding the pros and cons of adoption by lesbian or gay people and no reports of large numbers of such adoptions taking place. The legislature did not even engage in any fact-finding regarding harms of adoption by lesbian and gay people. Rather, an anti-gay cam-

ation "formally disassociat[ed] itself from the representations and interpretation of scientific literature offered by Dr. Paul Cameron in his writings and public statements on sexuality." Herek, *supra* note 55, at 152 (quoting Lynda S. Madison, *Minutes of the Fall Meeting*, 25 NEB. PSYCHOL. ASS'N F. 2, 3 (Winter 1984)).

82. Brief of the Rutherford Institute *Amicus Curiae*, in Support of Respondent, *supra* note 74, at 16.

83. *Id.* at 17.

84. *Id.* at 21.

85. *Id.* at 8.

86. *Id.* at 41-42.

paign was being waged by, among others, Anita Bryant, seeking to overturn non-discrimination laws and prevent lesbian and gay people from teaching in public schools.⁸⁷ In the middle of this campaign, the first state-wide statutory ban on adoptions by lesbians and gay men was passed with almost no analysis or debate.

During hearings in the Florida Senate Judiciary Committee on May 3, 1977, and again during debate on the Senate floor on May 11, 1977, Senator Chamberlain questioned the legislative purpose of the bill in light of the fact that the legislature had no demonstrable evidence that any problem existed in Florida with regard to adoptions by homosexuals. He argued that the purpose of the bill had nothing to do with adoption and everything to do with discrimination. No supporter of the bill disputed Senator Chamberlain's assessment. Instead, proponents of the bill expressed their concern for children of lesbian or gay parents, who would have to attend school with children of heterosexual parents, and for placing children in what may not be a "wholesome" family.⁸⁸

As exemplified in Florida, opponents of adoption by lesbian and gay people find the research on children of lesbian and gay parents irrelevant to their cause. First, any time a justification for the ban is hypothesized without factual support, the actual research is rendered irrelevant. This occurs in the context of constitutional equal protection review, where it is argued that the rational basis review described by the Supreme Court in *Heller v. Doe*,⁸⁹ allows courts to imagine any possible rational basis that the legislature could possibly have relied on to support the statute. Such an argument in this context is fatally flawed for two reasons: first, the relationship between statutes banning adoption by lesbian and gay people and the best interests of children is not rational because the evidence proves that there is no harm from having a lesbian or gay parent; and second, the statutory bans are based on prejudice against lesbian and gay people and therefore constitutionally impermissible.⁹⁰

A second argument about the irrelevance of the research is that a ban is justified by the moral or religious determination that, regardless of the evidence showing no harm to children, being raised by lesbian and gay parents can never be in the best interests of children. For example, in the *Cox* case, the Florida Catholic Conference filed an amicus brief with the Florida Supreme Court, suggesting that its particular religious views as to what will be in the best interests of all children be substituted for the individualized best interests determination that the Florida Constitution and Florida adoption law generally requires.⁹¹ While not disputing that the primary consideration

87. Tom Mathews et al., *Battle Over Gay Rights*, NEWSWEEK, Jun. 6, 1977, at 16.

88. See JOURNAL OF THE FLORIDA SENATE, ORGANIZATION SESSION, at 370-71 (1977).

89. 113 S. Ct. 2637 (1993).

90. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985) (holding that requiring a special use permit for a home for the mentally retarded violated the equal protection clause because the law was based on an irrational prejudice); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (holding that racial prejudice cannot justify a racial classification removing an infant child from the custody of its natural mother).

91. Brief of Florida Catholic Conference *Amicus Curiae* at 1, *Cox v. State Dep't of Health*

in the placement of children for adoption is the best interests of the child, the Catholic Conference argued that no best interests determination should ever be made when the prospective parent is lesbian or gay because it does not believe that it can ever be in the best interests of a child to be adopted by a lesbian or gay person.⁹²

Similarly, the Catholic Conference suggests that *its* particular religious views as to adoption by lesbian or gay people must be the law of this State; otherwise, it argued, Catholic agencies that contract with the State for adoption services might be required to consider lesbian or gay people as prospective adoptive parents.⁹³ This argument misconstrued the nature of the case. The issue presented is not whether a religious group that contracts with the State for adoption services could be exempt from laws requiring that all prospective parents be considered for adoption; the issue is whether the Catholic Conference's particular religious views can dictate whether the State may constitutionally prohibit any adoption agency, secular or religious, from considering whether adoption by a lesbian or gay parent is in the best interests of an individual child. Because a particular religious group's views cannot mandate the law applicable to everyone,⁹⁴ the Catholic Conference's arguments must fail.⁹⁵

III. CONCLUSION

The emergence of a body of social science research published in peer-reviewed social science journals is phenomenally important in the struggle for fair treatment of lesbian and gay parents and their children by the courts. The unanimity with which the studies have found no harm from being raised by lesbian and gay parents is overwhelming. For years courts have relied, implicitly and explicitly, on the assumption that having a lesbian or gay parent would be harmful to a child. This has been devastating in the area of child custody, where parents have been deprived of custody and visitation with their children on the basis of such unfounded assumptions.⁹⁶ But these assumptions have acted even more powerfully and negatively in the area of adoption, where no existing legal relationship exists and where the law traditionally allows for more deference to a social worker's or court's determination as to the "ideal parent." This new research defeats these assumptions. It must be used to fight the existing statutory bans, to

and Rehabilitative Servs., 637 So. 2d 234 (Fla. 1994) (No. 82,967), *granting review*, 627 So. 2d 1221 (Fla. Dist. Ct. App. 1993).

92. *Id.* at 8.

93. *Id.* at 16.

94. *See, e.g., Stone v. Graham*, 449 U.S. 39, 40-43 (1980).

95. In addition to unconstitutionally establishing one group's religious beliefs as secular law, following the Catholic Conference's argument would lead to absurd and intolerable results. For example, any law requiring that children in foster care be given medication when necessary would have to be stricken if a Christian Scientist foster care agency's religious view indicated otherwise, and no foster care agency would be permitted to provide medication to a sick child.

96. *See, e.g., Bottoms v. Bottoms*, No. CH93JA0517-00 (Va. Cir. Ct. Henrico County Sept. 7, 1993), *rev'd*, 444 S.E.2d 276 (Va. Ct. App. 1994), *appeal filed*.

fight new proposed statutory bans, and, perhaps the biggest challenge, to prevent the use of non-statutory means to discourage or disallow adoption by lesbian and gay people.

The debate must be properly framed. The research provides ammunition to fault the assumptions raised in support of prohibitions on adoption by lesbian and gay people. It should not be necessary, however, to bear this burden of proving that lesbian and gay people do not harm children—the burden should be on those seeking or supporting a ban. This is not only important as a technical matter, because despite the strength and unanimity of the research, there is always the risk of losing (and certainly this has historically been the case) because of misperceptions about the social science research coupled with prejudice against lesbian and gay people.⁹⁷ Briefs like the one submitted by the Rutherford Institute in *Cox* attempt to exploit these factors. Courts must reject unfounded assumptions about lesbian and gay people and instead rely on the well-documented social science research.

In addition to relying on the substance of these studies, advocates for lesbian and gay people must show that these statutory bans are based on biases against lesbian and gay people and therefore must be stricken. The Supreme Court, in *Palmore v. Sidoti*,⁹⁸ did just that in an interracial custody case. The Court did not look for studies proving that children raised by interracial couples develop no differently from children raised by parents of the same race. Instead, the Supreme Court held that to rely on the prejudiced reactions of others as the basis for placing children with parents was precisely what would be unconstitutional. In the context of adoption by lesbian and gay people, courts must be convinced to keep the promise of *Palmore*.

97. See *supra* notes 60, 63 and accompanying text.

98. 466 U.S. 429 (1984).

