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**Adults' Sexual Orientation and State Determinations Regarding Placement of Children**

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## I. INTRODUCTION

Should the fact that a parent or prospective parent is gay be deemed relevant when the state places children in adoptive and foster care homes, resolves child custody disputes, and establishes policy with respect to access to assisted reproductive technologies (ART)?<sup>1</sup> In this article, I examine this question from a child welfare and family law policy perspective.<sup>2</sup> Opponents of placing<sup>3</sup> children with lesbians or gay men claim that being raised by a gay parent may be harmful to children's social or emotional development, or at least less advantageous than being raised by a heterosexual parent or parents. I therefore focus on the issue of whether consideration of sexual orientation is likely to promote the positive development and well-being of children.<sup>4</sup> Some commentators oppose placing

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<sup>1</sup> ART is the use of non-coital technologies to conceive a child and initiate pregnancy. The most common methods are donor insemination, in vitro fertilization, and surrogacy. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994).

<sup>2</sup> Many commentators approach these issues from an adults' rights perspective, focusing on issues of equal treatment of gay individuals. See, e.g., SUSAN OLYAN & MARTHA NUSSBAUM, SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN LEGAL DISCOURSE (1998). With respect to ART, it also is argued that access should be a matter of reproductive rights or freedom and should not be regulated, except to control practices that are clearly harmful to the prospective child or to society. See, e.g., John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004). For reasons discussed *infra*, see notes and accompanying text, I agree that adults' interests are relevant, especially those regarding access to ART. However, since I am focusing here on policy from a children's perspective, I analyze all the issues primarily in terms of children's well-being and rights.

<sup>3</sup>With respect to ART, there is no child, so the issue is better conceptualized as an allocation of the opportunity to have a child, rather than as a child placement. For ease, I use the term placement for all these decisions.

<sup>4</sup> I focus on the claims that an adult's homosexuality should be treated as a potentially negative factor because this is

children with lesbians or gay men because they believe that homosexuality is immoral,<sup>5</sup> a position I reject. Others have addressed the morality issues and whether a belief that same-sex relations are immoral should, standing alone, be a sufficient basis for restricting gay peoples' access to parenting; I do not review these positions here.<sup>6</sup>

Our society does not assess the competence of individuals to become biological parents; no one needs permission to have a child. Nor does the state deny interfere with parental custody of children unless parental care falls below the minimum standards established under child abuse and neglect laws.<sup>7</sup> No state has policies preventing a gay adult from bearing a child or allowing children to be

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the way most people frame the issue. Most people would think it strange to ask whether an adult's heterosexuality should be considered a negative factor, although it might well be in some instances, for example with respect to placements of gay youth. In fact, the research indicates that many lesbian parents are exceptionally competent, which is consistent with my own observations. For a very insightful discussion of how policy makers and judges inappropriately make assumption about what is normal and place extra burdens on those thought to be "different" see MARTHA L. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 51 (1990). Discrimination based on race and religion has been common in family law. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.12 & cmt. d (2002) [hereinafter ALI].

<sup>5</sup> For example, in 2002 Raymond Moore, the former Chief Justice of the Alabama Supreme Court, wrote, "homosexual behavior is a ground for divorce[,] . . . a crime against nature, an inherent evil, and an act so heinous that it defies one's ability to describe. That is enough under the law to allow a court to consider such activity harmful to a child." *Ex Parte H.H.*, 830 So. 2d 21, 37 (Ala. 2002) (Moore, J., concurring). Many legislators also believe that the likelihood that a parent will promote a child's moral development should be a factor in placement decisions. For those legislators who believe that homosexuality is immoral, an adult's sexual orientation would obviously be relevant. The most prominent academics, social commentators, and advocacy groups that oppose placement of children with lesbians and gay men, such as Brigham Young law professor Lynn Wardle, syndicated columnist Maggie Gallagher, and the Family Research Council, a major advocacy group on family issues, also believe that homosexuality is immoral or a sickness. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997) [hereinafter Wardle, *Homosexual Parenting*]; Lynn D. Wardle, *Adoption by Adults Involved in Homosexual Lifestyles*, in *ADOPTION FACTBOOK III* 289 (Connaught Marshner & William L. Pierce eds., 1999) [hereinafter Wardle, *Adoption*]; Maggie Gallagher, *Fixing Sexual Orientation*, TOWNHALL.COM, May 10, 2001, <http://www.townhall.com/opinion/columns/maggiiegallagher/2001/05/10/166382.html>; FAMILY RESEARCH COUNCIL, *THE BIBLE, THE CHURCH, AND HOMOSEXUALITY* (2005); FAMILY RESEARCH COUNCIL, *GETTING IT STRAIGHT* (2005). However, they frequently present their arguments in terms of child well-being. See note 71 *infra* and accompanying text.

<sup>6</sup> See, e.g., OLYAN & NUSSBAUM, *supra* note 2; THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES (Timothy P. Jackson ed., 2005); Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1996); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart Rosenbaum eds., 1997).

<sup>7</sup> See Michael S. Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 75 STAN. L. REV. 985 (1975).

removed from gay parents solely because the parent is gay;<sup>8</sup> such policies would receive little public support and likely would be unconstitutional.<sup>9</sup>

The situation changes when the state is involved in placing children. Several states have laws or regulations that limit adoption or foster placement to heterosexual individuals or to married couples (which effectively precludes placement of children with same-sex couples, who are barred from marrying in these states); even in the absence of statutory bars, child welfare workers may be reluctant to place children with gay adults.<sup>10</sup> In contested custody disputes, the fact that a parent is gay may be considered as a negative factor, based on state legislation, rules adopted by state appellate courts, or the views of individual trial judges.<sup>11</sup> No state currently denies lesbians or gay men access. The absence of government restrictions leaves control to individual doctors or to clinics, which become de facto doorkeepers of access.<sup>12</sup> Some doctors and clinics refuse to provide services to lesbians.<sup>13</sup> A number of other countries do bar lesbians and gay men from access to state

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<sup>8</sup> There is no exact count of how many American children are being raised by same-sex couples today. The 2000 U.S. Census counted about 594,000 households headed by a member of a same-sex couple; there were children living in 27 percent of such households. Thus, at least 166,000 children are being raised by gay and lesbian couples. U.S. CENSUS BUREAU, MARRIED COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 (2003); GARY GATES & JASON OST, THE GAY AND LESBIAN ATLAS 45 (2004). This is a minimum estimate. The Census did not count the number of children in each home, children over age 16, or children living with single gay parents.

These children may be from the parent's previous marriage or other heterosexual relationship, born to the parent through assisted reproduction or adopted. In most of these families only the biological parent has a legal relationship with the child; in some same-sex couple households, the non-biological parent has adopted the biological parent's child, or the child was adopted by both parents, so that both partners are the child's legal parents.

<sup>9</sup> Under most state laws and the U.S. Constitution, intervention under child abuse laws requires some showing of harm or potential harm to the child. *See Prince v. Massachusetts*, 321 U.S. 158 (1944); *In re Jeanette S.*, 94 Cal. App. 3d. 52 (Ct. App. 1979). As discussed below, see notes \_\_\_-\_\_\_ and accompanying text *infra*, being raised by a gay parent is not, in and of itself, harmful to children. The evidence is all to the contrary.

<sup>10</sup> *See* discussion at note \_\_\_ and accompanying text *infra*; EVAN B. DONALDSON, ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES? 11-12(2006).

<sup>11</sup> *See* discussion at note \_\_\_ and accompanying text *infra*. In addition, concern with gay men and lesbians as parents is offered as a major reason for not allowing same-sex couple marriage and civil unions. *See, e.g., Wardle, Homosexual Parenting, supra* note 5, at 833.

<sup>12</sup> Many women perform insemination at home, with sperm acquired from known donors or donors contacted via the Internet or sperm banks. In five states, however, only doctors may inseminate women. *See Catherine DeLair, Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 148, 163 n.142 (2000).

<sup>13</sup> *See Benitez v. N. Coast Women's Care Med. Group, Inc.*, 106 Cal. App. 4th 978 (Ct. App. 2003) (challenging

facilities providing eggs or sperm, including several countries with “pro-gay” policies in other family-related areas.<sup>14</sup> Some commentators have proposed similar restrictions in the U.S.<sup>15</sup>

In assessing these policies, I begin by examining the value issues that should be addressed in establishing policy regarding placement of children. I pay special attention to the common assertion that the state should place children only in the “optimal” or “ideal” family setting, which is then defined as a heterosexual, married couple household. I also review interests besides those of children that ought to be weighed in establishing policy, specifically the interests of biological parents in raising their children, the interests of most adults in having children, and the general societal interest in equal treatment. I then look at the social science research assessing the family-related factors that contribute to the academic, social, and emotional well-being of children, especially the research on the development of children living with gay parents, in order to assess the potential relevance of a parent’s sexual orientation on children’s development. I then examine the implications of this research with respect to the various placement decisions.

I conclude that it is almost always detrimental to children if decision-makers consider an adult’s sexual orientation when making placement decisions. With respect to foster care and adoption placements, there should not be laws barring or disfavoring placement of children with gay adults; doing so would harm children and adults alike. At most, the fact that a prospective parent is gay might be considered, as one of a number of factors, in assessing the best alternative in the small number of situations when there are several qualified couples or individuals seeking to adopt or foster a child. With respect to custody disputes, the fact that a parent is gay should not be treated as

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doctors refusal to provide insemination to lesbians); DeLair, *supra* note 12, at 151 & n.36; Elizabeth Weil, *Breeder Reaction*, *Mother Jones* 33 (July-august 2006).

<sup>14</sup> The numerous restrictions adopted by countries throughout the world are detailed in LESLIE ANN MINOT, *CONCEIVING PARENTHOOD: PARENTING AND THE RIGHTS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE AND THEIR CHILDREN*, at ch. VI (2000); *see also* Robertson, *supra* note 2, at 325.

<sup>15</sup> *See, e.g.*, Helen Alvaré, *The Case For Regulating Collaborative Reproduction: A Children’s Rights Perspective* 40 *HARV. J. ON LEGIS.* 1 (2003); David Blankenhorn, President, Inst. for Am. Values, Presentation to the Danish Institute for Human Rights: The Rights of Children and the Redefinition of Parenthood (June 2, 2005), [www.americanvalues.org/html/danish\\_institute.htm](http://www.americanvalues.org/html/danish_institute.htm). At least one legislator has introduced legislation that would ban access. *See* Brooke Adams, *Controversial Surrogacy Law Fix Proposed*, *SALT LAKE TRIB.*, July 17, 2003, at A1.

relevant by decision-makers.<sup>16</sup> Regarding assisted reproductive technologies, same-sex couples and gay individuals should have access on the same terms that a state permits for heterosexual couples and individuals.

These recommendations would require substantial changes in the laws and/or practices of many states (and other countries). I recognize that many legislators, judges, and members of the general public will view some of my proposals skeptically, at best. Given the historic view that homosexuality is abnormal (and morally problematic), the majority of legislators and members of the public may well assume that living with a gay parent is likely to be detrimental to children. In all decision-making involving children, there is a great risk that adults will focus on their own values, not on children's interests. I hope that the analyses and data presented here at least help readers think about the issues that need to be confronted in establishing policy in these areas if the interests of children truly are the goal.

## **II. THE RELEVANCE OF SEXUAL ORIENTATION: A FRAMEWORK FOR ANALYSIS**

### **A. The Policy Options**

In making placement decisions, legislatures, courts, and child welfare agencies must develop standards for determining where to place a child, if there is more than one placement option available. These standards establish the criteria that individual judges and child welfare workers should apply in making such decisions. At present, when the state is involved in placing children for adoption/foster care or allocating custody, all states make the child's well-being the primary focus of the decision, usually by stating that the decision should be based on the "best interests of the child."<sup>17</sup> I agree with that value judgment.

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<sup>16</sup> As discussed *infra*, see note \_\_\_ and accompanying text, I propose that the parent's sexual orientation might be relevant when an adolescent objects to living with a parent.

<sup>17</sup> NAT'L INTERDISCIPLINARY COLLOQUIUM ON CHILD CUSTODY LAW, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES § 3.1 (Robert J. Levy ed., 1998) [hereinafter Levy].

As noted by many commentators,<sup>18</sup> the term best interests does not tell decision-makers what outcomes constitute a child's interests or what factors found in alternative caretakers or home environments are likely to produce these outcomes. In the past, many legislatures and courts adopted presumptions that certain people should be favored or disfavored, often focusing on the proposed parent's gender or race.<sup>19</sup> Today, family law policy generally is based on the premise that a presumption in favor or against particular categories of people is not in the interests of children.<sup>20</sup> While many state statutes direct decision-makers to consider some general factors in making these assessments, such as the capacity of the potential caretaker to provide love, affection, and guidance,<sup>21</sup> these statutes generally do not define best interests or focus on particular characteristics of the parent.<sup>22</sup> Current laws reflect the judgment that it is best for children if decision-makers assess each alternative placement in light of the specific child's needs.<sup>23</sup>

Critics of placing children with gay individuals contend that an adult's sexual orientation, unlike any other parental characteristic, should be singled out and specifically treated as a negative factor. Some advocate a total bar on placing adoptive or foster children with gay parents and a ban on access to ART; for example, the Catholic Church has said that allowing adoption by gay adults would be "doing violence to these children."<sup>24</sup> Others propose a presumption against placement of

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<sup>18</sup> Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

<sup>19</sup> For example, many states used to have custody laws favoring placement with mothers, especially of young children and favoring placement with parents of the same race as the child. See Levy, *supra* note 17, § 3.2 (discussing maternal preference); *Id.* § 3.5 (discussing race matching)

<sup>20</sup> See *id.* §§ 3.2, 3.5; ALI, *supra* note 4, § 2.12. Over the past twenty years, family law policies have moved from a focus on parental characteristics to a focus on behavior. As discussed *infra*, see notes and accompanying text, there may also be presumptions for preserving current caretaking arrangements and for involving both parents in the child's life through joint custody.

<sup>21</sup> See, e.g., MICH. COMP. LAWS ANN. § 722.23 (West 2002); Unif. Marriage & Divorce Act (UMDA), § 402, 9A U.L.A. 561 (1997).

<sup>22</sup> Levy, *supra* note 17, § 3.1.

<sup>23</sup> ALI, *supra* note 4, § 2.02 cmts. b & c.

<sup>24</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS § 7 (2003), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html).

children with gay couples or individuals with respect to all placement decisions.<sup>25</sup> In contrast, many commentators and professional organizations, including the American Law Institute, recommend that an adult's sexual orientation should be irrelevant in making these decisions.<sup>26</sup>

Policy-makers must determine which approach is likely to best serve the interests of most children for whom the state must decide on placement. In a system that focuses on the best interests of each child, a total bar on placements with gay adults would be justified only if placement with gay individuals would always, or almost always, be harmful to children, or a worse alternative than any other option. A presumption against placement with a gay adult would be justified only if there was strong reason to believe that children will usually do better if placed with a heterosexual adult, regardless of any other characteristics of the two adults, such as their education, income, mental health, or parenting history.<sup>27</sup> Another third alternative would be for decision-makers to utilize a preference for heterosexual families *other things being equal*.<sup>28</sup> Such a preference would reflect the decision that sexual orientation is relevant and that it should receive some extra weight when there is little to choose between alternative placements. Finally, determining that a factor should be excluded from consideration must rest on the judgment that the factor is irrelevant to the child's development or that allowing decision-makers to consider the factor is likely to lead to worse

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<sup>25</sup> Wardle, *Homosexual Parenting*, *supra* note 5, at 893-99.

<sup>26</sup> See, e.g., ALI, *supra* note 4, at 12 (introduction) & § 2.12 cmt. e (“[N]ondiscrimination provisions [including sexual orientation] conform to the emerging law, which recognizes that the prohibited factors usually reflect prejudice rather than a rational assessment of the child’s welfare. Because much bias is unintentional and subtle, however, it cannot be expected that nondiscrimination provisions will be entirely effective in ending over-reliance on stereotypes. . . . Some courts assume that the open homosexuality of a parent is detrimental to the child’s interest. This treatment reflects a moral judgment, not a scientific one, and, even as a moral matter, is subject to considerable societal debate. Attempting to avoid over-generalizations on both sides of the debate . . . [ALI advocates that] sexual orientation should not be a consideration and that homosexual conduct, like heterosexual, extramarital conduct, should be disregarded unless shown to be harmful to an individual child.”); Levy, *supra* note 17, § 3.8; sources cited in note \_\_\_ *infra*.

<sup>27</sup> Presumptions reflect a legislative or judicial judgment that some situations tend to benefit children and some tend to harm them. The role of the presumption is to create a base line value judgment and add predictability and consistency to the process of adjudication. See Katherine Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Process* 36 FAM. L.Q. 11 (2002). They are justified only if there is good reason to believe that applying the presumption will improve the overall quality of decisions.

<sup>28</sup> Unlike a presumption, which carries heavy weight and places the burden of proof on the party seeking to overcome



decisions overall. These judgments must be made with respect to each of the four placement categories—adoption, foster placement, custody, and access to ART; different considerations may be applicable for each category. I will use this framework in assessing the policy options.

## B. Optimality or Best Interests

Currently, most states direct courts and agencies charged with making child placement decisions to choose the placement, *among the available homes or other placements*, which best meets the overall needs of the specific child. The goal is to ensure that all children will receive at least adequate care in that placement. A fundamental premise is that children almost always are best off when raised by families, rather than in group homes.<sup>29</sup> Many opponents of gay parents frame the issue differently. They propose that when the state places children through adoption or foster care, or provides access to ART, it should place them only in optimal homes.<sup>30</sup> They then assert that being raised by married, heterosexual biological parents is the optimal environment for children; therefore children should not be placed in same-sex couple families. This position has been adopted by many politicians, including President Bush, who opposes adoption by gay couples because “[s]tudies have shown that the ideal is where a child is raised in a married family with a man and a woman.”<sup>31</sup>

As I will discuss later,<sup>32</sup> the claim that children raised with two heterosexual parents do better with respect to their academic, social, emotional, or behavioral development than children raised by two

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the presumption, a preference comes into to play only as a tie-breaker and does not alter the burden of proof.

<sup>29</sup> This is the premise of federal and state laws. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101 (codified as amended at 42 U.S.C. §§ 670-76); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101 (codified as amended at 42 U.S.C. § 671). There are, however, some children who require placement in a group home or residential treatment facility.

<sup>30</sup> *See, e.g.,* Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL’Y REV. 135, 186-91 (2004); William Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787 (2003); Blankenhorn, *supra* note 15; Wardle, *Homosexual Parenting*, *supra* note 5, at 841. The optimality standard is not proposed with respect to child custody disputes, since almost all commentators agree that children generally should be placed with the parent who will best meet the child’s needs and that neither home is necessarily optimal.

<sup>31</sup> Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. TIMES, Jan. 29, 2005, at A16.

<sup>32</sup> *See* notes \_\_\_\_ - \_\_\_\_ and accompanying text *infra*.

same-sex parents is not supported by the evidence. Numerous studies find few differences in children's development that are attributable to the sexual orientation of their caretakers. Moreover, irrespective of the research on family structure, framing placement decisions in terms of optimality is neither conceptually coherent nor sensible from a policy perspective. Application of the proposed optimality standard would be harmful to the interests of the child. It should be rejected.

#### (1) Placement Decisions Rarely Involve Choosing Between Heterosexual and Same-Sex Couples

A policy based on the premise that children be placed only with married, heterosexual families ignores the fact that placement decisions almost never involve choosing between a married, heterosexual couple and a same-sex couple. With respect to children needing state-facilitated adoption or foster care, the choice generally is placement with a gay couple, or a single heterosexual or gay individual, or not providing a child with a parent at all; there are far more children needing homes than available homes.<sup>33</sup> Excluding gay couples or individuals from becoming foster or adoptive parents means that some children will have to live in institutional settings or in non-permanent homes. The only situation in which a decision-maker must choose between married heterosexual and same-sex couples families with respect to an adoption or foster placement is when there are both married heterosexual couples and same-sex couples seeking to adopt (or foster) a child—a relatively rare situation.

The irrelevance of the optimality framework is even more pronounced in custody disputes between two biological parents. In these disputes, the question generally is which parent should have primary care of the child and what type of relationship the child should have with the non-custodial parent. In most situations, both parents will be a single parent. The assertion that children do better with two parents (heterosexual or gay) again is beside the point.<sup>34</sup>

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<sup>33</sup> See note \_\_\_ and accompanying text *infra*.

<sup>34</sup> Some custody disputes involve requests for modification of a previous custody arrangement. In these situations, one of the parents often has remarried, so the contest may be between a gay parent and a heterosexual couple. But even in these cases, the two parent option includes a stepparent, not the arrangement generally proposed as “optimal,” that is a home with two biological parents.

Access to ART presents a somewhat different situation. Restricting access to certain family structures might be feasible.<sup>35</sup> Still, the optimality standard has little to recommend it with respect to ART. No child exists when people seek to conceive a child using ART. The issue is not whether to provide a small pool of semen or eggs to one type of potential caretaker(s) versus another; the supply of semen and eggs exceeds demand.<sup>36</sup> The policy issue is whether people should be denied access to ART based solely on their sexual orientation or their marital status. It is argued that access to ART should be restricted to heterosexual married couples because the state has an obligation, with respect to assisted, but not with “non-assisted” reproduction, to ensure that children are brought into the world only if they will enter an optimal household.<sup>37</sup> In essence, the claim is that it is better for children not to be born than to be born into an environment deemed less than optimal. This claim seems patently wrong from both a children’s and societal perspective.<sup>38</sup>

From a children’s perspective, would an unborn child prefer not to come into existence unless guaranteed an optimal set of parents and environment? Obviously, we cannot ask the unborn this question. How do we speak for a child who cannot speak for herself? David Chambers has examined this question in another context, child custody disputes.<sup>39</sup> He explored the question how should a court determine a child’s best interests when the child is too young to speak for herself? He proposed that the decision-maker try to look at the question in terms of what the child would, once having reached adulthood, have realistically wanted to have happened.<sup>40</sup> I believe that using this test, the vast majority of children born to gay parents would not wish that they had not been

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<sup>35</sup> A state could pass laws restricting access to state funded or supported clinics and can restrict who provides services. Still, there are various ways an individual seeking ART could manage to find a sperm donor or someone willing to be a surrogate. The web is widely used for these purposes.

<sup>36</sup>This may not be true with respect to surrogacy. However, at least some women who are willing to be surrogates prefer doing so if the child will live with gay men. See Ginia Bellafante, *Surrogate Mothers’ New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1.

<sup>37</sup> See Alvaré, *supra* note 15, at 61-62; Alvaré, *supra* note 30, at 156-63. Issues of reproductive freedom clearly arise with respect to trying to restrict sexual relations, which is seen as justifying the distinction.

<sup>38</sup> I discuss the issue from a child’s perspective here. I address societal interests at notes \_\_\_-\_\_\_ and accompanying text *infra*.

<sup>39</sup> David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

<sup>40</sup> *Id.* at 488-89.

born; it certainly is not the view of children who live with gay parents or adults who were raised by gay parents.<sup>41</sup>

People do not seek optimality in life. Rather, most people are “satisfiers”, not optimizers.<sup>42</sup> They are content with a satisfactory set of outcomes—with satisfactory being defined in a highly individualistic manner. Consistent with this view, the federal government has determined that quality of life shall not be considered with respect to decisions regarding withholding of special medical treatment from newborns born with major impairments.<sup>43</sup> It is possible that an adult who has experienced a life filled with great pain, physical or emotional, might say they wished they had not been born. But there is no basis for concluding that most children would think it better not to be born unless they were provided optimal homes.

A far more persuasive standard is that children would prefer to exist so long as they have a reasonable chance of experiencing a life in which they are wanted by their parent(s), have access to basic goods, and the opportunity to seek happiness. A reasonable existence test is consistent with the way ethicists have assessed the question who should have children. For example, John Stuart Mill proposed “The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility—to bestow a life which may be either a curse or a blessing—unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being.”<sup>44</sup> Some philosophers recently have argued that even this is too high a standard; for example, Derek Parfit argues that from the perspective of the unborn any existence is better than not to exist at all.<sup>45</sup> But,

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<sup>41</sup> See ABIGAIL GARNER, *FAMILIES LIKE MINE* (2004).

<sup>42</sup> See, e.g., HERBERT SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL* (1957); Michael Byron, *Satisficing and Optimality*, 109 *ETHICS* 67 (1998).

<sup>43</sup> With respect to newborns, federal regulations forbid withholding life-saving treatment based on “subjective opinions about the future ‘quality of life.’” 45 C.F.R. § 1340.20 (2005).

<sup>44</sup> J.S. MILL, *ON LIBERTY*, at ch. V (David Bromwich & George Kateb eds., Yale University Press, 2003) (1869).

<sup>45</sup> DEREK PARFIT, *REASONS AND PERSONS* 359 (1984); Philip. G. Peters., Jr., *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 *ARIZ. L. REV.* 487, 488 (1989).

even taking Mill's test as appropriate, it is clear, as I shall show below,<sup>46</sup> that children born to gay couples, or individuals, will have as much, or more, opportunity to lead a desirable existence as children born to heterosexual couples or individuals.

A variation on the optimality claim is the argument that children are entitled to a "normal" existence and therefore should not be placed with gay parents. For example, one state legislator recently argued, "Children should have a male and female parent to grow up and have a normal life. I'd hate to think I grew up with a dad and a dad instead of a mom and a dad."<sup>47</sup> This legislator is suffering from a failure of imagination and an inability to put himself, as a decision-maker, in anybody's shoes but his own. Given the way he was raised, and who he is, he undoubtedly cannot imagine having grown up with a dad and a dad. But, if he listened to those who did grow up with a dad and a dad or a mom and a mom, he would discover that while having two moms or dads can be challenging, these children were more than happy to have grown up in their families.<sup>48</sup> Moreover, the normality test would apply to many other couples who might seek access to ART (or to be adoptive parents): prospective parents who belong to religious or cultural minorities, interracial couples, or parents with disabilities. Not surprisingly, critics of gay parents are not suggesting such couples should not be allowed to adopt children or have access to ART. Courts have rejected resting placement decisions on such factors.<sup>49</sup> Defining optimality in terms of "normality" of family characteristics would take policy in a highly undesirable direction.

## (2) The Proposed Concept of Optimality Is Not Meaningful

The claim that there is such a thing as an optimal home for rearing children, and that it always is a

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<sup>46</sup> See notes \_\_\_ - \_\_\_ and accompanying text *infra*.

<sup>47</sup> ACLU LESBIAN & GAY RIGHTS PROJECT, TOO HIGH A PRICE 106 (2003) (quoting Mississippi state representative Tom Cameron).

<sup>48</sup> See GARNER, *supra* note 41; JANE DRUCKER, FAMILIES OF VALUE: GAY AND LESBIAN PARENTS AND THEIR CHILDREN SPEAK OUT (1998).

<sup>49</sup> See *Smith v. Smith*, 367 P.2d 230 (Ariz. 1961)(religious minority); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (interracial couple); *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979) (disabled parent). Some private agencies do seem to use such criteria, often related to religion. See *Christian adoption agency snubs Catholics*, CNN, July 15, 2005, <http://www.cnn.com/2005/US/07/15/adoption.church.ap/> (Protestant agency declaring Catholics unacceptable as adoptive parents).

two parent, heterosexual, married family, also is flawed from a scientific perspective. No one family type constitutes an optimal environment as a general rule, let alone with respect to a specific child. As a number of leading researchers on families have concluded “social science research does not—and cannot—support the (contention) that the presence of two biological or opposite-sex parents comprises an “optimal” child rearing environment. There is broad consensus among child development specialists that child outcomes are affected by a large number of factors; these factors include . . . the overall quality of parenting as reflected in parental love, warmth, involvement and consistency; parental socioeconomic resources; quality of neighborhood and schools; (and) influences of peers and siblings . . . .”<sup>50</sup> The importance of any given factor may be influenced by the child’s abilities, temperament, attitudes, and psychological resources.<sup>51</sup>

The problem with the claim that a particular family structure is optimal and that placements should be restricted to such families is illustrated by the following example:

Jennifer and Linda are registered domestic partners, living together for eight years. Jennifer is a fourth grade teacher, who has worked with children needing special education; Linda a chef. They live in a small house in a neighborhood with many families, including a number of lesbian couples with children, and good schools. They have several brothers and sisters living nearby with their own families, whom they see often. They are seeking to adopt a child or have a child through ART. If they are successful, Linda will leave her job to be at home full-time, although she might do some catering, especially during the summer when Jennifer is out of school.

How should their sexuality be taken into account in establishing policies regarding placement or allocation decisions? For example, compare Jennifer and Linda’s home with that of a heterosexual couple each of who has only a high school education and a much lower income than Jennifer and Linda. Is the heterosexual household optimal because there is a male and female or because they are married? There is simply no reason to conclude that a child will do better in the

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<sup>50</sup> Brief of Amici Curiae Andrew J. Cherlin, Ph.D., et al., *Baehr v. Miike*, No. 91-CIV-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *available at* <http://www.qrd.org/qrd/usa/legal/hawaii/baehr/1997/brief.doctors.of.sociology-06.02.97>.

<sup>51</sup> *Id.*

home of a married couple with less income or education than in the home of Jennifer and Linda. In the United States, family income is associated with school performance, test scores on standardized tests, years of schooling completed, and incidence of child maltreatment, among other outcomes.<sup>52</sup> In part, this is accounted for by the high incidence of single-parent families among low income families. But children of two-parent, low income families also do less well than children from wealthier families, including single parents, in terms of all school related variables, including grade point, graduation, and college entrance exam test scores.<sup>53</sup> The same is true with respect to parental education; even controlling for family structure, children living with more educated parents do better in school and have fewer behavioral problems.<sup>54</sup> Child development research also indicates that a parent's style of interacting with a child can have a substantial influence on the child's social and emotional development.<sup>55</sup>

The list of other factors that might be relevant to assessing the relative benefits provided by any particular home is long. What if each of the heterosexual partners plans to continue working, leaving the daily care of the child to a neighbor? What if the heterosexual couple were members of a religious minority that was looked down upon in the community in which they lived? What if one or the other family lived among a close extended family relationship? Beyond parental characteristics, a child's future often is determined in part by geography. Outcomes for children vary significantly by state and neighborhood. This is especially true with respect to school achievement. At least thirty percent of the variation in students' academic achievement is related

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<sup>52</sup> See Greg J. Duncan & Katherine A. Magnuson, *Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?*, FUTURE CHILDREN, Spring 2005, at 35, 40-42; Jeanne Brooks-Gunn and Lisa B. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, FUTURE CHILDREN, Spring 2005, at 139, 145; Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, in THE FUTURE OF THE FAMILY (Daniel Moynihan et al. eds., 2004); SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT (1994).

<sup>53</sup> See Duncan & Magnuson, *supra* note 52, at 40; McLanahan & Sandefur, *supra* note 52, at 88-91.

<sup>54</sup> See Henry Ricciuti, *Single Parenthood and School Readiness in White, Black, and Hispanic 6- and 7-Year-Olds*, 13 J. FAM. PSYCHOL. 450, 458 (1999).

<sup>55</sup> See Diana Baumrind, *The Influence of Parenting Style on Adolescent Competence and Substance Use*, 11 J. ADOLESCENCE 59 (1991).

to the state in which they live.<sup>56</sup> Should children be placed for adoption only with families in higher performing states or neighborhoods?

I am not arguing that family structure, or the fact that parents are married, does not influence children's development or against the assertion that it should be considered in making placement decisions. However, based on the evidence regarding the factors that influence children's development, a number of other factors also are relevant. There is no clear rank ordering of factors such that a given factor always should be the determinative element in placement policy or decisions. No single factor or family form makes a home optimal.

### (3) Optimal Placements for All Children is an Unattainable Goal

Aside from the difficulties in defining optimality, the state simply cannot ensure that children live in, or are placed, in optimal settings. When children require adoptive or foster placement or judges are making custody determinations, the state does well when it is able to provide children with adequate homes; in some cases, the best possibility is the least detrimental alternative, as the noted child development experts Anna Freud, Joseph Goldstein, and Albert Solnit pointed out many years ago.<sup>57</sup> Family law policy is based on the premise that the role of the state is to protect children from harm and, when making placements, to choose the best available alternative. Failure to recognize this is likely to produce policies harmful to children. For example, one prominent person in the adoption field has argued that, rather than place children with gay adults, the state "should change the incentives and supports to eliminate the shortage of appropriate families (that is two parent heterosexual families)."<sup>58</sup> This position would mean that thousands of children would be left

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<sup>56</sup> JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 22 (2003); THE EDUC. TRUST, *PRIMARY PROGRESS, SECONDARY CHALLENGE: A STATE-BY-STATE LOOK AT STUDENT ACHIEVEMENT PATTERNS 20-24* (2006).

<sup>57</sup> JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD*, at ch. 4 (1974).

<sup>58</sup> William L. Pierce, *Adoption Principles*, NAT'L REV. ONLINE, May 10, 2002, <http://www.discovery.org/scripts/viewDB/index.php?command=view&prgram=Misc&id=1159>. Pierce was the influential founder of the National Council for Adoptions. Pierce does not make the same claim with respect to placement with single parents, again raising the likelihood that his position is based on his belief that homosexuality is immoral.



without families until the state figured out how to achieve his goal, a goal that is likely unobtainable (and, as shown below, is not desirable).

The optimality standard has a superficial appeal. However, it is not a meaningful concept. In fact, commentators arguing for optimality as a basis for rejecting placement with gay adults do not actually support a general optimality test; they are totally willing to place children with single individuals when a married couple is not available, even though they start with the premise that two parents are optimal. The fact that the optimality standard is being proposed only with respect to sexual orientation, not family structure, parental education or income, or any other factor that arguably makes a home less optimal, calls into question the reasoning of those who oppose placement of children with gay adults. Their claims appear to be based their belief that homosexuality is immoral, not on the developmental needs of children.

### C. The Interests of Adults and the Goal of Equal Treatment

Ultimately, the choice of placement policies involves value judgments. I support the value judgment that furthering the interests of children should be a primary goal of all placement decisions. But the interests of children should not be the exclusive focus in examining policy options. The interests of adults deserve consideration. The opportunities to have, and care for, children are critical aspects of happiness for most adults.<sup>59</sup> The loss of custody of a child may be the most devastating event a parent can experience, other than the death of a child. Thus, policies that regularly disadvantage gay parents in custody disputes or gay adults seeking to adopt a child or have a child through ART ought to be clearly supportable as necessary to protect children to justify the harm to these adults.<sup>60</sup>

Policy-makers also should consider the implications of potential policies with respect to the fundamental American commitment to equal treatment. When the state tries to restrict access to

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<sup>59</sup> See Amy Harmon, *First Comes the Baby Carriage*, N.Y. TIMES, Oct. 13, 2005, at E1; Dawn Yun, *And Adoption Makes Three*, S.F. CHRON., Oct. 21, 2005, at F1.

<sup>60</sup> It is morally good for society to create more opportunities and possibilities for individual self-realization.

fundamental opportunities, it should have clearly supportable reasons for categorically denying some groups this opportunity. As noted by Jonathan Rauch, “American’s commitment to equality under the law . . . is the country’s essential social contract. It is the glue that binds a diverse population into a nation.”<sup>61</sup> Our laws reflect special concern with treatment differences based on an individual’s choice of identity.<sup>62</sup> Opponents of placement with lesbians and gay men do not suggest that access to parenthood categorically be denied to any other groups of adults, despite the fact that these other characteristics **are** predictive of less desirable outcomes.<sup>63</sup> Singling out sexual orientation as the only disqualifying factor violates the norm of equal treatment. Denying lesbians and gay men this opportunity is especially troubling since no state precludes anyone from having a child if she or he can conceive through heterosexual intercourse; single individuals, teenagers, adults with limited ability to support the child all are given the right to have children; restricting the right to have children raises major constitutional issues.<sup>64</sup> The interests of children in the quality of the home do not vary by the manner of conception.

Policies embodying the goal of equal treatment also are the best way of promoting the well being of children in general. It is in the interests of all children that parenthood be open to all adults in society. Adults who are parents are likely to support public policies beneficial to children, including the expenditure of resources on schools, health care, and other goods children need. It is not desirable to have a significant portion of the population feel that the interests of children are someone else’s problem. In addition, at least two to three percent of all children are likely to self-identify as gay; some will do so when they are still legally children, others after reaching

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<sup>61</sup> JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 97 (2004).

<sup>62</sup> *Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (“[A]dults may choose to enter upon [a same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”)

<sup>63</sup> Some commentators do suggest that ART and adoption be restricted to married people. *See* Alvaré, *supra* note 15, at 62-63; Duncan, *supra* note 30, at 38-39.

<sup>64</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972); Robertson, *supra* note 2, at 36-37.

adulthood.<sup>65</sup> A legislature needs to think about the implications of its policies on the interests of these children, during their childhood and/or in adulthood.

The desirability of considering interests beyond the immediate interests of children is reflected in many aspects of family law policy, including those related to child placement. For example, the Supreme Court has held that race cannot be taken into account in custody determinations, even if relevant to a child's interests.<sup>66</sup> In particular, a policy that might provide a small advantage to children in terms of well-being might be rejected if that policy has a large detrimental impact on other important values. Legislative attention to interests of adults and the goal of equal treatment is especially important with respect to placement policies, since the definition of best interests is so indeterminate and the process of predicting what will influence a child's development is so fraught with error, which makes the determination of children's interests uncertain, even speculative.

As it turns out, difficult balancing of competing values is not necessary with respect to most placement decisions, since, as I will discuss, the evidence indicates that children's development is not negatively influenced by their parent's sexual orientation. There are, however, some infrequent situations, where the interests of gay adults and those of children might differ to a degree. I examine how these interests should be balanced when I discuss each type of decision, since the balance may be different in each context. I first look at the research.

### **III. PARENTS' SEXUAL ORIENTATION AND CHILDREN'S DEVELOPMENT**

#### **A. The Claims**

Adults have many attributes--height, weight, political affiliation--that we would not think of as

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<sup>65</sup> See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 297, 305 (1994).

<sup>66</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984). The interests of adults also are weighed against the interests of children with respect to custody challenges by non-parents, parental visitation when children object, child support, and issues related to children's education. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). I do not necessarily agree with the balance established in all of these areas, but I do support the need for balancing, with the child's interests given greater weight.

relevant in placement decisions.<sup>67</sup> In assessing whether consideration of a parent's or couples' sexual orientation is relevant to placement decisions, policy-makers should want evidence on the relationship, if any, between a parent's sexual orientation and those aspects of a child's development that are deemed relevant to their definition of best interest. Absent such evidence, there is no basis for taking sexual orientation into account.

Proponents of considering sexual orientation<sup>68</sup> generally make three claims regarding how a parent's sexual orientation might affect her or his child's well being. The most commonly expressed concern is that the absence of two parents of opposite sex affects children's development in undesirable ways, especially with respect to the child's developing an adequate sense of "gender identity."<sup>69</sup> The absence of a father is viewed as especially problematic by some commentators, who believe that children are more likely to develop behavioral problems without a male in the

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<sup>67</sup> As discussed previously, *see* notes \_\_\_\_-\_\_\_\_ and accompanying text *supra*, there are other parental characteristics, including gender, income, race, and education that are treated as irrelevant or not singled out for special attention, although they may well have an impact on children's development. It is reasonable to ask why sexual orientation is singled out for concern. The debate seems largely driven by those who oppose homosexuality from a values or religious perspective. *See* note 5 *supra*. In fact, if the issue were race or religion a debate about whether it is bad for children to be raised by members of a certain race or religion would be seen as illegitimate and empirical research would be deemed irrelevant. I believe that a strong argument can be made that the sexual orientation should be treated in the same manner. Perhaps it will be in the future, as same sex relationships become more and more accepted. Since many legislators and courts do think that sexual orientation could be a legitimate consideration if an adult's sexual orientation affects children, I treat the empirical questions as a valid subject for analysis.

<sup>68</sup> There is a large literature focusing on the policy issues regarding gay adults as parents. Most of this literature focuses on the question of same-sex marriage. As noted by Lynn Wardle, the vast majority of the articles written by academics take the position that an adult's sexual orientation should not be considered as a negative factor. *See* Wardle, *Homosexual Parenting*, *supra* note 5, at 835-40. The same is true with respect to the placement issues I address in this article; very few academic commentators argue that children should not be placed with gay adults. Wardle is by far the most prolific of the writers opposed to placement with gay parents. His work frequently is cited by politicians and judges opposed to such placements. There also are a number of advocates and advocacy groups that have published reports and papers arguing against placement. Among the best known and most widely cited are journalist Maggie Gallagher, David Blankenhorn, founder of the Institute for American Values, and the Family Research Council. I focus on the writings of these commentators because they are the most active writers on the issues. As noted, *see* note 5 *supra*, most of these commentators believe that homosexuality is immoral, based on their religious convictions. They often invoke social science research in support of their positions, especially research regarding divorce and unwed parenthood and the role of fathers in children's lives. There is a vast academic literature on these subjects. However, few researchers on these subjects are hostile to lesbians and gay men as parents. Many have taken public positions indicating that they do not believe that their research warrants taking sexual orientation into account with respect to placement decisions. *See, e.g.*, Brief of Amici Curiae Andrew J. Cherlin, Ph.D., et al., *supra* note 50; DAVID POPENOE, LIFE WITHOUT FATHER 147 (1996).

household.<sup>70</sup> A second claim is that gay parents have a style of parenting which causes children to develop in less desirable ways or that sexual orientation is related to lifestyles that may negatively affect children; in particular, some commentators assert that gay couples are likely to have less stable relationships and therefore their children are more likely to experience instability.<sup>71</sup> Based on these claims, it is argued that living with a gay parent is harmful in and of itself and therefore children should not be placed in homes headed by gay parents<sup>72</sup> or that public policy should disfavor placement of children in non-married, non-heterosexual households and should limit the opportunity of gay individuals to acquire children through ART.<sup>73</sup>

In this part, I examine the social science evidence relevant to these claims. I begin by examining research studies that have looked at the development of children being raised by gay parents. This research provides the only direct evidence on whether children's development appears to be affected by their parent's sexual orientation. I then look at research regarding heterosexual families that opponents of placing children with gay parents believe demonstrates that the need for opposite sex parents.

I look at the research in terms of its relevance to the policy decisions. Placement decisions arise in two different contexts, which I will call the competitive and non-competitive contexts. With respect to many children needing adoptive or foster care homes, placement with a gay couple or individual

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<sup>69</sup> See, e.g., POPENOE, *supra* note 68, at 77.

<sup>70</sup> See, e.g., DAVID BLANKENHORN, *FATHERLESS FAMILIES: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 25 (1995).

<sup>71</sup> Wardle, *Homosexual Parenting*, *supra* note 5, at 852-67.

<sup>72</sup> Just recently, following the requirements of the Vatican, Catholic social service agencies in the U.S. have stopped placing children for adoption with gay couples. See Katie Zezima, *National Briefing New England: Massachusetts: Bishops on Gays' Adoptions*, N.Y. TIMES, Mar. 1, 2006, at A17 (describing four Catholic bishops in Massachusetts requesting exemption from rules requiring the church to assist adoptions for gay couples); Katie Zezima, *National Briefing New England: Massachusetts: Charity Board Members Quit over Adoption Plan*, N.Y. TIMES, Mar. 2, 2006, at A19 (reporting that several board members resigned from Catholic Charities in opposition to the bishops' announcement that it would not place children in same-sex families since this "undermines [Catholic Charities'] priority to place children in homes and seeking an exemption shows a "profound disrespect" for same-sex couples). See also Wardle, *Homosexual Parenting*, *supra* note 5, at 893 (advocating a presumption against placing children with a gay parent or parents).

<sup>73</sup> See Wardle, *Homosexual Parenting*, *supra* note 5, at 893.

is the only family placement available.<sup>74</sup> If gay adults are barred from becoming adoptive parents, some children will be denied the opportunity to have a family. To justify such a policy requires evidence that being raised by a gay parent *harms* children--that children raised by a gay parent are likely to experience serious or significant developmental problems, for example mental health problems, poor school performance, or poor peer relationships, and that the risk is greater than for children raised in heterosexual households?<sup>75</sup> If children will develop adequately, there is no basis for never placing them with gay parents. The same considerations apply with respect to access to ART, since denying gay individuals access would result in some (potential) children not having the opportunity to be born.

In contrast, in those adoption or foster care placements when there is more than one family available to take the child, the placement will be made to one of two or more potential caretakers, who are “competing” to adopt the child. Each setting may be perfectly adequate; the decision-maker has to determine which would be “better.” The same is true with respect to custody disputes; the placement almost always will be with one of the parents who are competing for custody. Therefore, I examine whether the evidence indicates that being raised by heterosexual parents is, in general, more advantageous to children, for example are such children likely to be “happier” or better adjusted socially, even if they are not harmed (however defined) by living with gay parents. Evidence that heterosexual households offer a *comparative advantage* might justify choosing an adoptive placement with a heterosexual parent(s), assuming other aspects of the prospective households that might affect children’s development, for example income and education, were reasonably equal (which often will not be the case.)<sup>76</sup> The comparative advantage framework also applies to custody disputes, when a court must choose between the parents. Do children do better when custody is given to the heterosexual parent?

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<sup>74</sup> See note \_\_\_ and accompanying text *infra*.

<sup>75</sup> In terms of harm, the appropriate question probably should be would the child be better off adopted or left in foster care or an abusive family?

<sup>76</sup> There are other factors relevant to comparative advantage. In the custody context, the nature of each parent’s relationship with the child is critical. Any alleged disadvantages associated with living with a gay parent to whom the child was strongly bonded would need to be weighed against the harm of separating the child from this parent.

## B. Research Assessing Children Living With Gay Parents

There is a substantial body of research examining children living with gay parents and the characteristics of gay parents and same-sex couple households. However, as discussed below,<sup>77</sup> many studies did not have a comparison group of children living with heterosexual parents and the parents, all of whom were lesbians, were all volunteers. While such studies tell us something about the specific children that were studied, it is not possible to draw any general conclusions from these studies with respect to harm or comparative advantage because the samples were not random and there were no comparison groups.

There are 20-30 studies that I consider sufficiently sound methodologically to be probative on the policy questions.<sup>78</sup> Most of these assessed the development of children being raised by lesbian

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<sup>77</sup> See note \_\_\_ and accompanying text *infra*.

<sup>78</sup> I have read all of these studies and discussed them with a number of child development researchers. Any review will reflect, to some degree, the weight a reviewer place on the various studies. However, I think that there can be little debate about the actual findings themselves—the issue is what to make of the finding given their methodological limits. I discuss that issue below. See Section \_\_\_ *infra*. My conclusions regarding the findings are consistent with all of the professional groups that have reviewed the body of literature. *E.g.*, AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004), <http://www.apa.org/pi/lgbcpolicy/parents.html> (concluding that “[o]verall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents”); see also William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 *FUTURE CHILD*. 97, 100-02 (2005); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 *J. DEVELOPMENTAL & BEHAV. PEDIATRICS* 224 (2005); Norman Anderssen, Christine Amlie, & Erling Andre Ytteroy, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 *SCANDINAVIAN J. PSYCHOL.* 335 (2002). Other reviewers might reach somewhat different conclusions with respect to the utility of any particular study.

I draw my conclusions primarily from the following studies: Jennifer Wainwright & Charlotte Patterson, *Delinquency, Victimization, and Substance Use Among adolescents With Female Same-Sex Parents*, *J. FAMILY PSYCHOL.* (2006); Nanette Gartrell et al., *The National Lesbian Family Study: 4. Interviews with the 10-Year-Old Children*, 75 *AM. J. ORTHOPSYCHOL.* 518 (2005); H.M.W. Bos et al., *Minority Stress, Experience of Parenthood and Child Adjustment in Lesbian Families*, 22 *J. REPROD. & INFANT PSYCHOL.* 291 (2004); Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 *J. CHILD PSYCHOL. & PSYCHIATRY* 1407 (2004); Beth Perry et al., *Children’s Play Narratives: What They Tell Us About Lesbian-Mother Families*, 74 *AM. J. ORTHOPSYCHIATRY* 467 (2004); Jennifer L. Wainwright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 *CHILD DEV.* 1886 (2004); Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 *DEVELOPMENTAL PSYCHOL.* 20 (2003) [hereinafter Golombok et al., *Children with Lesbian Parents*]; Katrien Vanfraussen et al., *Family Functioning in Lesbian*

parents and included a comparison group of children being raised by heterosexual parents. There also are some high-quality studies of children living with lesbian parents that did not include comparison groups but that did use well-standardized tests to assess the children's development, especially with respect to aspects of development (e.g. gender identity) that have been the focus of concern by those opposed to placement with gay adults. These studies allow assessments of how the children's development compared with national norms. In general, these studies best inform the harm, not the comparative advantage, issues. If a study finds no evidence that children are experiencing significant problems, the absence of harm by itself answers the policy question.<sup>79</sup>

The majority of studies, especially those done in the 1970's and 80's, involved children living with a lesbian parent following that parent's divorce or separation from the child's father. Almost all of the children had lived for a period of time with both biological parents. When studied, some of the

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*Families Created by Donor Insemination*, 73 AM. J. ORTHOPSYCHIATRY 78 (2003); Susan Golombok et al., *Families with Children Conceived by Donor Insemination: A Follow-Up at Age Twelve*, 73 CHILD DEV. 952 (2002) [hereinafter Golombok et al., *Families with Children Conceived by Donor Insemination*]; Tamar D. Gershon et al., *Stigmatization, Self-Esteem, and Coping Among the Adolescent Children of Lesbian Mothers*, 24 J. ADOLESCENT HEALTH 437 (1999); Anne Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUMAN REPROD. 1349 (1997); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551 (1998) [hereinafter Golombok et al., *Children in Lesbian and Single-Parent Households*]; Raymond Chan et al., *Psychosocial Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443 (1997); Susan Golombok et al., *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCHIATRY 783 (1997) [hereinafter Golombok et al., *Children Raised in Fatherless Families from Infancy*]; FIONA TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY* (1997); Sotirios Sarantakos, *Children in Three Contexts: Family, Education, and Social Development* 21 CHILD. AUSTL. 23 (1996); David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Heterosexual Parents and Their Children*, 31 DEVELOPMENTAL PSYCHOL. 105 (1995); Charlotte Patterson, *Families of the Lesbian Baby Boom: Parents' Division of Labor and Children's Adjustment*, 31 DEVELOPMENTAL PSYCHOL. 115 (1995); Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203 (1995); Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, 24 CHILD PSYCHIATRY & HUMAN DEV. 24 (1993); Frederick W. Bozett, *Children of Gay Fathers*, in *GAY AND LESBIAN PARENTS* 39-57 (Bozett ed., 1987); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 167 (1986); Beverly Hoefter, *Children's Acquisition of Sex Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981).

<sup>79</sup> Since a number of studies relied on volunteers, the absence of findings of harm could reflect the non-random sample. Most of the parents were highly educated and relatively well-off economically, which also likely influenced outcomes for children.



children were living with a single lesbian mother; the majority was living with their mother and her new same-sex partner. There are also six more recent studies that looked at children conceived by donor insemination and raised from birth by a lesbian mother.<sup>80</sup> In the majority of these households the biological mother had a partner and they treated the child as their joint child; in a few instances, the non-biological parent had adopted the child. Four of these studies included a comparison group of children born through donor insemination to heterosexual couples; the others used assessment instruments with national norms. All families were recruited to participate in the study.

There are also four recent studies based on data from two large data sets, one in the U.S. and one in England, which had tracked thousands of families over a period of years.<sup>81</sup> The data had been gathered originally by researchers interested in general child development, not on the impact of parent's sexual orientation. Two groups of researchers, interested in the relevance of sexual orientation, examined these data sets and identified the children living with gay parents. They then compared these children's development with that of the other children in the sample, who were living with heterosexual parents.

The body of research, taken as a whole, provides evidence on a number of outcomes including: the gender identification and sexual orientation of children in these families; cognitive abilities and school performance; children's general emotional well-being; self-esteem; peer relations; parent-child relations; and general happiness. The studies that included adolescents looked at behavioral problems such as drug use and delinquency. The only study that followed a group of children into adulthood also looked at employment and general well being in adulthood.

In reviewing the findings from these studies, I organize the review along the lines suggested by my framing of the policy issues. First, is there evidence that children are actually harmed by living with

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<sup>80</sup> These samples are described in Bos et al., *supra* note 78; Brewaeys et al., *supra* note 78; Chan et al., *supra* note 78; Flaks et al., *supra* note 78; Gartrell et al., *supra* note 78; Golombok et al., *Families with children conceived by donor insemination*, *supra* note 78. Some of these samples have been followed for a number of years and there are additional reports on the children's development over time.

<sup>81</sup> See Wainright et al., *supra* note 78; Golombok et al., *Children with Lesbian Parents*, *supra* note 78.

a lesbian parent? Second, are there any areas of development for which children may do better or worse, on-average, in households with a heterosexual or homosexual parent(s)?

### *L. Major Developmental Issues-Evidence of harm*

#### (a) Cognitive Abilities and School Performance

The children in these studies were, on average, doing extremely well in terms of cognitive development and school performance.<sup>82</sup> Generally, their IQ scores were above average and the children were, on average, doing well academically. This was true of children living with a gay parent following divorce and those born through donor insemination. While the children's high IQ and school performance undoubtedly reflected, in part, the fact that most of the lesbian parents had high education, which is predictive of children's school performance, the children performed as well as would be expected given their parents' education and income and as well as classmates living with heterosexual parents of comparable education and income.<sup>83</sup>

#### (b) Serious Behavioral Problems

A number of studies tried to determine whether children in lesbian households were experiencing any serious behavior problems, such as misbehavior in school, aggressiveness towards peers or delinquency. The researchers employed two different approaches. Some measured behavior by asking parents and teachers to complete standardized questionnaires that have been widely used by other researchers studying child development.<sup>84</sup> Other studies relied primarily on clinical interviews with parents and/or children.<sup>85</sup> The majority of the studies had comparison groups.

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<sup>82</sup> There is one exception to this general finding. A study of elementary school children in one Australian school found that teachers reported that the children living with gay parents did somewhat less well in some aspects of school performance; however, the teachers appeared to disapprove of gay parents. *See Sarantakos, supra* note 78.

<sup>83</sup> It is possible that children living with lower income gay parents might differ from those with lower income heterosexual parents if hostility towards gay parents and stigmatization of their children is greater in areas where lower income gay parents live.

<sup>84</sup> The most common instrument was the widely used Child Behavior Check List developed by Thomas Achenbach. *See THOMAS ACHENBACH & C. EDELBROCK, MANUAL FOR THE CHILD BEHAVIOR CHECKLIST AND REVISED CHILD BEHAVIOR PROFILE (1983).*

<sup>85</sup> Such interviews often produce less reliable data than standardized instruments.

Overall, the children living with a lesbian parent seemed comparable to the children living with heterosexual parents with respect to serious emotional or behavioral problems. In the studies that utilized standardized tests of children's behavior, the great majority of children living with lesbian parents scored within the normal range on both parent and teacher ratings. The few children who did have serious problems were in households that had experienced divorce; the proportions of children with problems were the same in households headed by lesbian and heterosexual divorced parents. Children of divorced parents typically have somewhat more problems, on average, than children from non-divorced families.<sup>86</sup> Only a very small number of studies have included teenage children, so there is not much evidence with respect to problem behaviors, such as delinquency, early pregnancy, drug use, or dropping out of school, which generally manifest themselves in adolescence. Several recent studies that focused on teens did not find problem levels any higher than the general population of children in comparable heterosexual families.<sup>87</sup> The one study that followed children raised from birth into adulthood by a lesbian parent(s) found that these young adults did not differ from the young adults raised in heterosexual families, with respect to employment, ability to find and relate to partners, or in their general sense of wellbeing.<sup>88</sup>

(c) Gender Identification and Sexual Orientation

A consistently expressed concern is that children living with gay parents will have problems with their own sexual development. Two separate issues have been raised. First, it is hypothesized that these children will have difficulty with respect to their gender identity, that is their concept of themselves as a male or female. Second, some commentators contend that children of gay parents are more likely to engage in same-sex sexual activity or become gay than are children raised by heterosexual parents

(i) *Gender Identification.* Some child development specialists believe that children with a poor

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<sup>86</sup> See Paul Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well Being of the Next Generation*, 15 FUTURE CHILD. 75, 76-78 (2005)

<sup>87</sup> See Wainright and Patterson, *supra* note 78; Wainright et al., *supra* note 78; Tasker and Golombok, *supra* note 78; Golombok et. al, *Children Raised in Fatherless Families from Infancy*, *supra* note 78; MacCallum & Golombok, *supra* note 78; Gershon et. al, *supra* note 78..

<sup>88</sup> Tasker & Golombok, *supra* note 78.

sense of gender identity experience emotional problems because they are confused about their identity or unhappy with being a female or male; other child development specialists believe that a child's sense of gender identity is unrelated to their emotional wellbeing. Regardless, the many studies that looked at gender identification of children with gay parents found that the vast majority of children were happy with their own gender; the few children in these studies who reported a desire to be the opposite sex came equally from the gay and heterosexual households.<sup>89</sup>

Aside from gender identification, critics of gay parents sometimes express concern that their children will not adopt appropriate male or female roles--they will not act in ways deemed "appropriate" for their gender with respect to preferred toys, games, activities, friendships. As many commentators have pointed out "appropriate gender roles" is a totally value-laden concept.<sup>90</sup> In any case research has not shown this to be an issue. Research consistently finds that children living with gay parents generally do not differ from those in heterosexual households in terms of those behaviors that are seen as gender linked.<sup>91</sup>

(ii) *Sexual Orientation*. The potential impact of living with a gay parent on the child's sexual behavior or identity is a major focus of some commentators, who believe that that being gay is an undesirable outcome.<sup>92</sup> Of course, many people, including myself, reject the premise that this is an undesirable outcome. But even if becoming gay were considered a negative outcome, the research indicates that the vast majority of children raised by gay parents will identify as heterosexual in

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<sup>89</sup> In a personal communication, developmental psychologist Ross Thompson, who has done extensive research on gender and on the role of fathers, points out that with respect to gender roles, as well as other areas of development children have multiple social sources on which to draw from outside (as well as within) the family for identifying the behavioral characteristics associated with their sex: peers, the media, schools are among the extra-familial contexts in which children learn about gender. Thus, the over-socialization of gender roles makes it very doubtful that it will be a disadvantage for children to grow-up with gay or lesbian parents. This is one of the reasons, to use a different example, that heroic parental efforts to raise children with a nonsexist orientation are often frustrated by the fact that their offspring are being influenced to adopt conventional roles by these outside influences.

<sup>90</sup> See Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003).

<sup>91</sup> Tasker & Golombok, *supra* note 78. Some commentators contend that there are, in fact, small differences and that these favor children raised by lesbians. For example, there are indications that daughters of lesbians mothers engage in less "sex stereotypical behavior." Timothy Biblarz & Judith Stacey, *(How) Does the Sexual Orientation of Parents Matter?* 66 AM. SOC. REV. 159, 168 (2001).

<sup>92</sup> Wardle, *Adoption*, *supra* note 5, at 291.

adulthood, although there may be a somewhat greater likelihood that they will consider or experience a same-sex relationship at some point in their lives.

It is difficult to determine through research whether a parent's sexual orientation influences a child's sexual orientation or behavior. First, there are no precise figures on the proportion of the population that ever engages in same-sex relations or the percentage that self-identifies as gay. There are reasonable approximations, but these remain approximations.<sup>93</sup> Thus, it is not clear what numbers should be used in comparing outcomes for children raised by gay parents. Second, very few studies have looked at sexual behavior and orientation of adolescents or adults raised by gay parents. The total number of children in these studies is under 100; the number raised exclusively by gay parents is even smaller, since many of these children had lived with a heterosexual parent at some point.

Thus, any conclusions are somewhat speculative. The one study that followed children into adulthood found that children raised by lesbian parents were not more likely to self-identify as gay in adulthood.<sup>94</sup> There is some indication, in a few studies, that the adolescent children living with gay parents in the study sample were more likely to have a same-sex sexual encounter or relationship during adolescence than were children living with heterosexual parents in the study sample. Because the samples in these studies were very small and over eighty percent of the adolescents or young adults in both settings reported only heterosexual relationships, the differences in the percentages reporting same-sex relationships were not statistically significant. Two researchers, Timothy Biblarz and Judith Stacey, have written that the data in these studies, considered as a whole, may indicate that children raised by gay parents are slightly more likely to self-identify as gay, although the differences did not meet normal tests of statistical significance.<sup>95</sup> Because these researchers are supporters of same-sex marriage and gay parents, their paper

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<sup>93</sup> The most comprehensive national study of sexual behavior found that 4.3% of females and 9.1% of males report that they have had a homosexual relationship or encounter at some point in their life and that approximately 2.8% of adult men and 1.4% of adult women self-identify as homosexual. LAUMANN ET AL., *supra* note 65, at 295-96, 305.

<sup>94</sup> TASKER & GOLOMBOK, *supra* note 78.

<sup>95</sup> Biblarz & Stacey, *supra* note 91, at 170-71.

frequently is cited for proof that children raised by gay parents are more likely to be gay.<sup>96</sup>

I believe that the number of youth in these studies simply is too small to draw any conclusions from trends in the data that are not statistically significant. At least one more recent study did not find differences.<sup>97</sup> Nonetheless, it does not seem unreasonable to hypothesize that both the presence of a parental role model, and the fact that the children living with a gay parent generally would assume that homosexual relationships are not bad, might make these children more open to considering a same-sex relationship than children in heterosexual families. In addition, if there is a genetic element in the development of sexual orientation, as some researchers believe, biological children of a gay parent would be somewhat more likely to be gay.<sup>98</sup>

If there is an influence, it seems clear that the influence will be small. Most studies find that between ten and fifteen percent of adolescents raised in heterosexual households engage in same-sex sexual relations at some point; about three percent ultimately self-identify as homosexual. At most, the research indicates that the percentages might be a few percent higher for children raised by gay parents.<sup>99</sup> The vast majority of children in both types of households will self-identify as heterosexual. The great majority of self-identified gay individuals have been raised in heterosexual families and this will continue to be the case.

Suppose children living with gay parents are slightly more likely to have same-sex relations or self-identify as gay. Why should policy-makers be concerned? Of course, this outcome is undesirable

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<sup>96</sup> Biblarz and Stacey forcefully concluded that “[b]ecause every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children’s mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children’s best interest . . .” *Id.* at 176. The authors note that any measurable differences between children of lesbian and gay parents and those of heterosexual parents cannot be considered deficits—according to Biblarz and Stacey, “they either favor the children with lesbian and gay parents, are secondary effects of social prejudice, or represent just a difference.” *Id.* at 177.

<sup>97</sup> Wainright et al., *supra* note 78.

<sup>98</sup> See, GLENN WILSON and QAZI RAHMAN, *BORN GAY: THE PSYCHOLOGY OF SEX ORIENTATION* (2005).

<sup>99</sup> See Biblarz & Stacey, *supra* note 91, at 170-71.

for those who believe that homosexuality is immoral. But for those who reject this view, does the research show that there is reason for concern? Opponents of placing children with gay parents claim that gay youth have higher suicide rates and are more likely to contract sexually transmitted diseases than non-gay youth.<sup>100</sup> In fact, there is no evidence supporting the claims of higher rates of STD. With respect to suicide, the Institute of Medicine of the National Academy of Sciences recently concluded that suicide rates among heterosexual and gay youth do not differ, although the rate of suicide attempts by young gay males, but not females, may be higher.<sup>101</sup> But even if the rates are somewhat higher, this does not seem like an argument against placing children with gay parents. It seems clear that about equal percentages of children will identify as gay regardless of the sexual orientation of their parents. However, gay adolescents may be far less likely to commit suicide if they live with gay parents than if they live with heterosexual parents. To the degree that suicidal ideation and attempts are higher among gay males, at least part of the difference is likely attributable to the stigma still associated with being gay.<sup>102</sup> It would not be surprising that being called immoral by many in society has an impact on the psychological health of some gay youth. Even more significantly, many heterosexual parents reject their homosexual children, which can lead to severe mental health problems for the children, including attempted or actual suicide.<sup>103</sup> Since gay children in gay households will not face parental rejection and will have parental support in dealing with societal stigma, gay adolescents would benefit from living with gay parents.

Moreover, under any set of policies, the vast majority of gay adolescents will be born to heterosexual parents. If society reduces the stigma associated with homosexuality, and thereby helps more heterosexual parents accept their gay children, the overall increase in children's well-being would likely be substantial. From the perspective of children as a whole, a cost-benefit analysis seems strongly to favor eliminating distinctions based on sexual orientation.

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<sup>100</sup> Wardle, *Homosexual Parenting*, *supra* note 5, at 856.

<sup>101</sup> COMM. ON PATHOPHYSIOLOGY & PREVENTION OF ADOLESCENT AND ADULT SUICIDE, INST. OF MED. OF THE NAT'L ACADEMIES, *REDUCING SUICIDE: A NATIONAL IMPERATIVE* 53-55 (S.K. Goldsmith et al. eds., 2002)

<sup>102</sup> *Id.* at 55.

<sup>103</sup> Ritch Savin-Williams, *Coming Out to Parents and Self-Esteem Among Gay and Lesbian Youths*, 18 J. HOMOSEXUALITY 1 (1989).

(d.) The Negative Impact of Community Attitudes.

Among the most frequently expressed concerns by judges and legislators is that children living with gay parents will suffer emotional harm as a result of community stigma. Whether the potential exposure to stigma is a legitimate consideration in placement policies is a subject of debate; the U.S. Supreme Court has ruled that courts cannot consider the impact on children of community stigma based on a parent's race in making custody determinations.<sup>104</sup> I look at the issue from a value perspective later.<sup>105</sup> Here I review what is known about the impact of stigma.

Studies regularly find that by the time they are school-aged children are aware that homosexuality is stigmatized by many people and that having two moms or two dads is quite unusual. Several studies found that some children are stigmatized by other children, by some parents of their classmates, and, in one report from Australia, by some teachers.<sup>106</sup> Some children report being embarrassed to tell their friends about their parent's sexual orientation or living arrangement.<sup>107</sup> In some instances, it affects their social relations, for example, they may avoid some children or not ask certain friends to their house. In addition, some children living with a gay parent following that parent's divorce report that coping with the parent's new sexual identity added to the difficulties most children experience from divorce itself.<sup>108</sup>

While the presence of stigma is clear, the research does not find that it has a significant harmful impact on the children's mental health. No study has found evidence of higher rates of emotional problems among children living with gay parents. On average, the social development of the subject

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<sup>104</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>105</sup> See note \_\_\_ and accompanying text *infra*.

<sup>106</sup> Sarantakos, *supra* note 78.

<sup>107</sup> The experiences of youth in households of gay parents are insightfully described in GARNER, *supra* note 41. See also Ann O'Connell, *Voices from the Heart: The Developmental Impact of Mother's Lesbianism on Her Adolescent Children*, 63 SMITH C. STUD. SOC. WORK 281 (1993); S.J. Pennington, *Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS, *supra* note 78, at 58-74; Gershon et al., *supra* note 78; Javaid, *supra* note 78; Karen G. Lewis, *Children of Lesbians: Their Point of View*, 25 SOC. WORK 198 (1980).

<sup>108</sup> Garner, *supra* note 43, at ch. 3.



children in all the studies was well within normal range. Interviews of adults who lived with gay parents during childhood indicate that, while having gay parent or parents presents varied challenges, and could lead to painful experiences, these adults did not report major developmental problems or long-term disadvantages. Concerns about the negative impact of community attitudes do not find support from the research.

## 2. *Comparative Well-being.*

Even if children raised by gay parents develop adequately, in terms of academics, social relations, and mental health, are they likely to be better-off if they live with heterosexual parents? The evidence on this question is much more limited than the evidence regarding harm. To make assessments of comparative advantage, it is necessary to compare children living with heterosexual and homosexual parents who are comparable with respect to education, income, family structure and other factors that have been shown to influence children's development. Only a small number of studies, fewer than ten, meet this criterion.<sup>109</sup>

None of these studies found significant differences in children's development related to their parent's sexual orientation.<sup>110</sup> In every critical aspect of well-being, the children in these studies who were being raised by lesbian parents appeared to be doing as well as the children being raised by heterosexual parents. The children were not more likely to show poor mental health (anxiety, depression); this was the finding from direct tests of children and from reports by parents and teachers. They got along as well with their parents and peers as children living with heterosexual parents. The research found no evidence of differences between these groups of children in self-

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<sup>109</sup> These studies looked at a number of aspects related to children's general development, including self-esteem, social competence, peer relations, and general emotional health. Some of the studies also measured the perceived quality of family relations from the child's and parents' perspectives. Data were gathered using interviews with children, parents, and teachers, as well as through standardized instruments designed to assess children's well-being.

<sup>110</sup> As discussed below, see note and accompanying text, the sample sizes in many of these studies may have been too small to allow for detection any differences between the two groups. In another vein, Biblarz and Stacey, *supra* note 92, criticize the focus of researchers on finding no differences. They believe that at least some differences should be expected based on various psychological theories of child development. They argue that the appropriate question is the policy relevance of any differences. They also argue that some of the differences favor children living with gay parents. I agree with their critique, but the policy world asks for research looking for no differences.

esteem or in measures of social competence and healthy development, such as leadership ability, self-reliance, interpersonal flexibility, and self-confidence. Thus, the research to date has not found evidence indicating a comparative advantage based on the sexual orientation of the parents.

### C. Methodological Issues and Their Relevance

I turn now to an issue that has assumed great prominence in the debates over policy. Several prominent opponents of allowing lesbians and gays to become parents have argued that the body of research on children living with gay parents is so flawed that it is of no relevance to policy-makers.<sup>111</sup> The essence of these critiques is the research, taken as a whole, does not prove that there are no differences in children's development related to their parent's sexual orientation. In technical terms, it is argued that the research has not established the "null hypothesis", that it has not established that there are no differences between children in the two types of households.<sup>112</sup> Critics point out that while no study has found differences, the sample size in most studies were too small to detect differences and that future research may show differences, especially

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<sup>111</sup>See, e.g., ROBERT LERNER & ALTHEA K. NAGAI, MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING (2001), available at <http://marriagelaw.cua.edu/publications/nobasis.pdf>; Wardle, *Homosexual Parenting*, supra note 5, at 841-52. As discussed below, there are many flaws in these analyses. Yet these analyses have been seized upon by ideological opponents of gay parenting and marriage as justifying policies limiting placement with gay adults. See, e.g., MAGGIE GALLAGHER & JOSHUA K. BAKER, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY, DO MOTHERS AND FATHERS MATTER?: THE SOCIAL SCIENCE EVIDENCE ON MARRIAGE AND CHILD WELL-BEING (2004), available at <http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf>. Ironically, some of the most ardent opponents of gay parenting, and the strongest advocates for ignoring the research looking at children in these homes, have offered totally unsupportable reasons for denying gays the right to adopt. For example, Wardle suggests that if gays are allowed to adopt "heterosexual couples ...may be discouraged by the increased competition from gay and lesbian couples and decline to enter the 'adoption market.'" Wardle, *Adoption*, supra note 5, at 291. He offers no evidence in support of a seemingly indefensible prediction. Moreover, these opponents have been willing to rest their case on research that has been totally discredited as fraudulent, in particular the work of Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 ADOLESCENCE 757, 770-74 (1996). Paul Cameron, the author of this study, has been widely discredited for misrepresenting and misconstruing sociological research on homosexuality and its effects. The American Psychological Association expelled Cameron, and the American Sociological Association cited him for willfully misrepresenting research. See Stacey & Biblarz, supra note 91, at 161. A federal district court determined that Cameron's conclusions, and specifically his conclusion that homosexuals abuse children at a greater rate than heterosexuals, constituted a total distortion of the data. *Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985), rev'd on other grounds, 769 F.2d 289 (5th Cir. 1985).

<sup>112</sup> Affidavit of Steven Lowell Nock, *Halpern v. Toronto*, 60 O.R.3d 321 (Ontario Div. Ct. 2003) (No. 684/00, 39/2001); LERNER & NAGAI, supra note 111. These same issues would apply, of course, if differences had been found.

relatively small, subtle differences.<sup>113</sup>

A second critique is that because almost all studies the sample populations were not selected randomly, they may not be representative of the entire gay and lesbian population (the samples included a disproportionate number of highly-educated, economically well off lesbian individuals and couples). Moreover, no studies examine the development of children living with gay fathers, although there are studies describing parenting styles of gay fathers.<sup>114</sup> Therefore, the findings cannot be generalized to all lesbian parents and not at all to gay men as parents.<sup>115</sup> In addition, in a few studies, the comparison samples differed in important respects from the study population, including income or family composition, making comparisons unreliable.

These are legitimate concerns. Nonetheless, the research is relevant to policy development. These studies, even with their limitations, provide no support for the claim that being raised by gay parents is harmful to children, with respect to the aspects of child development that always have been considered relevant for public policy-mental health, social relations, and academic performance. There is not a single study that finds children raised by gay parents are at greater risk than any other children of doing poorly academically, engaging in behaviors harmful to themselves or to others, or experiencing mental health problems. Altogether, these studies included hundreds of children, with very few children showing any significant problems, no more than the comparison children.<sup>116</sup> Moreover, the small number of studies drawn from random populations, which looked at a range of factors indicative of psychological health, including

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<sup>113</sup> Affidavit of Stephen Lowell Nock at ¶¶ 116-19, *Halpern*, 60 O.R.3d 321 (No. 684/00, 39/2001); LERNER & NAGAI, *supra* note 111, at 98-106. Individual studies ranged from fewer than 10 children to a maximum of subjects. The children were of a fairly wide age range, which limits comparisons across studies. Altogether the studies involved about 600 children and a similar number of parents.

<sup>114</sup> There are some clinical reports and descriptions but these are not systematic.

<sup>115</sup> Many studies, especially the earlier ones, utilized clinical interviews or used psychological tests that have not been standardized on large samples. Studies that use more standardized tests allow for greater confidence in generalizing from the findings. Almost all of the research looked at the children's development at a single point in time, often during early childhood or at a point in time shortly after they began living exclusively with a gay parent. Many of the aspects that were being studied, such as problem behaviors or sexual orientation, do not develop until children are older. In addition, problems might develop the longer the child lives with the parent.

mental health scores, self-esteem, peer relationships, and parent-child attachment, found no differences in well-being.<sup>117</sup>

While the samples in individual studies often were small, they were large enough to detect differences related to family factors other than parents' sexual orientation. For example, while no study found differences related to parent's sexual orientation, most of the studies found that children in single parent families (gay or heterosexual) did less well than children in two parent families (gay or heterosexual).<sup>118</sup> Differences also were found based on family income, parental education, high levels of family conflict, and parental behavior towards the child.<sup>119</sup> These findings are consistent with the evidence from a large body of child development research examining the influence of these factors on children's development and indicate that the research designs could uncover differences.

While this body of research does not prove that there will be no differences in children's development based on the sexual orientation of their parents, it provides no support for taking sexual orientation into account in placement decisions. If there is a case to be made for consideration of sexual orientation, it does not come from the research directly looking at children raised by gay parents.

#### D. Evidence Offered By Opponents of Gay Parents

Recognizing that direct evidence from studies of children with gay parents does not warrant on sexual orientation, opponents of placing children with gay adults contend that other social science research justifies rejecting or limiting placement of children with gay adults. The main contention is that children need both a mother and father to develop adequately. Some commentators also assert that gay adults are likely to behave in ways that may be harmful to children.

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<sup>116</sup> The children experiencing problems were in families that had divorced.

<sup>117</sup> Wainright et al., *supra* note 78; TASKER & GOLOMBOK, *supra* note 78.

<sup>118</sup> See, e.g. MacCallum and Golombok, *supra* note 78.

<sup>119</sup> See, e.g. Golombok et. al., *Children with Lesbian Parents*, *supra* note 78; Perry et al., *supra* note 78; Wainright

### (1) The Need for Fathers and Mothers

The central contention is that a two-biological-parent family, especially a married two-biological-parent family, is the optimal setting for children. In particular, it is asserted that the presence of a male in two parent families, not just the presence of two married adults, is critical to children's positive development.<sup>120</sup> In support of these claims, the numerous studies comparing the development of children in two-parent versus single parent families are referenced. In general, this research finds that children raised by both biological parents evidence fewer developmental problems than children raised by never married or divorced single parents. While the majority of children in both types of households do not experience major developmental problems, and the differences in developmental outcomes between children in one parent and two parent households are not that large, it appears that, on average, being raised by always married parents who get along with each other is more advantageous for children than being raised by a single heterosexual mother or by a divorced parent.<sup>121</sup> Children in single parent homes are more likely to engage in delinquent behavior or become pregnant as teens than children in two biological parent households, and children raised by both biological parents also do better, on average, in school.

However, while research indicates that there are advantages to being raised by two always married biological parents as compared with a single parent, the research does not demonstrate that the gender of the two parents matters. Researchers propose at least five different reasons why children in married households might do better than children in single parent households. First, the presence

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et al., *supra* note 78; Chan et al., *supra* note 78.

<sup>120</sup> Wardle, *Homosexual Parenting*, *supra* note 5, at 857-64; GALLAGHER & BAKER, *supra* note 112; BLANKENHORN, *supra* note 70, at 222-31.

<sup>121</sup> There is a very large body of research examining the effects of family structure and divorce on children's development. There is no consensus among researchers about either the effects of family structure on the causes for the effects that many studies find. Many of the issues are discussed in the recent volume of *The Future of Children on Marriage and Child Wellbeing*, which contains a particularly good summary by Paul Amato, who has written extensively about divorce and family structure. Amato, *supra* note 86. Amato concludes that "the estimated effects of parental divorce on children's development are modest rather than strong." Amato, *supra* note 86, at 88, 86 tb. 1. See also E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 7 (2002). This conclusion, which is consistent with the great majority of the research, belies the often hysterical claims of some commentators that divorce and single parenthood are destroying the lives of large numbers of children and the cause of major social problems. Moreover, as discussed below, most experts attribute these differences to factors

of two parents, rather than one, might make a difference. Second, the fact that the parents are married may have an influence. Third, the development of children in single parent households may be affected by the fact that many of these children experienced parental divorce. Fourth, the fact that single parent families have low income and that many of the children were born to poor single mothers may influence the children's development. Finally, the fact that the children in married households live with opposite sex parents might account for some of the differences. This last possibility is, of course, the critical question for assessing the relevance of sexual orientation.

Researchers have examined each of these explanations. All of the evidence supports the first four. There is no evidence supporting the claim that having opposite sex parents makes a difference; as discussed, the body of research looking at children with gay parents goes the opposite way. Most researchers who study the impact of family structure attribute the differences in children's outcomes primarily to the fact that there are two parents rather than one. They find that children do better in two parent families due to several factors: (1) the advantages generated by the fact that two parent families have higher income; (2) the fact that two parents provide more monitoring and supervision of children's activities and behavior; and (3) the greater consistency of parenting in homes with two caretakers, since single-parents often become overburdened and less able to provide consistent care and nurture.<sup>122</sup> None of these advantages turn on the sex of the two adults. It is the number of adults that count. In addition, research regularly shows that some children in divorced families experience behavioral problems that seem to be related to the fact of divorce in and of itself and by the effects of being exposed to parental conflict preceding and/or following the divorce.<sup>123</sup> Third, the fact that many single parents have low income makes a difference.<sup>124</sup> Finally, there is some evidence that children living with their biological heterosexual married parents do better than children living with two unmarried biological heterosexual parents.<sup>125</sup> The hypothesis is that cohabiting couples make

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other than the gender of the parents.

<sup>122</sup> *Id.*; see also McLanahan & Sandefur, *supra* note 52; Sigle-Rushton & McLanahan, *supra* note 52, at 126-39.

<sup>123</sup> See Amato, *supra* note 86, at 84.

<sup>124</sup> See McLanahan & Sandefur, *supra* note 52; Duncan & Magnuson, *supra* note 52.

<sup>125</sup> See, e.g., JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY (Alan Booth & Ann C. Crouter eds., 2002); Rachel Dunifon & Lori Kowaleski-Jones, *Who's in the House?*

less of an investment in their relationship, which could affect the children; a small amount of evidence supports this hypothesis. This research is much more limited; there no consensus as to whether there are systematic differences based on marriage itself.

While this body of research provides evidence that living with two biological parents may be preferable living with a single parent and that divorce can be harmful to children's development, none of the family structure studies provide any support for the claim that the gender of the two parents makes a difference. Moreover, as Paul Amato concludes that "the estimated effects of parental divorce on children's development are modest rather than strong."<sup>126</sup> Both the modesty of the impact and the very high likelihood that they are not associated with having opposite sex parents strongly undercuts the argument that children will be disadvantaged if placed with gay adults. Reliance on this literature to justify policies against placement of children with gay adults is inappropriate and misleading.

Opponents of placing children with gay adults also refer to two other bodies of theory and research to support the assertion that gender matters and therefore sexual orientation should be relevant to placement decisions. First, classic psychoanalytic theory emphasized the importance of same-sex role models; some psychiatrists and psychologists continue to hold this view.<sup>127</sup> These theories sometimes are based on the assumption that there are appropriate gender roles to which females and males should conform.<sup>128</sup> It also is theorized that mother-father interactions may provide children

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*Race Differences in Cohabitation, Single Parenthood, and Child Development*, 73 CHILD DEV. 1249 (2002); Wendy Manning & Kathleen Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J.MARRIAGE &FAMILY 876 (2003). This may reflect the fact that cohabiting couples generally have lower income. Differences also are reported depending on the race of the family.

<sup>126</sup> Amato, *supra* note 86, at 77.

<sup>127</sup> Much of classic theory was based on the idea that boys needed active fathers or they would turn out effeminate, the result of overly protective mothering. Such boys would become homosexual. Girls would become delinquent because they lacked a father to help them work through Oedipal desires. See Elizabeth Pleck, *Two Dimensions of Fatherhood*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 40-41 (M. Lamb ed., 4th ed. 2004).

<sup>128</sup> Wardle adopts the view that "father love and mother love are different kinds of love," Wardle, *Homosexual Parenting*, *supra* note 5, at 858, and that men and women have distinct, gender based roles—fathers as providers and mothers as stay at home nurturers, Lynn D. Wardle, *Introduction, Relationships Between Family and Government* 31 CAL. W. INT'L L.J. 1, 21 (2000) ("Fathers must selflessly return to their role as providers and protectors of their

with models of adult relationships.<sup>129</sup> Second, some studies that find that fathers and mothers engage in different patterns of interaction and guidance with their children. For example, fathers engage in different styles of play and may use different means of enforcing discipline. It is argued that these differences are critical to children's socialization, especially to that of boys.<sup>130</sup>

While males and females may provide children with role-modeling with respect to some aspects of gender roles, no research shows that being exposed to this role differentiation is critical to any aspects of children's development. To the contrary, as noted by psychologist Michael Lamb, editor of the major anthology on fatherhood, "very little about the gender of the parent seems to be distinctly important. The characteristics of the father as a parent rather than the characteristics of the father as a man appear to be most significant, although it is impossible to demonstrate that the father's masculine characteristics are of no significance."<sup>131</sup>

This conclusion may be surprising in light of all of the political attention that is paid to the importance of both family structure and the role of fathers. It is not necessary, however, to conclude that fathers are unimportant in order to reject the claim that the law should disfavor gay adults in placement decisions.<sup>132</sup> Many "fathers are critical" proponents appear to be concerned

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families, and mothers must return lovingly to nurture their children.").

<sup>129</sup> See Ross Parke et al., *Fathering and Children's Peer Relationships*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, *supra* note 128, at 307-08; cf. Michael Lamb, *The Development and Significance of Father-Child Relationships in Two-Parent Families*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, *supra* note 127, at 287.

<sup>130</sup> See POPENOE, *supra* note 68, at chs. V & VI (1996); Wardle, *supra* note 128, at 21. Fathers provide children "with what might be termed paternal cultural transmission: a father's distinctive capacity to contribute to the identity, character, and competence of children." Wardle, *supra* note \_\_\_\_, at \_\_\_\_.

<sup>131</sup> Michael Lamb, *The Role of the Father an Introduction*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, *supra* note 127, at 7. His views are shared by other leading researchers. For example, Kyle Pruett, one of the main contemporary advocates of involved fathering, recently wrote "I also now realize that most of the enduring skills (of children) are probably, in the end, not dependent on gender." KYLE PRUETT, *FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE FOR YOUR CHILD* 18 (2000). See also Parke et al., *supra* note 130, at 330.

<sup>132</sup> There is a vast academic literature on fatherhood. In contrast to social critics like Wardle and Gallagher, I have not found any academic researchers on these subjects who are hostile to lesbians and gay men as parents. Many prominent researchers have taken public positions indicating that they do not believe that their research warrants taking sexual orientation into account with respect to placement decisions. See, e.g., Brief of Amici Curiae Andrew J. Cherlin, Ph.D., et al., *supra* note 50; POPENOE, *supra* note 68, at 147; sources cited in note 132 *supra*.



with the situation of males in low-income, mother only families, who often experience very bad outcomes. It may be that for children in high poverty neighborhoods, the presence of a father is a protective factor for young males, lessening the chances that they will engage in undesirable behaviors. Thus, the stress on the importance of fathers is not surprising; increasing father involvement with their children may be strategically valuable in combating the impacts of poverty and single motherhood. But regardless of whether it would benefit some children if their fathers were more involved, there is no carry-over to policies regarding placement I address in this article.<sup>133</sup> There is no evidence that children do better with a father and mother than with two mothers or two fathers.<sup>134</sup> To the extent that the claims about the need for fathers purport to be passed on research, this research is far less relevant than the research studying children living with gay parents.

## 2. Parental Behaviors

Some critics also contend that children should not be placed with gay adults because such homes are likely to be harmful to children. Specifically, it has been claimed that: (a) gay men and lesbians are likely to engage in infidelity, promiscuity or other irresponsible sexual behavior; (b) gay adults have higher mortality rates and therefore are more likely to leave children parentless, and (c) that gay couples are likely to break up at higher rates than heterosexual couples.<sup>135</sup>

To support the claims regarding fidelity, commitment, and sexual behavior, opponents of placement

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<sup>133</sup> Some opponents of placement of children with gay adults seem to be concerned that acceptance of gay parenting will be seen as conveying the message that fathers are not important, thereby undercutting their efforts to push for more father responsibility. But however valuable it may be strategically, it is wrong from a scientific, and moral, perspective to penalize children and gay adults for a problem unrelated to them. As I discuss below, preventing gay adults from becoming parents often is harmful to children. It is both bad policy and values to treat these children as pawns in other struggles.

<sup>134</sup> In fact, many studies find that while father involvement can be valuable to children, fathers are far less involved with their children than are mothers. See Brent A. McBride & Mary M. Lutz, *Intervention Changing the Nature and Extent of Father Involvement*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, *supra* note 127, at 447. Several studies find that in lesbian families, both parents spend considerable time with the children, each spending more time than would an average father. Thus, children may benefit by being placed in a lesbian household. See Patterson, *supra* note 78.

<sup>135</sup> Wardle, *Adoption*, *supra* note 5, at 291. Wardle's writings reflect the flawed notion that there is such a thing as homosexual parenting or homosexual lifestyle." People whose love and sexual interests are to others of the same-sex

with gay adults cite surveys of gay men that reported that many of these men had sexual relations with multiple partners and that gay males with partners are less likely than heterosexual men to believe that monogamy is a critical aspect of a committed relationship.<sup>136</sup> But, as law Professor Eugene Volokh has shown, these surveys, many of which are 30-40 years old, were of highly unrepresentative samples of men, generally recruited by methods that “were focused not on homosexual men generally, but only on a sample that would predictably have many more sexual partners than the average gay man.”<sup>137</sup> In contrast the largest national study of sexual behavior, with a representative sample of gay men and lesbians, found only small differences in the behaviors of gay males and comparably situated heterosexual males; there were virtually no differences for women.<sup>138</sup> Moreover, these studies did not include gay men with children and none of the respondents had the opportunity to marry. There is substantial evidence that marriage and the presence of children significantly alters the behavior of heterosexual men.<sup>139</sup>

With respect to the claim of a greater likelihood of relationship instability, again there is no evidence that same-sex couples choosing to have children through ART or seeking to adopt children are at greater risk of breaking up than heterosexual couples choosing to have children by these means. This is not to say that the issue of stability is irrelevant. The evidence indicates that, in the absence of the option of marriage or civil unions, same-sex couple relationships (at least those without children) may be somewhat less stable than the relationships of married heterosexuals.<sup>140</sup> But these are not relationships with children or that have the advantages of marriage. Whether the situation will change as marriage and civil unions becomes more widely available is unknown.

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have many different lifestyles and gay, like heterosexual, parents have many different parenting styles.

<sup>136</sup> Wardle, *Homosexual Parenting*, *supra* note 5, at 582 n.84.

<sup>137</sup> RAUCH, *supra* note 61, at 141-45.

<sup>138</sup> LAUMANN ET AL., *supra* note 65, at 313-317. See also RAUCH, *supra* note 61, at 143-45.

<sup>139</sup> See LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE 21* (1999). These authors contend that marriage significantly changes the marital partners' behavior, increasing their commitment to each other. This, along with the social support given married couples by relatives, friends, and society in general, enhances the stability of the relationship.

<sup>140</sup> See sources cited in Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 316 (2001).

However, agencies placing children already seek to assess the likelihood that a prospective adoptive couples' relationship will remain stable; they do so regardless of the couple's sexual orientation.

The claim regarding risk of higher mortality due to AIDS is groundless with respect to those individuals seeking to become parents. Most gay parents are lesbians, who have the lowest risk of AIDS of all population groups. There is no reason to believe that gay men with children are at higher risk of life-threatening disease than similarly situated heterosexual men. In sum, the assertion that children are at greater risk of being harmed if placed with gay adults does not withstand scrutiny. The claims are based on studies that do not meet even the most minimal research standards and on logically flawed arguments.<sup>141</sup>

#### **IV. APPLYING THE RESEARCH IN ESTABLISHING POLICY: BURDEN OF PROOF**

Neither the evidence from studies of children with gay parents nor widely-accepted theory provides a basis for policy-makers to conclude that an adult's sexual orientation will make any significant difference in terms of children's well-being that should generally influence policies regarding placement decisions. Yet, advocates like Wardle call for rejecting lesbians and gay men as parents until the "evidence is clear beyond reasonable dispute that adult homosexual relationships do not pose risk" of harms to children.<sup>142</sup> In essence, it is being asserted that those who support placement of children with gay individuals or couples should bear the burden of proving, through social science, that a parent's sexual orientation has no negative impact on children's development. This argument is ill-conceived. It does not make sense in terms of meeting the needs of children and it

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<sup>141</sup> For example, Wardle suggests that if gays are allowed to adopt "heterosexual couples ...may be discouraged by the increased competition from gay and lesbian couples and decline to enter the 'adoption market.'" Wardle, *Adoption*, *supra* note 5, at 291. He offers no evidence in support of a seemingly indefensible prediction. As I discuss below, I do not believe that the policy issues can be or should be resolved solely on the basis of social science research. However, since reference to social science research plays such an important part in policy debates, it is important for policymakers to be aware of the quality of the research. While asserting that the research looking at children with gay parents should be ignored because of methodological limitations, commentators like Wardle, Gallagher, and the Family Research Council generally base their claims on studies that, I believe, are either irrelevant to the policy issues or that have been discredited and are totally inadequate methodologically.

<sup>142</sup> Wardle, *Adoption*, *supra* note 5, at 291.

contradicts basic principles regarding who should bear the burden of proof on issues like these.

Most importantly, policies requiring or encouraging decision-makers to focus on sexual orientation in making placements generally will lead to worse outcomes for children.<sup>143</sup> For example, such policies would reduce the pool of potential adoptive and foster parents, thereby lessening the chances that children will be adopted and lead to placements that are less desirable for some children. It also would significantly increase the likelihood of inappropriate decisions in custody disputes.

A presumption against placement with gay adults also ignores the great weight of the existing evidence and professional opinion. The great majority of child development professionals and researchers assert that any differences in child outcomes raised in similar two parent families, differing only in gender composition, are likely to be small and irrelevant for policy purposes. According to the American Psychiatric Association “optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults.”<sup>144</sup> Similarly, The Committee on Psychosocial Aspects of Child and Family Health of the American Academy of Pediatrics recently wrote “Research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.”<sup>145</sup> Moreover, virtually every organization of professionals working with children and families has adopted the position that same-sex households should be treated equivalent to heterosexual households with respect to placement policies.<sup>146</sup> The positions of such organizations

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<sup>143</sup> See discussion at notes \_\_\_-\_\_\_ and accompanying text *infra*.

<sup>144</sup> AM. PSYCHIATRIC ASS’N, SAME-SEX COUPLES: POSITION STATEMENT (2002), *available at* [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200214.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf).

<sup>145</sup> AM. PSYCHOLOGICAL ASS’N, SEXUAL ORIENTATION, PARENTS, & CHILDREN: POLICY STATEMENT (2004), *available at* <http://www.apa.org/pi/lgbc/policy.parents.html>.

<sup>146</sup> The American Psychological Association, the American Psychoanalytic Association, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry all have adopted this view. AM. PSYCHOLOGICAL ASS’N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004), *available at* <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf>; AM. ACAD. OF PEDIATRICS, ADOPTION AND CO-PARENTING OF

are not incontestable and not all members will subscribe to every position. However, these are the best available reflections of professional and scientific consensus.<sup>147</sup> The burden should be on those who seek to reject this level of consensus.

In addition, singling out sexual orientation as a strongly negative (or positive) factor is inconsistent with the lessons from social science research on children's development. Children's development is influenced by a complex mix of factors. No single parental characteristic or behavior, other than a history of very bad parenting, has significant predictive power with respect to children's development. This is why, in most areas of family law, decision-makers are directed to determine a child's "best interests" on a case-by-case basis, without resorting to presumptions related to parental characteristics.<sup>148</sup>

Moreover, the research situation is not going to change in any significant way in the near future--or perhaps ever. It is especially difficult to obtain data on large numbers of children living with gay parents. These data could only be obtained from general surveys of large samples of randomly selected families.<sup>149</sup> While there are several such data sets, the number of gay families in these data sets is invariably small, since the number of gay families in the general population is small. For example, one recent study looked at data from the "ADD Health" National Survey, one of the largest data sets focused on children's developmental, [finish sentence]. Even in this very large research sample of 12,105 adolescents, only 44 adolescents lived in a household that appeared to be headed by a gay parent, only 18 for certain.<sup>150</sup> Thus, most research will come from studies that

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CHILDREN BY SAME-SEX COUPLES: POSITION STATEMENT (2002), *available at* [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200214.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200214.pdf); AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, POLICY STATEMENT: GAY, LESBIAN, AND BISEXUAL PARENTS (1999), *available at* <http://www.aacap.org/publications/policy/ps46.htm>.

<sup>147</sup> See Sarah Ramsey, *Social Science Knowledge in Family Law Cases: Judicial Gatekeeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 72-79 (2004); cf. Margaret F. Brinig, *Promoting Children's Interests Through a Responsible Research Agenda* 14 U. FLA. J.L. & PUB. POL'Y 137 (2002).

<sup>148</sup> See Levy, *supra* note 17, §§ 28:1-28:4.

<sup>149</sup> It is from such large scale studies that evidence about the impact of variables like income and family structure have been obtained.

<sup>150</sup> See Wainright et al., *supra* note 78, at 1888-90.

recruit families and thereby encounter the problems associated with using non-random samples. In addition, for both logistical and financial reasons, there will be very few long-term longitudinal family studies and few, if any, studies will include large numbers of randomly selected gay parents.

These methodological problems are not unique to research related to assessing the relevance of sexual orientation: they are common in virtually all research related to controversial family law policies, such as the desirability of trans-racial adoptions, fathers as parents, the desirability of joint custody, the conditions under which a custodial parent should be allowed to relocate to a home distant from a non-custodial parent, or the impact of grandparent visitation.<sup>151</sup> In each of these contexts, it is very difficult to get a substantial amount of data on the development of large numbers of randomly selected children and compare their development with comparable children who subject to a different arrangement. The body of research on gay parenting is at least as developed and reliable as other research relied on by legislatures in making policy regarding placement of children, such as those just mentioned.

While future research will add to our knowledge, social science evidence will not provide definitive answers to the policy questions. When it comes to children's policy, social science rarely, if ever, establishes that something is "clear beyond reasonable dispute."<sup>152</sup> For example, there are now thousands of studies examining the impact of family structure (single parent versus two parents) on children's development, a variable that is commonplace and easily obtained in data sets with very large numbers of subjects. Yet, debates still rage about the impact of family structure on

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<sup>151</sup> See Brinig, *supra* note 147, at 141-43.

<sup>152</sup> In fact, Wardle's proposal that the absence of harm from living with a gay parent be shown beyond reasonable dispute displays a fundamental misunderstanding of social science methods. Social science cannot prove that something will not happen. Even if every research study finds no harm, it remains possible that future studies might find situations that could be thought of as harm. What constitutes proof beyond reasonable dispute? Given the difficulties in conducting studies, people who believe that homosexuality is harmful will always find problems with the research. The burden should be on those claiming the likelihood of harm, since they only need a small number of studies finding harm to meet this burden. Other opponents of gay parents argue that the burden should be on those supporting change. See LERNER & NAGAI, *supra* note 111, at 16-21. But this would only make sense if there were good reasons to believe that preserving the status would benefit children. As I discuss throughout this article, there are many reasons why preserving the status quo is bad for children.

children.<sup>153</sup> So many factors effect children’s well-being, it is extremely difficult to develop and conduct studies that prove the impact of any particular factor. Thus, any presumptions disfavoring gay adults are likely to remain permanent if they can only be changed by indisputable social science.

Finally, in the absence of any data indicating harm to children,<sup>154</sup> it is unfair from a values perspective to place the burden on the group that is being denied an opportunity, especially an opportunity as important to adults as access to children or parenthood.

Thus, in adopting policies with respect to each of the placement decisions, policy-makers should presume that, in general, children will do as well being raised by gay parents as with heterosexual parents. There may, however, be some situations where an adult’s sexual orientation should be relevant. I examine the implications of the research with respect to designing policies in each of the placement arenas in the remainder of the article.

## **IV ADOPTION AND FOSTER CARE**

### **A. Adoption**

#### **1. Current Policies**

All states regulate the adoption process. At present, five states have legislation or regulations limiting adoption by gay adults.<sup>155</sup> In 1977, Florida enacted legislation prohibiting adoption by

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<sup>153</sup> See Amato, *supra* note 86, at 76-78.

<sup>154</sup> With respect to harm, only one issue emerges from the studies—the painful impact of the behavior of some children and adults towards children and youth living with gay parents. Still, as noted, the social development of the subject children was well within normal range and did not differ from the development of other children. In essence, it appears that these children had learned to deal with the fact that society considered their family different, just as children living in other minority families, for example religious minorities or interracial families, learn to cope with community stigma based on their family's difference.

<sup>155</sup> Florida, Mississippi, Utah, Virginia. While the Alabama statute does not contain a bar, the legislature adopted a resolution in 2002, stating that its “intent is to prohibit child adoption by homosexual couples.” ALA. CODE § 26-10A-6 (2002) (referencing Act 98-439, HJR35). The status of gay adults is unclear in Nebraska and Oklahoma. Many states have been modifying their laws regarding adoption by gay individuals and couples in recent years. New Hampshire had a statute barring adoption by homosexuals that was repealed in 1999. N.H. REV. STAT. ANN. § 170-B:4 (amended 1999). The ability of gay adults to adopt also is affected by court opinions and administrative

gay couples or individuals.<sup>156</sup> More recently, Mississippi enacted legislation that bars adoption by gay couples, but not gay individuals.<sup>157</sup> Utah and Virginia bar adoption by any unmarried couples, effectively precluding gay couples, but not gay individuals.<sup>158</sup> Legislation to ban adoption by gay adults has been introduced, but not passed, in at least seven other states.<sup>159</sup> In contrast, at least 10 states either provide for adoption by gay couples and individuals or bar discrimination based on sexual orientation.<sup>160</sup>

In states where there is no legislation, courts and public and private adoption agencies have discretion to consider or ignore sexual orientation as one of the factors to weigh in making or approving an adoptive placement. Practices vary by state and agency; in a recent nationwide survey of private adoption agencies, one-third of the responding agencies indicated that they would not place a child with a gay person.<sup>161</sup> There is little research indicating how the relevance of adult's sexual orientation is assessed by caseworkers in the remaining agencies. Most reports indicate that the children placed with gay individuals and couples often have special needs and are considered hard to place children, indicating that many workers consider placement with gay adults as less desirable than other placements.<sup>162</sup>

## 2. Proposed Approach

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regulations. For a review of these laws see National Gay and Lesbian Task force, *Adoption Laws in the U.S.* (Jan. 2006), <http://thetaskforce.org>; Duncan, *supra* note 30, at 32-36.

<sup>156</sup> Florida law prohibits adoptions by individuals otherwise qualified if those individuals are sexually active "homosexuals," although the state does not prohibit lesbians or gay men from being foster parents. 1977 Fla. Laws, ch. 77-140, § 1, FLA. STAT. ANN § 63.042(3) (West 2002).

<sup>157</sup> MISS. CODE ANN. § 93-17-3 (2002).

<sup>158</sup> UTAH CODE ANN. § 78-30-1 (2002), VIR. CODE ANN. § 63.2-1225 (West 2006).

<sup>159</sup> Leslie Cooper and Paul Cates, *TOO HIGH A PRICE* 6 (ACLU LESBIAN & GAY RIGHTS PROJECT 2d ed. 2006).

<sup>160</sup> See Maryland Family Policy Impact Seminar, *Impact of Gay Adoption Laws on Permanency for Foster Youth*, [http://www.hhp.umd.edu/FMST/\\_docsContribute/GayAdoptionResearchBrief\\_000.pdf](http://www.hhp.umd.edu/FMST/_docsContribute/GayAdoptionResearchBrief_000.pdf).

<sup>161</sup> See David Brodzinsky et al., *Adoption Agency Perspectives on Lesbian and Gay Prospective Parents: A National Study*, 5 *Adoption Quarterly* 5 (2002); See also EVAN B. DONALDSON INSTITUTE, *ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES* (2002).

<sup>162</sup> See EVAN B. DONALDSON INSTITUTE, *EXPANDING RESOURCES FOR CHILDREN*, *supra* note 10, at 4, 11-12. There are some agencies generally considered gay-friendly to which gay couples, especially men, look for children.



(a). *Total Bans*

In terms of children's interests, legislative bans on placing children with gay individuals are irrational and harmful to children, as are agency policies that refuse placements with gay persons. Currently, there are over 100,000 children in the U.S. awaiting adoptive homes; almost all entered care through the child welfare system.<sup>163</sup> This number has remained stable for many years. There are not now, and will not be in the future, anywhere near enough individuals or families, heterosexual or gay, wanting to adopt these children.<sup>164</sup> Many hard to place children are adopted by gay individuals or couples.<sup>165</sup> Obviously, a bar on adoption by gay individuals or couples will mean that even fewer of these children will be adopted. They will either remain in a foster family home or be placed in a group residential setting.

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<sup>163</sup> See Administration for Children & Families, U.S. Dep't of Health & Human Services, The AFCARS Report: Preliminary FY2003 Estimates as of April 2005, [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report10.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.htm).

<sup>164</sup> In most states, there are two different processes by which children are adopted—independent adoptions and agency adoptions. Most adoptions involve the voluntary decision of the biological parent(s) to give up their right to custody of the child and to allow another person or persons to become the legal parents of the child through adoption. Generally, these are very young children, often newborns. There usually are more people wanting to adopt than there are children available, especially if the child is under one year of age. Most birth parents who voluntarily place a child utilize what is called the private or independent adoption process. Frequently, the parent, using a lawyer or doctor as an intermediary, selects a person or couple to be the adoptive parents and relinquishes custody to them. Alternatively, the parent may relinquish the child to a private non-profit adoption agency, authorizing that agency to place the child for adoption. The state role in both these types of placements generally is quite limited. All states require that a state agency evaluate the suitability of the proposed home and the adoption must ultimately receive approval by a court; however, the choice of the parent or the private agency rarely is rejected. Except in the states limiting placement with gay couples or individuals, the birth parent or the private agency decides on the relevance of the prospective adoptive parent's sexual orientation.

In contrast to voluntary placements, some children are placed for adoption after their parents' rights to custody have been involuntarily terminated by a court because the parents are ruled unfit to care for the child. These usually are children who have been removed from their parents by a juvenile court because of inadequate parental care or maltreatment. Most such children are initially placed in a foster home, while efforts to help the parent(s) regain custody are implemented. If these efforts are unsuccessful, federal and state laws require that the state look to have the child adopted and the child welfare agency will choose the prospective adoptive parents. Often the agency chooses the child's foster family. In other cases, relatives are sought out. Finally, an adoptive family may be selected from a pool of applicants evaluated by the agency. If there are no families already available, the agency will seek out potential adoptive homes through a variety of means. With respect to children who have been abused or neglected, there are fewer homes available than there are children needing adoptive placement. Many of these children are older and may have a variety of "special needs." Most such children are adopted by their foster parents, if they are adopted at all. Large numbers are never adopted. See note 164 *supra*.

<sup>165</sup> These may be only children available to them. See note 163 *supra*.

The vast majority of children without parents unquestionably would be better off being adopted. Child development specialists all agree that adoption is the best means of promoting the well-being of most children who do not have parents willing or able to care for them.<sup>166</sup> Adoption provides children with the most committed caretakers, the greatest stability, the most emotional security, and the most legal protection. A preference for adoption is recognized in federal law and is the public policy of every state, including the states with bans.<sup>167</sup> All of the leading professional child health and welfare organizations oppose the exclusion of gay men and lesbians as potential adoptive parents.<sup>168</sup> Some opponents of adoption by gay parents assert that “the interest of the child served by adoption laws is an ‘interest’ in having an ideal family.”<sup>169</sup> This is clearly wrong. The interest is in having a family, one that is better than the alternatives of foster care or institution. There is not a shred of evidence, or a single reason to believe, that most children would be better-off left in foster family or group homes than adopted by a gay couple or individual, which is essentially the judgment reflected in a total bar.<sup>170</sup>

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<sup>166</sup> See, John Triseliotis and Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, in *THE PSYCHOLOGY OF ADOPTION 107*(David M. Brodzinsky and Marshall D. Schechter eds. 1990).

<sup>167</sup> See The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272; The Adoption and Safe Families Act of 1997, P.L. 105-89. In Florida, adoption is “the primary permanency option” Fla Stat. ch. 39.001(1)(h);39.621 (2).

<sup>168</sup> See AMERICAN ACADEMY OF PEDIATRICS, ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES: POSITION STATEMENT (2002), available at <http://www.aclu.org/getequal/ffm/section1/1c7apa.pdf> ; AMERICAN PSYCHOLOGICAL ASSOCIATION, RESOLUTION ON SEXUAL ORIENTATION, PARENTS, AND CHILDREN (2004), available at <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf>; AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, POLICY STATEMENT: GAY, LESBIAN, AND BISEXUAL PARENTS (1999), available at <http://www.aacap.org/publications/policy/ps46.htm>; AMERICAN PSYCHOANALYTIC ASSOCIATION, POSITION STATEMENT ON GAY AND LESBIAN PARENTING (2002), available at <http://www.apsa.org/ctf/cgli/parenting.htm>; NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, NACAC POSITION STATEMENTS: GAY AND LESBIAN ADOPTIONS AND FOSTER CARE (2002), available at <http://www.aclu.org/getequal/ffm/section1/1c11nacac.pdf>; AMERICAN ACADEMY OF FAMILY PHYSICIANS, CHILDREN’S HEALTH (2003), available at <http://www.aafp.org/x16320.xml>. In 2002, approximately 60 of AAP’s more than 60,000 members formed the American College of Pediatricians (ACP) in 2002 to oppose adoption by gay adults. Bill Fancher & Jody Brown, Am. Family Ass’n, *Pro -Life Pediatric Group Stands Contrary to Established AAP*, AGAPE PRESS, July 29, 2003, <http://headlines.agapepress.org/archive/7/afa/292003e.asp>. American College of Pediatricians, *Homosexual Parenting: Is It Time for Change?* (2004), <http://www.acped.org/?CONTEXT=art&cat=10005&art=50&BISKIT=2684987796> (last visited Oct. 20, 2005).

<sup>169</sup> See Duncan, *supra* note 30, at 37.

<sup>170</sup> While there are circumstances where long-term foster care or legal guardianship is preferable for a given child, this choice should be made because it is best for the child, not out of the necessity caused by limiting the applicant pool. The irrationality and inconsistencies of the arguments against adoption are reflected the writings of William Duncan. Duncan states that the purpose of adoption law is “fashion adoption in imitation of procreation,” *id* at 31; no

The irrationality of a total ban is reflected in other policies in the four states with bans. The Florida statute was passed in 1977 following an anti-gay crusade led by singer Anita Bryant, who argued that homosexuality was immoral.<sup>171</sup> This policy has been challenged in court a number of times; it was recently upheld by the 11<sup>th</sup> Circuit Court of Appeals in the case of *Lofton v. State of Florida*.<sup>172</sup> Over the years, as Florida has defended its law in court challenges, it no longer focuses on morality. Its current justification is that the state should place children for adoption only in optimal families, which the AG claimed is a two parent heterosexual household.<sup>173</sup> As discussed previously, the optimality claim is indefensible—there is no justification for denying children a perfectly good permanent family, because the family is not optimal. Moreover, Florida allows adoption by single individuals and cohabiting couples. While any of these individuals or couples may be totally suitable, they would not be considered optimal under the standard proposed by the AG. In addition, other Florida laws and practices recognize that gay individuals and families provide perfectly suitable homes. Florida allows gay individuals to become foster parents and legal guardians of foster children. Many of these gay foster parents raise children from birth until they become adults.<sup>174</sup> Obviously, the Florida legislature and state placement agencies believe that these homes are suitable and preferable to institutions. Ironically, the plaintiffs in the Lofton case were a gay couple who had been selected as foster parents of the year in Florida.<sup>175</sup> If a child is to be raised by a gay family, it is irrational not to allow the child to be adopted, which provides children with more legal protections and greater stability.

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state makes this the goal of adoption. Duncan rejects the idea that a child's best interests are met if he or she is ensured the "best" emotional, physical, and economic context. Like others, he makes no effort to address the question whether children are better-off left in foster care or a residential institution if an "ideal" family is not available. Yet, Duncan accepts that adoption by single individuals is all right, even though such settings are not ideal. He asserts that such placements are acceptable because single individuals may get married; there is no evidence showing any likelihood that this happens often.

<sup>171</sup> See *Adoption Ruling a Slap at Gays*, MIAMI HERALD, Sept. 2, 2001, at [Page].

<sup>172</sup> *Lofton v. Sec'y Dep't Child. & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *rehearing en banc denied*, 337 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

<sup>173</sup> Brief of Appellees at 16, 30, *Lofton*, 358 F.3d 804, 2002 WL 32868748; Appellants' Reply Brief at 4, 9, *Lofton*, 358 F.3d 804, 2003 WL 24131214.

<sup>174</sup> Steven Lofton is a registered pediatric nurse who raised three Florida foster children from infancy. *Lofton*, 358 F.3d at 807.

<sup>175</sup> *Fighting for Their Families*, S. FLA. SUN-SENTINEL (Broward Metro Edition), Aug. 12, 2001, at G1.

The Florida Attorney General's Office also proposed that the legislation could reflect the goal of keeping open the possibility of adoption by a heterosexual couple at some point in the child's life, a position that the Lofton court majority found sufficient to uphold the law.<sup>176</sup> Regardless of whether this claim is sufficient to pass muster under a rational basis review of the statute's constitutionality,<sup>177</sup> it is indefensible policy from a child welfare perspective. Delay in placing a child for adoption decreases the ultimate likelihood of adoption. This was recognized by Congress when it passed the federal Multi-Ethnic Placement Act (MEPA) in 1994,<sup>178</sup> an act that addressed adoption policies akin to those barring adoption by gays. In the case of MEPA, the issue was trans-racial adoption. It was the practice, if not the policy, in many states, to try to place children, especially African-American children, with families of the same race or ethnicity as the child. Many people argued that this was the optimal placement in the case of minority children. Yet, because there were many more African-American children needing adoptive homes than there were available African-American families looking to adopt, large numbers of African-American children remained in foster care for lengthy periods of time; most were never adopted.

There was, and remains, substantial debate regarding the desirability of racial matching.<sup>179</sup> But, even those who favored a preference for same race placements recognized that it was bad for children to delay adoption placement in the hope that a same race family would materialize. For many children, delay means denial of adoption. Delay often is accompanied by decreases in a

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<sup>176</sup> Lofton at

<sup>177</sup> For a discussion of the legal issues, see Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421, 428-41 (2005).

<sup>178</sup> The Multi-Ethnic Placement Act of 1994, as amended, P.L. 103-382 [42 USC 622] prohibits the delay or denial of any adoption or placement in foster care due to the race, color, or national origin of the child or of the foster or adoptive parents and requires States to provide for diligent recruitment of potential foster and adoptive families who reflect the ethnic and racial diversity of children for whom homes are needed. The 1996 amendment, Section 1808 of P.L. 104-188, Removal of Barriers to Interethnic Adoption, affirms the prohibition against delaying or denying the placement of a child for adoption or foster care on the basis of race, color or national origin of the foster or adoptive parents or of the child involved [42 USC 1996b].

<sup>179</sup> See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through*

child's emotional health, making adoption less likely. Moreover, there is little reason to believe that for hard to place children adoptive families will materialize. Therefore, MEPA bars states from delaying placements in order to find a more a so-called more "suitable" home-in this case a same race home. As MEPA recognizes, denying a child a good adoptive home on the possibility that a "better" home will become available at some point cuts against every element of good adoption practice.

Mississippi bars gay couples, but not gay individuals, from adopting. Utah and Virginia ban adoption by unmarried couples, regardless of sexual orientation, but not by gay or heterosexual individuals. Why bar gay or unmarried couples but allow adoption by single individuals? It cannot be because these legislatures thought that children do best with single parents. Mississippi law prefers heterosexual married couples over heterosexual individuals as candidates for adoption. A total bar prevents adoption by couples in long-term, highly stable relationships and assumes that children are worse off with two parents who are not married than they are with a single parent. The policy would only make sense if it was always better for children to remain in foster care or a residential placement, or with a single parent, than in two parent homes with unmarried parents. This is extraordinarily unlikely, given the advantages to children associated with having two parents in the household. It appears that these legislatures did not want to give any recognition to same-sex relationships, perhaps out of concern that such recognition might be used as a justification for same-sex marriage in any litigation of this issue.<sup>180</sup>

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*Discriminatory State Action*, 107 YALE L.J. 875 (1998).

<sup>180</sup> The fact that gay couples could adopt was viewed by courts in Vermont and Massachusetts as evidence that the legislature believed that such couples were competent parents and denial of the opportunity to marry violated their right to equal treatment. For a discussion of some of the legislative reasoning in Mississippi and Utah, see Kari E. Hong, *Parens Patri(archy): Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 40-60 (2003).

In fact, the child-focused arguments against same-sex couple marriage also are illogical. Opponents often assert that children do better in heterosexual families and therefore marriage should be restricted to such couples. Regardless of whether this is true, and I do not believe it is, the policy issue is not about the potential benefits of living with both a mother and father versus two same-sex parents. The children who will be affected by same-sex marriage already live with two same-sex adults. The issue is whether it is better for those children if these adults, both of whom function as parents, are able to marry, rather than be required to cohabit. The hundreds of thousands of children who are currently living with parents in a same-sex partnership, or who are living with a single gay mother or father who may later find a partner, will continue living with their parent(s) regardless of whether the state allows their parents to marry. Nobody is

In addition to harming children needing adoptive homes, singling out sexual orientation as the only basis for a total ban stigmatizes gay families, potentially adding to the burdens children in these families already experience. A total ban also means that birth parents lose the right to select an adoptive home they prefer, if they wish to choose a gay couple or individual. A total ban on adoption by gay families should be rejected. Lesbian and gay individuals should be considered as suitable adoptive parents.

*(b) Consideration of Sexual Orientation When Alternative Placements Are Available*

Where there is more than one family seeking to adopt a child, it is necessary to ask whether sexual orientation should be viewed as a factor in choosing among families and, if so, how. There are four possible general policies. Policy-makers could direct that adoption agencies always select placement with a heterosexual couple or individual over a same-sex couple or individual, regardless of any of the other characteristics of the two families or individuals. Alternatively, they could choose a presumption for heterosexual couples or individuals, making this the placement of choice unless there are factors that suggest placement with the same-sex couple or individual is clearly preferable. Third, agencies could be instructed to consider sexual orientation as just one of the factors relevant in trying to choose the “best” placement for the specific child. Finally, agencies could be directed not to consider sexual orientation in assessing the alternative placements.

Would a policy that heterosexual families or individuals should always be selected when available, or that there should be a presumption for heterosexuality, lead to the best outcomes for children? While the answer may seem obvious to many people, think again about Jennifer and

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suggesting that they be should be taken from their parent(s) and placed elsewhere; such a policy would not only be undesirable and contrary to existing state laws, it would be unconstitutional. These children clearly would benefit if their parents were able to marry. This would maximize stability and protect their economic interests. They would be able to see their family as more normal. Their parent's wellbeing will be improved, which will contribute to their capacity for child rearing. By not allowing their parents to marry, or by undoing existing marriages, the children are made to suffer. *See* Wald, *supra* note 140.

Linda, the hypothetical couple described previously.<sup>181</sup> A legislative rule requiring placement with a heterosexual couple if one is available or a strong presumption for placement with heterosexual parents can be defended only if the sexual orientation of the prospective parent(s) is likely, in general, to be the most critical factor in predicting the home that will be best for the child. As discussed previously, this premise is not supported by the evidence.<sup>182</sup> Therefore, neither a bar, nor a presumption, against placement with gay adults is justified, even when a heterosexual family is available. Instead, agencies should treat each child individually, focusing on the needs the specific child and the suitability of specific caregivers in meeting those needs.<sup>183</sup>

The most difficult issue, I believe, is whether there should be a preference for heterosexual families when reasonably comparable heterosexual and gay couples or individuals are available to adopt a child. The fact that they are adopted poses challenges for many children, especially during adolescence and early adulthood, although most adopted children appear to lead successful lives and benefit from adoption. Therefore, a legislature might choose policies that minimize any potential obstacles to a successful adoption, including the challenges a child will face living in a “non-normal” family.<sup>184</sup> As previously discussed,<sup>185</sup> children with gay parents will face challenges that they would not face if raised in a heterosexual household. Some of these children, perhaps most, ultimately may see these challenges as having had a beneficial impact. But this will certainly not be true for all children. While it could be argued that facing such

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<sup>181</sup> See note \_\_\_ and accompanying text *supra*.

<sup>182</sup> See note \_\_\_ and accompanying text *supra*.

<sup>183</sup> This is the position taken by the Child Welfare League of America, the preeminent professional organization dealing with children in the child welfare system. According to the League “Applicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing life style, or sexual orientation. Applicant should be accepted on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child...” CHILD WELFARE LEAGUE OF AMERICA, CWLA STANDARD OF EXCELLENCE FOR ADOPTION SERVICES §§ 4.7, 5.1 (rev. ed. 2000).

<sup>184</sup> Historically, agencies emphasized matching the characteristics of the child and adoptive parents as closely as possible to avoid the “stigma” of adoption. They sought to place children with adoptive families that resembled the child’s biological families as closely as possible, families in which parents and child were physically, ethnically, racially, and intellectually alike. See BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION, at chs. 2-3 (2002).

<sup>185</sup> See notes \_\_\_-\_\_\_ and accompanying text *supra*.

challenges has potential benefits, it strikes me that most adults looking back at their childhoods would opt for minimizing painful experiences, as would most children if asked.

Nonetheless, there are major problems with creating a preference for normality, even when there are reasonably comparable families in all respects except sexual orientation.<sup>186</sup> In fact, there is a strong case for discouraging agencies from considering sexual orientation at all. In considering the appropriate policy, policy-makers should assess how a given policy is likely to be implemented. If the ultimate decision-makers are likely to use a particular factor inappropriately, this should be taken into consideration in establishing policy. Many agencies already focus on sexual orientation inappropriately; any policy preference for heterosexual families would exacerbate the situation.

Adoption placements involve highly discretionary decisions by workers in public and private adoption agencies. Under current practices, most agencies instruct their staff to try to match the child with the family they consider most suitable for each child. A staff member will review the characteristics of the pool of families that have applied to the agency for a child. The worker will look first at any preferences a family has with respect to the type of child it wishes to adopt. The agency then will assess the adults' capacity to meet any special needs the child might have, for example, their ability to raise a child with a disability, a child of a different race or ethnicity than theirs, or their willingness to have contact with the birth mother, if an open adoption seems appropriate.

At their best, placement decisions reflect sound clinical judgments by experienced, well-trained adoption specialists, using their clinical experience. A sound decision should involve weighing multiple factors, including family structure, marital status of couples, education levels, income, presence of other children in the family, evidence of childrearing skills, availability of an extended family support network, as well as sexual orientation. The ability of the family to meet

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<sup>186</sup> It may be that having a pool of families comparable in all respect except for sexual orientation is a rare event.



the needs of the specific child should be the focus. Unfortunately, the decision-making process is far from ideal in most circumstances. There is little science to the selection process. Caseworkers, many of whom have limited training, are likely to make these decisions based on their own value judgments, plus any agency policies. There is little reason to expect that these decisions will be free of bias. Many workers are likely to bring the general biases found in society and give too much weight to sexual orientation and not enough weight to other factors. As noted, one recent survey found that a third of all agencies nationally have policies against placements with gay families; in other agencies this will be the practice of many workers.<sup>187</sup>

The historical record with respect to agency decision-making is not encouraging.<sup>188</sup> Beginning in the early 1900's, adoption agencies purported to use psychological knowledge to place children in the best available adoptive families. For much of the last century, agencies assumed that the best families were those that were most normal. However, the factors considered normal often were questionable with respect to their influence on children's development. For example, agencies placed major emphasis on matching children with parents of the same religion and intelligence level. They also looked for families where the adults performed according to proper gender roles--men in the labor force in masculine jobs, women at home. These factors were used as rules of thumb and given far more weight than factors likely to be predictive of successful child development. While agency practices have become more sophisticated over time, worker competence and attitudes are still highly variable. It remains highly likely that allowing caseworkers to consider sexual orientation on a case by case basis will lead to unwarranted rejections of gay families or too long delays in the placement of children with gay adults while the worker searches for a "comparable" heterosexual placement.

In addition, choosing a normality standard is problematic. What factors should be considered as

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<sup>187</sup> See note \_\_\_ *supra*. This is especially true with respect to adoption agencies affiliated with religious organizations.

<sup>188</sup> The following description of adoption agency practices is drawn from MELOSH, *supra* note 184; there are many other books and articles also describing these practices. See Hong, *supra* note 180, at 3 n. 7, 4 nn.8-9.

non-normal? Should agencies disfavor placement with adults who belong to religious or cultural minorities or who are of a different race than the child? Encouraging workers to consider value laden criteria is likely to lead to bad decisions.

Allowing consideration of sexual orientation on a case by case basis raises another problem. A major reason why the sexual orientation of the family matters might be considered relevant is because of the stigma that the children will experience because their family is different. It is difficult for gay parents to protect their children from stigma, although they certainly can mitigate the impact of community prejudice, just as other parents from stigmatized minorities--racial, ethnic, or religious--help their children deal with prejudice. Should policy-makers allow community bias to influence policy?<sup>189</sup>

This issue was considered by the U.S. Supreme Court in the case of *Palmore v. Sidoti*,<sup>190</sup> involving a custody dispute following a divorce. At the time of the divorce, the mother, a Caucasian, was granted primary physical custody of the child. Several years later, the mother married an African-American man. The father filed for a change of custody. The trial judge in rural Florida transferred custody to the father. The judge based his decision on the need to protect the child from the social stigma that would presumably accompany an interracial marriage in this rural area.<sup>191</sup> The Supreme Court reversed, holding that a court cannot ratify such local prejudices, even if this requires disregarding one aspect of the child's best interests. The Supreme Court agreed that it "would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated."<sup>192</sup> The Justices accepted that, all else being equal, it might be better for the child to live in an environment free of these pressures and

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<sup>189</sup> At this point, many policymakers have the same biases. The same is true of the general public; about half of all people oppose adoption by lesbians and gay men. See Wyatt Buchan, *Poll Finds U.S. Warming to Gay Marriage*, S.F. CHRON., Mar. 23, 2006, at A5.

<sup>190</sup> 466 U.S. 429 (1984).

<sup>191</sup> The Florida trial court stated that: "[D]espite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." *Id.* at 431

<sup>192</sup> *Palmore*, 466 U.S. at 433.

stresses. Nonetheless, the Court held that “the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother....The Constitution cannot control such prejudices but neither can it tolerate them.”<sup>193</sup>

Due to the legal differences between adoption and custody,<sup>194</sup> and the level of constitutional concern with distinctions based on race versus sexual orientation,<sup>195</sup> the *Palmore* holding might not be applied by the Supreme Court to a legislative preference for heterosexual couples in adoption proceedings. Nonetheless, the value premises underlying the holding are relevant to any situations where government policy supports community biases. The chance of stigma is not limited to situations with a gay parent. Depending where they live, children could face stigma, teasing, and feelings of defensiveness based on their families’ religion, race, or cultural practices. It is highly undesirable to allow community biases against any groups influence public policies towards those groups. This concern is furthered by the need to protect the important interest of gay adults in having the opportunity to adopt and the undesirability of any policies that contribute to societal beliefs that gay parents are less desirable. Thus, there is a strong case for barring consideration of sexual orientation at all.

Despite these concerns, I would opt for a system that allows decision-makers to assess, on a case by case basis, the difficulties or advantages a particular child is likely to face in living with a gay family as one of the factors in determining the best placement. Even if the difficulties are related to the fact of stigma, as a general rule children should not be made to bear the costs of remedying biases that are deemed undesirable by policy-makers. They are voiceless and easily made victims of adults’ agendas. They have no ability to avoid the costs. This is especially true of children

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<sup>193</sup> *Id.*

<sup>194</sup> The rights of an existing parent are accorded substantial protection while an applicant to adopt a child has no special standing. *See Lofton v. Sec’y Dep’t Child. & Family Servs.*, 358 F.3d 804, 809-11, 815 (11th Cir. 2004), *rehearing en banc denied*, 337 F.3d 1275 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

<sup>195</sup> Unlike race, sexual orientation is not a suspect classification requiring heightened scrutiny. *Cf. Drummond v. Fulton County Dep’t Family & Children’s Servs.* 563 F.2d 1200 (5th Cir. 1977) (race may be considered as one

needing adoptive placements; other children generally have at least their parents as advocates and protectors of their interests.

Moreover, workers are likely to take sexual orientation into consideration, even if a legislature specifies that they should not do so.<sup>196</sup> Legislatures should recognize this and enact rules or guidelines designed to limit inappropriate uses of discretion. Most importantly, in states where foster parents are the preferred adoptive home if their foster child becomes adoptable, gay foster parents should be given the same preference as other foster parents. Situations like that of Stephen Lofton in Florida should not be allowed. Foster children generally benefit when adopted by their foster parents, thereby providing stability and continuity in their lives. In addition, non-discrimination laws, like those found in a number of states, should be adopted.<sup>197</sup>

Another approach would be for a legislature to adopt a statutory framework indicating the factors that agencies and courts should consider. This would force legislatures to confront the complexity of the decision, the values involved, and the potential for irrational decision-making by agencies. It might be specified that if potential stigma or the search for normalcy is to be a basis for rejection of an applicant, it should be applied uniformly to stigma from all sources, including religion, not singling out sexual orientation. Agencies could be required to specify the factors they considered in choosing the prospective adoptive home. When a gay applicant(s) is passed over, the agency could be required to document the reasons, including the bases for concluding that stigma is relevant in the particular case.

There is little reason to believe, however, that legislatures will confront these issues in a reasoned fashion. In many states, legislators concerned with public attitudes, especially those of a highly

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factor but not only factor in determining whether foster parts may adopt).

<sup>196</sup> There is evidence that worker attitudes toward racial matching continue to influence placement decisions of African-American children despite the mandates of MEPA. *See* U.S. Dept Health and Human Services, Protection from Racial Discrimination in Adoption and Foster Care, Summary of Selected OCR Compliance Activities at <http://www.hhs.gov/ocr/mepa/complianceact.html>.

<sup>197</sup> *See* note \_\_\_ *supra*.

organized constituency opposed to lesbians and gay men as parents, may draft guidelines that do more harm than good. As a practical matter, it will be very hard to monitor whether agencies in fact weigh the relevance of sexual orientation appropriately or end up giving it too much weight. It is generally very difficult to show that an agency used inappropriate factors in a given case. To establish worker bias, a pattern would need to be shown. This is quite difficult, as the attempts to enforce MEPA have demonstrated.<sup>198</sup> Therefore, it may be best to let the current low visibility process remain as it is. Gay adults already are permitted able to adopt, both privately and through agencies, in most states. Public acceptance of gay parents is likely to keep increasing; the shift has been substantial in just the past few years.<sup>199</sup> While the laws in Florida, Mississippi, Utah and Virginia should be repealed, the current process might be satisfactory elsewhere.

Finally, state laws should be changed or clarified to permit joint adoption by both partners and to authorize second parent adoptions when the child is the biological or adopted child of one of the partners, so that the child can have the benefits associated with having two legal parents.<sup>200</sup>

## B. Foster Care Placements

### 1. *Current Law and Practice*

Each year, approximately 100,000 children and youth are removed from their parents' homes and placed in foster homes in the U.S. because their parents are unable to adequately care for them.<sup>201</sup> Child welfare agencies and courts must choose the family in which the child will be placed.

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<sup>198</sup> See note 196 *supra*; Cindi Andrews, *Report finds rights were violated in interracial adoption case*, The Cincinnati Enquirer, Sunday, October 26, 2003.

<sup>199</sup> See Buchan, *supra* note 189.

<sup>200</sup> As of mid-2004, at least six states and the District of Columbia permitted same-sex couples to apply jointly for adoption, meaning that both members of the couple could be simultaneously granted parental status. In a number of other states, courts in either the whole state or in some jurisdictions allow "second-parent" adoptions, under which one gay or lesbian partner can petition to become the second parent of the first partner's biological or previously adopted child. (For instance, a gay man could first adopt as a single parent, and then his partner could apply to become the child's other legal parent.) In many states, however, same-sex couples are not eligible for either joint or second-parent adoption, which means that any children they might be raising are legally related to only one custodial parent. See Cooper & Cates, *supra* note 159, at 8, 9; Theresa Glennon, *Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 255 (1998).

<sup>201</sup> About ten percent are placed in group homes or other residential facilities, not foster family homes.

Foster placements are not intended to be permanent. The goal is to reunify the child and parent when possible. However, if reunification does not become possible because the biological parents continue to be unable to provide adequate parenting, legal proceedings to terminate parental rights and place the child for adoption often are pursued. In many such situations, the foster parents seek to become the adoptive family.

At present, only Utah precludes placement of children with a gay foster parent.<sup>202</sup> Arkansas enacted a ban in 1999, but the ban has been declared unconstitutional as was a similar policy in Missouri.<sup>203</sup> Legislation proposing bans has been rejected in several other states in recent years. It is unknown how child welfare workers generally assess the relevance of an adult's sexual orientation when making placements. While there are no data available, various reports indicate that agencies in many states regularly place children with gay foster parents. Some of these placements involve gay youth. Others are undoubtedly hard to place children.

## 2. Proposed Approach

While, in general, the considerations that apply to adoption policy are the same with respect to foster placements, children needing foster homes differ from those needing adoptive homes. First, their age range is greater and quite different. Only four percent are infants; over forty percent are teens.<sup>204</sup> Older children have different needs, and more to say about where they will be placed. Many foster children have serious emotional problems and are significantly behind in school--the consequences of the poor parental care that lead to the placement and/or to poor placement practices. Many of the infants have been exposed to drugs in utero or live with a mother who has substantial problems related to drug or alcohol use. All of these children require high quality care from their foster parents, care that is too often hard to find.

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<sup>202</sup> UTAH CODE ANN. § 78-30-1 (2005).

<sup>203</sup> Howard v. Dep't of Human Servs. & Child Welfare Agency Review Bd., \_\_\_ S.W.3d \_\_\_, 2006 WL 1779467 (Ark. 2006), *affirming* Howard v. Child Welfare Agency Review Bd., No. 1999-CV-9881, 2004 WL 3154530 (Cir. Ct. Ark. Dec. 29, 2004); [www.aclu.org/lgbt/parenting/12199res20050503.html](http://www.aclu.org/lgbt/parenting/12199res20050503.html)  
[www.semissourian.com/story/1155954.html](http://www.semissourian.com/story/1155954.html)

<sup>204</sup> *The AFCARS Report: Preliminary FY 2003 Estimates as of April 2005 (10)* (U.S. Department of Health and

Virtually every child welfare agency in the country faces a shortage of qualified foster parents. As a result, children often must live in one or more temporary foster homes or residential institutions until a more permanent foster home can be found; multiple placements are often traumatic for children needing stability of care. Thus, the situation with respect to foster care is much like that facing the hard to place children needing adoptive homes, most of who are already in foster homes. Any diminution of the applicant pool lessens the chances that all children will find good homes. As the Arkansas court concluded, banning foster placement with gay adults is irrational--it means that some children will be left in abusive parental homes or placed in institutions because of the lack of foster homes. Legislative bans seemed motivated by a desire to avoid putting gay adults in a situation where they would be the preferred adoptive parents if a foster child becomes free for adoption, as well as some public officials desire to express disapproval of homosexuality.<sup>205</sup> Such policies are not pro-child.

The case for allowing agencies to consider an adult's sexual orientation as one of a number of factors is stronger with respect to foster placement than it is in the typical case of adoption, however. As noted, children tend to enter foster care at older ages; many are teens. They face very difficult adjustments. Asking these youth to adjust to a home where the caretakers are of a different sexual orientation may be unwise in some situations. The youth may bring biases that will undermine the chances of a successful placement. Getting foster youth to develop the emotional commitment and sense of trust needed for successful placements is challenging under the best of circumstances. It is likely to be impossible if the youth is resistant. Adjusting to a home headed by a gay adult may be more of a challenge than some foster youth can handle, even if they are not hostile. These youth must adjust to new schools, peers, and family dynamics. Facilitating continuity of experiences can ease these adjustments. In contrast, some youth may prefer placement with gay adults; for example, for gay youth placement in a gay household may provide a level of support greatly missing in their biological family. Also, gay adults may be

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Human Services, 2005a).

more tolerant of foster children whose attitudes or behaviors pose problems for other foster parents.

Thus, agencies should explore the attributes of alternative placements with older foster youth, at least those over 10. By this age, many children have well-thought through views about placements, especially if they have been in foster placement before. Foster youth should be consulted for all placements, not just those where the potential foster parents are gay, and allowed to visit the prospective home. With training, social workers can have sensitive conversations with the youth. If the potential foster parent's sexual orientation is a concern for the youth, the nature of the concern should be explored. Ultimately, youth should not be placed in homes in which they do not want to live. These considerations are less significant with younger children. The little available evidence indicates that many abused or neglected children begin to thrive after placement with a gay parent. Therefore, the sexual orientation of prospective foster parents should be irrelevant when placing younger children.

#### **IV. CUSTODY DISPUTES**

In several respects, child custody disputes raise the most difficult issues regarding the appropriate consideration of sexual orientation by decision-makers. There are countervailing considerations. On the one hand, there is no basis for believing that a parent's sexual orientation is a critical, or even relevant, factor in assessing the needs of the child in most situations. In fact, there is good reason to believe that if courts are allowed to consider sexual orientation many judges will place inappropriate weight on sexual orientation and deprive a child of the opportunity to live with the parent with whom the child has the closest and best relationship. In addition, allowing courts to consider sexual orientation may generate more custody disputes and parental conflict, thereby harming many more children than would conceivably be benefited by considering sexual orientation. However, a parent's sexual orientation may have great relevance to some children's

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<sup>205</sup> See Hong, *supra* note 180, at 41.



well-being. Devising policies that prevent the inappropriate focus on sexual orientation in the great majority of cases, while meeting the child's needs in the very small number of cases where consideration may be appropriate, is challenging.

#### A. Current Rules Related to Custody Determinations In General

Parents may contest three issues related to custody of their children. First, at the time of the break-up, they may disagree as to how physical custody of the child(ren) shall be divided between them; if so, a court will need to decide where the child should live.<sup>206</sup> Second, if one parent is awarded primary physical custody of the child, there may be a dispute the amount of time the child should spend with the other parent and under what conditions; this is called visitation or access. Finally, at some point after the break-up, there may be a dispute about whether physical custody of a child who has been living with one of the parents should be transferred to the other parent; a court may be asked to modify the custodial arrangement. In addition to disputes between parents, non-parents, such as grandparents, sometimes challenge the parent's right to custody; these are commonly called third-party disputes.

With respect to initial custody determinations, all states instruct courts to select the custodial arrangement that furthers the child's "best interests." In some states, this is the only standard. These statutes provide little guidance with respect to what best interest means.<sup>207</sup> Over the past twenty years, many states have modified the "pure" best interest test by adopting a statutory presumption favoring joint physical custody; under this test it is presumed that the child should spend substantial periods of time living with each parent.<sup>208</sup> This presumption reflects the judgment that a substantial relationship with both parent's generally is best for children, absent substantial parental conflict. In these states, a parent wanting some other form of custody must prove that joint custody is not in the

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<sup>206</sup> Courts also determine legal custody—how decision-making authority regarding the child should be allocated between the parents.

<sup>207</sup> Some statutes specify factors for a court to consider but they do not specify the weight courts should give to specific factors. *See Levy, supra* note 17, § 3.1.

<sup>208</sup> *Id.* § 4.3.

child's best interest.<sup>209</sup> The importance of continuity of relationships also is reflected in the rules regarding visitation and modification. All states provide that it is generally in a child's interest to have regular contact with a non-custodial parent. A custodial parent who wishes to significantly restrict visitation by the other parent typically must demonstrate that the child would be harmed by the proposed visitation.<sup>210</sup>

In order to preserve continuity of care and to discourage continued litigation over children, most state statutes provide that modification shall occur only if there is a significant change of circumstances adversely affecting the child's well being. It is presumed that children are best off staying with their current caretaker; the parent moving for modification generally bears a heavy burden of proof.<sup>211</sup> When a non-parent challenges a parent for custody, all states place a heavy burden on the challenger. Generally, a person seeking to replace the parent must show that the parent is "unfit" or that parental custody would be harmful to the child; this is true even in situations when the non-parent has cared for the child.<sup>212</sup> It is not enough to claim that the living with the non-parent would be in the child's best interests.

## **B. Current Approaches to the Relevance of Sexual Orientation in Custody Decisions**

At present, no state has legislation specifically addressing the relevance of a parent's sexual orientation in custody disputes, although some states' statutes direct courts not to consider parental

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<sup>209</sup> Very recently, the American Law Institute proposed a presumption that physical custody be allocated in a manner that roughly approximates the proportion of time each parent spent caring for the child when the marriage was intact. The draft identifies six values that advance children's interests: (1) parental planning and agreement about the child's custodial arrangements; (2) continuity of existing parent-child attachments; (3) meaningful contact between the child and each parent; (4) caretaking relationships by adults who love the child, know how to provide for the child's needs, and place a high priority on doing so; (5) security from exposure to physical and emotional harm; and (6) expeditious, predictable decision-making and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control. A secondary objective is fairness between parents. *See* ALI, *supra* note 4, § 2.08.

<sup>210</sup> Levy, *supra* note 17, § 12.5. Some states have abandoned the term visitation, replacing it with the concept of allocation of time, to reflect the judgment that both parents remain as custodians and caregivers. This approach is also taken by the ALI. *See* ALI, *supra* note 4, § 2.08(1)(a) & cmt. a.

<sup>211</sup> *Id.* § 2.08.

<sup>212</sup> *Id.*

conduct that does not affect the well-being of the child.<sup>213</sup> The courts in many states have established policies through case law, however. A few state courts have adopted rules that specifically disfavor gay parents both with respect to custody and visitation.<sup>214</sup> The Virginia Supreme Court has stated that it is always harmful for a child to live with a gay parent, based on its belief that homosexual conduct is immoral, as well as illegal in that state.<sup>215</sup> Other courts have created a presumption that placement with a gay parent is harmful to the child; the gay parent bears the burden of overcoming this presumption.<sup>216</sup> Overcoming such a presumption is extremely difficult, especially when courts rest the decision on value judgments. Even in states where there is no presumption, several recent court decisions make clear that homosexuality remains a negative consideration.<sup>217</sup> Gay parents may be granted more restricted visitation than other parents and trial courts have modified custody based solely on the fact that the custodial parent entered into a same-sex relationship, without any showing of significant detriment to the child from the relationship.<sup>218</sup>

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<sup>213</sup> See, e.g., COLO. REV. STAT. ANN. § 14-10-124(2) (West 1999); ALI, *supra* note 4, § 2.12(1)(d) & cmt. e.

<sup>214</sup> For an extensive discussion of the statutes and case law, see Note, *Assessing the Best Interests of the Child: Missouri Declares that a Homosexual Parent Is Not Ipso Facto Unfit for Custody*, 64 MO. L. REV. 949 (1999) [hereinafter Note, *Assessing the Best Interests*].

<sup>215</sup> *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985); see also *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999); *Pulliam v. Smith*, 501 S.E.2d 898 (N.C. 1998). These courts based their decisions on the fact that homosexual behavior was criminal in their state. All of these decisions preceded the 2003 U.S. Supreme Court decision in *Lawrence v. Texas*, declaring such laws unconstitutional. It is not clear how these courts would treat open same-sex relationships today.

<sup>216</sup> See *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (stating that Missouri courts presume detrimental impact to a child from a parent's homosexual conduct); *Thigpen v. Carpenter*, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (holding that it is not necessary in Arkansas to prove that illicit sexual conduct by custodial parent is harmful to the children because it is presumed child might be exposed to ridicule and teasing by other children); *Constant A. v. Paul C.A.*, 496 A.2d 1, 10 (Pa. Super. Ct. 1985) (finding that “there are sufficient social, moral and legal distinctions between the traditional heterosexual family relationship and illicit homosexual relationship to raise the presumption of regularity in favor of the licit, when established, shifting to the illicit, the burden of disproving detriment to the children”); see also *In re J.B.F. v. J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (reinstating trial court's order changing custody to father based, in part, on presumed harm resulting from mother's decision to change her relationship with her lover from a discreet affair in the guise of roommates to an openly homosexual home environment and had presented it to the daughter as the social and moral equivalent of a heterosexual marriage. With evidence that the child believed “girls can marry girls,” the court held that the trial court did not abuse its discretion by transferring the girl to her father's custody).

<sup>217</sup> See, e.g., *Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) (court stated that when a homosexual parent openly resides with his or her partner, primary custody with the homosexual parent would rarely be in the best interests of the child); *Pulliam*, 501 S.E.2d at 905 (upholding the trial court's conclusion that homosexual father was exposing the children to unfit and improper influences that would likely create emotional difficulties despite the fact that evidence only showed that the father was gay).

<sup>218</sup> See, e.g., *In re J.B.F. v. J.M.F.*, 730 So. 2d at 1196.

The majority of state courts have moved away from presumptions or assumptions that a parent's homosexuality is likely to negatively impact the child. Most courts now apply what is commonly called the *nexus* test: a parent's sexual orientation will be deemed relevant only if there is evidence that the parent's sexual orientation is having, or is likely to have, a negative impact on the child.<sup>219</sup> However, even under the nexus test court opinions in several states continue to treat open same-sex relationships as suspect and to assume that a parent's active involvement in a same-sex relationship will adversely affect the child, without requiring a showing of actual harm.<sup>220</sup> For example, courts have ruled that the likelihood of harm can be inferred if a gay parent openly engages in affectionate conduct with a partner, including hand-holding or kissing,<sup>221</sup> or from the fact that the gay parent shared a bed with his partner.<sup>222</sup> Courts also have imposed restrictions on visitation, such as forbidding the gay parent's partner from being present during visitation and forbidding gay parents from discussing issues related to homosexuality with their children.<sup>223</sup> Courts have changed custody from a mother to a father because her child attended the mother's commitment ceremony.<sup>224</sup> These opinions are based on perceived negative societal attitudes towards same-sex relationships, concerns that the children will be harmed because the parent will be stigmatized, or concerns that the child will be attracted to homosexuality.<sup>225</sup>

Indeed, some judges treat sexual orientation as more important than any other aspect of the child's

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<sup>219</sup> See cases discussed in Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 635 n.67 (1996); Note, *Assessing the Best Interests*, *supra* note 214.

<sup>220</sup> See discussion and cases in Shapiro, *supra* note 219, at 641-46.

<sup>221</sup> *Tucker v. Tucker*, 910 P.2d 1209, 1218 (Utah 1996); *M.J.P. v. J.G.P.*, 640 P.2d 966, 967 (Okla. 1982); *Pulliam v. Smith*, 501 S.E.2d 898, 901-02, 904 (N.C. 1998).

<sup>222</sup> This is sometimes justified because the partners were not married, ignoring the fact that same-sex couples cannot marry.

<sup>223</sup> *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 167 (Mo. Ct. App. 1987); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974); *DiStefano v. DiStefano*, 401 N.Y.S.2d 636 (App. Div. 1978); *In re Jane B.*, 380 N.Y.S.2d 848 (App. Div. 1976); *Woodruff v. Woodruff*, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979); *Roberts v. Roberts*, 489 N.E.2d 1067 (Ohio Ct. App. 1985).

<sup>224</sup> *Hertzler v. Hertzler*, 908 P.2d 946, 951 (Wyo. 1995)

<sup>225</sup> *But see Hassenstab v. Hassenstab*, 570 N.W.2d. 368 (Neb. Ct. App. 1997); *Fox v. Fox*, 904 P.2d 66, 69 (Okla. 1995); *Stroman v. Williams*, 353 S.E.2d 704, 706 (S.C. Ct. App. 1987).

home environment. For example, in 1997 Missouri decision, an appellate court transferred custody from a mother to a father because the mother was in an open same-sex relationship. In dissent, one judge noted:

The mother was not perfect, but (she) provides the child with his own room in a well kept house, enrolls him in a pre-school, has a steady nursing job, cares about the child, and, despite sleeping with and occasionally hugging a woman, has stated under oath she would discourage her son from emulating her sexual preference. The father has limited education, an income of \$6500 and lives in basically a one room cabin containing a toilet surrounded by a curtain; the child sleeps in a fold-up cot by a woodstove and plays in an area littered with Busch beer cans, collected by the father's "slow" sister, who was ordered by the trial court not to care for the boy while alone. The 75 year old paternal grandmother helps care for the little boy. To say it is in the best interests of this little boy to put him in the sole custody of the father, who was pictured leering at a girly magazine, solely on the basis of the mother's sexual preference, would be and is a mistake.<sup>226</sup>

It has long been recognized that making custody decisions under a general best interest standard is problematic.<sup>227</sup> The best interest standard provides judges with substantial leeway to base decisions on their own values about what is good for a child; these can be highly biased or idiosyncratic.<sup>228</sup> When trial judges apply personal values, appellate remedies are limited. Many trial court decisions are not appealed, since appeals are costly both economically and emotionally, time-consuming, and generally futile, since appellate courts give great deference to trial court judgments.<sup>229</sup> In addition, the positions taken by trial court judges may influence the assessments of evaluators who provide recommendations to trial courts. Thus, court-established policies that place

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<sup>226</sup> G.A. v. D.A., 745 S.W.2d 726, 729-30 (Mo. Ct. App. 1987).

<sup>227</sup> Mnookin, *supra* note 18, at 229.

<sup>228</sup> See Levy, *supra* note 17, § 3:8. For an very interesting discussion of trial court practices, see Kimberly Richman, *Judging Knowledge: The Courts and Arbiters and Purveyors of Social Science Knowledge and Expertise in Gay and Lesbian Parents' Custody and Adoption Cases*, 35 *STUD. L. POL. & SOC'Y* 3 (2005). Richman gives many examples of judges relying on their own views about homosexuality and its likely impact on children and ignoring any and all evidence that contradicted their views. Some judges also invited organizations that oppose homosexuality based on their religious beliefs, such as the Family Research Council, to submit materials to the court. See also *Pleasant v. Pleasant*, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993) (trial judge characterized mother as a "defiant and hostile admitted lesbian" in ordering only supervised visitation.)

<sup>229</sup> In a 1989 survey, almost a third of the surveyed judges indicated that a parent's homosexuality alone warranted a finding of unfitness. Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian—An Empirical Survey*, 23 *SUFFOLK U. L. REV.* 711, 736 (1989).

inappropriate emphasis on a parent's sexual orientation can have a significant negative impact on many children.

### C. Proposed Approach

#### 1. Factors Relevant To Designing Custody Rules

Designing a child-oriented set of rules regarding custody requires consideration of several factors that differ from those relevant to ART or adoption. First, unlike adoption or ART, custody disputes almost always arise in a context in which the child has an existing relationship with both parents.<sup>230</sup> The nature of the relationship with each parent is likely to be the most predictive factor in assessing the arrangements that will best promote the child's future well-being.<sup>231</sup> It is critical to keep this relationship at the center of all determinations. In addition, as most legislatures have concluded, it generally is best for children to continue as full a relationship with both parents as is feasible, unless the parents are engaged in on-going conflict that place the children in painful loyalty binds or expose them to continuing conflict.<sup>232</sup> Third, because of the desirability of continuity and the need to minimize conflict, modification of physical custody arrangements should be discouraged.<sup>233</sup> These premises are accepted by virtually all researchers and clinicians.<sup>234</sup>

These factors caution strongly against allowing consideration of sexual orientation in custody disputes. In a system where judges have substantial discretion, it is especially critical to adopt rules designed to minimize the possibility that trial judges will act on the basis of their personal biases.

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<sup>230</sup> This also is true in adoption cases when a foster parent seeks to adopt a child. *See* note \_\_\_\_ and accompanying text *supra*.

<sup>231</sup> The importance of continuity was first pointed out by GOLDSTEIN, ET. AL., *supra* note 57, at 31-52 and has been well-recognized since. *See* Levy, *supra* note 17, § 5.2. In addition, a child may be more strongly attached to one of the parent's due to the nature of the caretaking arrangements or the behavior of the parents.

<sup>232</sup> *See* ALI, *supra* note 4, § 2.02 & accompanying notes.

<sup>233</sup> *See* ALI, *supra* note 4, § 2.15; Levy, *supra* note 17, § 20.1. Motions for modification may be more common when parent's sexual orientation at issue than in other custody cases. The gay parent's sexuality may not have been revealed initially or the parent's entering into a same-sex relationship may trigger the motion, especially if moving parent has remarried.

<sup>234</sup> ALI, *supra* note 4, § 2.15 & cmts. a-c; Levy, *supra* note 17, §§ 5:1-5:3. Both the ALI Standards and the Levy Deskbook were the products of interdisciplinary workgroups that consisted of many of the leading family court judges, child development specialists, and family law professors in the country.

To do otherwise invites bad results for children. When judges focus on the morality or presumed harmfulness of homosexuality, they are likely to ignore the factors that are of real importance to the child's well-being. A judge's view regarding the morality of homosexuality is totally inappropriate as a basis for decision, as inappropriate as, for example, a judge's views about a parent's religion or political beliefs.<sup>235</sup> Unfortunately, few family court judges come to the bench with any training in child development; many evaluation specialists used by courts or the parents also have minimal qualifications. Individual biases or misconceptions about the likely impact of a parent's sexual orientation may play a large role in their decision-making.

Custody rules also should be designed to minimize the incentive for parents to enter into custody disputes. They certainly should not include elements that encourage conflict. Deep conflict may be especially prevalent in custody disputes involving a gay parent, since non-gay parents may react very negatively when their previous partners inform them about their sexual orientation. Just the fact that parents are contesting custody can be extremely traumatic for children, who often get caught in the middle of parental battles.<sup>236</sup> Many children experience loyalty conflicts and a sense of guilt about "siding" with one or the other parent. Parents regularly seek to influence the child's attitude towards the other parent and may compete for the child's attention or affection. Custody disputes generally are drawn out, placing the children under great strain for a substantial period of time. In addition, resolution of these disputes often requires assessments by evaluators, who are asked by courts to provide information on how the child might be affected by living with each parent. If sexual orientation is a factor, the evaluators will be asked to determine whether the parent's sexuality is having an adverse impact on the child. These assessments frequently include interviews with the children, again a potentially traumatic event for the child.<sup>237</sup> A meaningful assessment process often requires a number of interviews with the children. The children may be

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<sup>235</sup> This is clearly the case in the increasing number of states that recognize same-sex relationships, but also should be rejected in states where legislative and public views remain less accepting of homosexuality. See Levy, *supra* note 17, § 3.8.

<sup>236</sup> For general descriptions of the custody process, see Levy, *supra* note 17, §§ 1:1-1:5; ALI, *supra* note 4, § 2.02(h). For discussions of problems associated with high conflict divorces see JANET JOHNSON & LINDA CAMPBELL, IMPASSES OF DIVORCE, at chs. 6-7 (1988); MARLA BETH ISSACS ET AL., THE DIFFICULT DIVORCE (1986).

pressured by parents about what to say in these sessions. Even the most well meaning and sensitively put questions by evaluators can be threatening to children, who are being asked to judge their parents. Ideally, divorcing parents would agree on custody arrangements, including the sharing of custodial time, since avoiding conflicts generally is most beneficial to the children.

The rules established by legislatures and courts with respect to factors that may be considered by the court will influence parents behavior prior to the divorce, during the divorce, and after an arrangement has been established.<sup>238</sup> If courts are allowed to consider sexual orientation, and especially if a parent's sexual orientation is given substantial weight, heterosexual parents will be more likely to challenge custody in situations where they might otherwise work out an agreement. For example, if heterosexual parents believe that sexual orientation will trump other aspects of caregiving, challenges will occur even in situations where the gay parent was the primary caretaker of the child or has an especially close relationship with the child. Similarly, heterosexual parents may try to restrict visitation or to move for modifications of custody in situations where they would not prevail absent claims based on sexual orientation. Of special concern, such rules may encourage non-gay parents to try to influence the child's view of the gay parent, creating loyalty conflicts for the child and risking great psychological harm<sup>239</sup> Policies allowing consideration of sexual orientation also may discourage highly-qualified gay parents from asking for custody initially.

Thus, the case for not allowing any consideration of sexual orientation is very strong. There is a countervailing consideration, however. A parent's sexual orientation may play a significant role in the life of a child caught in a contested divorce, in ways that do not affect adopted children or those born through ART. Because the child starts with a relationship with each parent, anything that significantly alters that relationship can have a large effect on the child. In virtually all situations,

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<sup>237</sup> Levy, *supra* note 17, § 25.1; JOHNSON & CAMPBELL, *supra* note 237, at ch. 8.

<sup>238</sup> As first pointed out by Mnookin and Kornhauser, the underlying rules greatly influence parental bargaining behavior. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>239</sup> The problem of parent's trying to influence children is common to all divorces, not just those involving gay parents. See Levy, *supra* note 17, §§ 6:5-6:6.



the divorce itself is painful for the child and requires significant adjustments. When the divorce is accompanied by, perhaps associated with, a parent's becoming openly gay children react in a variety of ways. For many, especially younger children, the parent's sexual orientation is irrelevant. But other children may reject the parent, feel betrayed, or be frightened by the change.<sup>240</sup> Thus, there may be a clear and strong current relationship between the parent's sexual orientation and the child's best interests with respect to placement in some situations, not because the parent's sexual orientation influences their parenting but because of the child's reaction to the orientation.

## 2. No Presumptions

How should these competing considerations be weighted and reflected in legislative or judicial policies?

To begin with, there clearly is no empirical basis for a presumption against placing children with a gay parent or for limiting visitation by a gay parent.<sup>241</sup> To justify such a presumption regarding sexual orientation, it would be necessary to conclude that following divorce children growing-up in households headed by their gay parents generally will be less well-off than those growing-up in

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<sup>240</sup> See Rebecca Van Voorhis & Linda McClain, *Accepting a Lesbian Mother*, FAMILIES SOC'Y: J. CONTEMP. HUM. SERVS., Nov.-Dec. 1997, at 642. Van Voorhis and McClain present a model of children's reactions to their parent's shift from a heterosexual orientation to a homosexual orientation. A number of studies report on children's experiences upon learning that a parent is gay. See, e.g., Ghazala Afzal Javaid, *The Children of Homosexual and Heterosexual Single Mothers*, supra note 78; MARTHA KIRKPATRICK, CLINICAL IMPLICATIONS OF LESBIAN MOTHER STUDIES 208 (1987); Ann O'Connell, *Voices From The Heart: The Developmental Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 SMITH . STUD. SOC. WORK 281, 283 (1993); LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 198-99 (1994). Some cases report such impacts. See, e.g., *Knotts v. Knotts*, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998) (finding no abuse of discretion in awarding custody to father when evidence showed oldest child was "diagnosed with major depression and taking prozac, when symptoms were caused at least in part by her mother's relationship with another woman"); *Johnson v. Schlotman*, 502 N.W.2d 831, 833-34 (N.D. 1993) (finding no clear error in trial court's decision not to change primary physical custody from father to lesbian mother when the children disliked mother's partner and began having sleeping problems and experienced depression after learning of their mother's homosexuality notwithstanding the mother's allegations that children's problems stemmed from father's bigotry with regard to homosexual) As discussed below, attributing children's behavioral problems to the parent's sexual orientation is difficult and may involve speculation by evaluators based on their own views regarding homosexuality.

<sup>241</sup> Cf. Wardle, *Homosexual Parenting*, supra note 5, at 893 (contending that there should be a "rebuttable presumption that ongoing homosexual relations by an adult seeking or exercising parental rights is not in the best interest of a child").

households headed by their non-gay parents. As discussed fully previously,<sup>242</sup> this conclusion is not justified. In the absence of any evidence that children on average do better when placed with a heterosexual parent, a presumption is not rational. Even more significantly, such a presumption is likely to lead to worse outcomes for children. Most legislatures, following the advice of child welfare specialists, have identified a number of factors that should be considered by courts because they are important to children's well-being. These include the nature of the current parent-child relationship, parental violence towards the children or spouse, and the likelihood that the parent will facilitate contact with the non-custodial parent.<sup>243</sup> It would make sense to adopt a presumption against placement with a gay parent only if there were good reason to believe that a parent's sexual orientation is likely to have enough negative influence on a child's development that it should outweigh these other considerations. This certainly is not the case.<sup>244</sup> Moreover, a presumption is likely to encourage heterosexual parents to contest custody, try to restrict visitation, or move for modification of custody even when the other parent has previously played the primary caretaking role, or when the heterosexual parent would almost certainly not prevail due to limits in their caretaking abilities. A presumption or preference against placement with a gay parent should be rejected.

### 3. The Nexus Test

While some courts continue to treat sexual orientation, in and of itself, as a negative factor, most courts are moving in the opposite direction, towards the "nexus" test. This has the clear advantage that it directs trial court judges to focus on the alleged impact of the parent's sexual orientation on the child, and not to base decisions on their views of homosexuality. Still, there are significant problems with this test. First, as noted above, if evidence regarding a parent's sexual orientation is deemed relevant in custody disputes, some judges and evaluators will continue to make it the major

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<sup>242</sup> See note \_\_\_\_ and accompanying text *supra*. Even Wardle concedes that children raised by gay parents generally feel loved, wanted, and are well cared for. Wardle, *Homosexual Parenting*, *supra* note 5, at 856-57.

<sup>243</sup> See Levy, *supra* note 17, §§ 3:1-3:9.

<sup>244</sup> It also might be argued, as Florida did in the adoption context, that there should be a presumption for the heterosexual parent because if that parent remarries, there will be a two parent, heterosexual household. But this is a different argument, requiring different reasons and evidence, than the contention that decision-makers should favor

factor in their determination, ignoring the nexus requirement.<sup>245</sup> In addition, in states with a nexus test, some judges continue to speculate about the potential negative impacts of living with a gay parent, especially the possible effects of community attitudes.<sup>246</sup> Since the empirical research refutes the claim that children are worse-off with gay parent, research cannot serve as the source of a court's predictions regarding the possible impact of sexual orientation. Allowing judges to speculate about potential harm is unwise.<sup>247</sup>

The nexus test certainly constitutes an improvement over the prior situation, which allowed trial judges to speculate about possible harm or rule solely on the basis of their value judgments. Nonetheless, even if trial courts are instructed to considering only allegations of current harm, not the possibility of future harm, the nexus test is undesirable. The basic problem is that it lends itself to making the parent's sexual orientation, rather than the general nature of the parent-child relationship, the focus of the proceedings. By singling out sexual orientation, and no other factor, it implies that a parent's sexual orientation is of special concern. It makes it too easy for judges to conclude that any behavior problems a child may be exhibiting result from the gay parent's sexual orientation. It may lead trial judges to ignore the normal presumptions and considerations applied in custody disputes. It can encourage heterosexual parents to disparage gay parent's sexuality with the child. The nexus test should be abandoned.

#### 4. Proposed Approach.

Rather than a special test for disputes involving gay parents, courts should apply the same standards

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married, heterosexual households consisting of the child's biological parents.

<sup>245</sup> See *T.C.H. v. K.M.H.* 784 S.W.2d 281, 284 (Mo. Ct. App. 1989); *Pulliam v. Smith* 501 S.E.2d 898, 901-02, 904 (N.C. 1998); *Cf. In re Marriage of R.S. & S.S.*, 677 N.E.2d 1297, 1301-03 (Ill. App. Ct. 1996) (kissing harmless when evidence showed children well adjusted, well groomed, and doing well in school); *Pleasant v. Pleasant*, 628 N.E.2d 633, 642 (Ill. App. Ct. 1993) (finding no evidence that seeing two consenting adults hug and kiss in a friendly manner is harmful to the child); Shapiro, *supra* note 219.

<sup>246</sup> See generally Shapiro, *supra* note 219, at 642-45. In some cases, courts have ordered gay parents not to engage in same-sex sexual relations even in the absence of the children. *Id.*

<sup>247</sup> This has been recognized recently by a number of appellate courts. See, e.g., *In Re Marriage R.S. & S.S.*, 667 N.E.2d 1297.

as are applied in all other cases.<sup>248</sup> With respect to initial custody, the most prevalent standard directs courts to focus on the nature of the parent-child relationship, with the goal of maximizing the involvement of both parents in the child's life, unless this is clearly contrary to the child's well-being. Where parents dispute physical custody, courts are directed to give primary custody based on the child's relationship with each parent, the past caretaking arrangements, and the ability of each parent to meet the physical and emotional needs of the child in determining who should have primary physical custody.<sup>249</sup> These factors also should be central in disputes involving gay parents. In general, the fact that one of the parent's is gay should be irrelevant in making these determinations. As a panel of the leading national experts on child custody recently concluded, "a parent's competence to provide a child all the food, clothing, shelter, and physical, educational, and emotional nurturance a child needs cannot possibly be measured by the parent's sexual practices or gender preferences; how the parent deals with the child is all that matters."<sup>250</sup>

Under current laws, if one parent is granted primary physical custody, courts should maximize the time the child spends with the "non-custodial" parent, consistent with the child's needs, and restrict that parent's conduct only when clearly necessary to protect the child.<sup>251</sup> In fact, courts generally have been very reluctant to limit or deny visitation, except for proven serious risk to the child and have hesitated to impose conditions on visitation.<sup>252</sup> Yet, as noted, some courts have ignored these general rules in cases involving gay parents and placed restrictions on visitation with gay parents that would not be considered in other situations, such as ordering that the gay parent not expose the child to the parent's partner.<sup>253</sup> In contrast, courts have been reluctant to order a parent not to

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<sup>248</sup> In fact, disputes that arise because of sexual orientation resemble in many respects disputes that arise when divorced parents have strong and different religious beliefs. For a discussion of these conflicts, see ALI, *supra* note 4, at 299-307.

<sup>249</sup> With respect to parental ability to meet the child's needs, the main factor commonly considered by courts is evidence that a parent is mentally ill or emotionally unstable and that the parent's mental health is affecting the child.

<sup>250</sup> Levy, *supra* note 17, § 3:8-3:9. The American Law Institute also reached this conclusion. See ALI, *supra* note 4, at 2.12 & cmt. e.

<sup>251</sup> Levy, *supra* note 17, § 12.2; ALI, *supra* note 4, § 2:02 & cmt. f.

<sup>252</sup> Levy, *supra* note 17, § 12:5.

<sup>253</sup> See generally Note, *Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 WM. & MARY BILL RTS. J. 643 (1997). In some cases, courts have ordered gay parents not to engage in same-sex sexual relations even in the

expose the child to particular religious views, even when these conflict with the views of the primary custodian.<sup>254</sup> While it is generally important to try to protect children from parental conflict, conflict based on the fact that one of the parents is gay should not be treated differently than conflict arising out of religious or other differences.<sup>255</sup>

This is not to say that a gay parent's sexual behavior, rather than sexual orientation, is never relevant to decisions regarding visitation. Inappropriate sexual behavior, by gay or heterosexual parents, should be considered when the behavior impacts the child. For example, in one case a court based its decision on the fact that a gay parent allowed the children to observe the parent having sexual relations with her partner.<sup>256</sup> Inappropriate exposure of children to sexual activity is a factor courts should consider, whether the sex is with a same-sex or opposite sex partner. But it is the particular behaviors, not the fact that the parent is gay, that are relevant, a fact that courts often ignore using the nexus test.

Finally, no special rules should be applied with respect to requests for modification of custody. Modification should be discouraged.<sup>257</sup> In cases involving gay parents, motions for modification frequently are brought when the gay parent becomes open about her or his sexual orientation or establishes a relationship with a same-sex partner. As with many custody disputes, the dispute is triggered by the anger of one parent towards the other and may have little to do with the children.

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absence of the children.

<sup>254</sup> See ALI, *supra* note 4, § 2:12 cmt. d.

<sup>255</sup> Both the Interdisciplinary Colloquium (Levy) and the ALI adopt the position that courts should not restrict parental behavior during visitation that is not illegal or clearly harmful to the child. These groups would err on the side of deferring to the non-custodial parent, even if the child is uncomfortable during the visit. See Levy, *supra* note 17, § 12.5; ALI, *supra* note 4, § 2.12. I am not necessarily in agreement with these recommendations, which, I believe, do not take adequate account of the child's interests. It is beyond the scope of this article to develop specific criteria. For purposes here, the critical point I wish to make is that disputes arising out of differences related to sexual orientation should not be treated differently than disputes arising from other factors, such as religion, that may be dividing the parents.

<sup>256</sup> *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992).

<sup>257</sup> I believe that the test proposed in the Uniform Marriage and Divorce Act provides the best standard: Modification should be granted only if there is substantial evidence that "the child's present environment endangers seriously his physical, mental, moral or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages" to the child. UMDA § 409, 9A U.L.A. 439 (1987).

But the non-custodial parent will claim that the children are experiencing problems. It is critical that trial courts be directed to focus on the child's past and current development and how the child is likely to do in each setting, not on the custodial parent's sexual orientation, since the sexual orientation will undoubtedly come up as an explanation for why a child is not doing well.

The most difficult policy question is what voice should be given to those children who react very negatively to living with a gay parent. Unquestionably, some children find it stressful to live with a gay parent due to the impact of community stigma or their difficulty in accepting the parent's sexual orientation. Some children will voice their objection to living with a gay parent. Other children may not want to make a choice, but may indicate significant concerns about the parent's homosexuality.<sup>258</sup>

A number of states have legislation requiring courts to consider the child's preference, at least with respect to adolescents. According to a recent review,<sup>259</sup> four states give older children a right to choose their custodian, unless the parent is determined to be unfit; twenty-nine other states direct the courts to consider a child's preference but custodial arrangements and visitation may be ordered over a child's objection. There is substantial division among child welfare experts regarding the weight to be given children's views. Some commentators believe that children have a right to be heard and that older children should have a right to decide. Others assert that allowing children, even older children, to decide is ultimately not in the interests of children.<sup>260</sup>

I believe that the views of children, especially older children, are relevant and that a child should

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<sup>258</sup> For a review of the studies that report on children's reactions to learning that a parent is gay, see Kirsten Lea Doolittle, *Don't Ask, You Might Not Want To Know: Custody Preferences of Children of Gay and Lesbian Parents* 73 S. CAL. L. REV. 677 (2000).

<sup>259</sup> See Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Going, Where We Should Go*, 83 IOWA L. REV. 437, 440 (1998)

<sup>260</sup> Family law scholars have reached very different views on this issue. Compare MARY ANN MASON, *THE CUSTODY WARS* (1999), and Elizabeth S. Scott et al., *Children's Preferences in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988), with Levy, *supra* note 17, §§ 6.3-6.8.

not be forced to live with a parent when this is very painful or difficult for the child.<sup>261</sup> However, it would be inappropriate for there to be a special rule in cases involving a gay parent. There is little distinguishing such cases from other custody disputes where a child does not want to live with a parent.<sup>262</sup> Although cases involving gay parents raise some unique considerations, there are many parallels to cases involving disputes between parents with substantial religious differences. Yet, courts are very reluctant to listen to the voice of children who do not like one parent's religious beliefs. Therefore, judges should consider the wishes of the child that are based on the parent's sexual orientation only if the state allows judges to consider children's wishes in general. Judges must recognize that it is the child's views, not the parent's sexual orientation, which becomes the relevant factor. Hopefully, judges will do all they can to discourage each parent from trying to turn a child against the other parent.<sup>263</sup> This may be of special concern in cases involving a gay parent, since, as discussed previously, one spouse coming out as gay often provokes strong hostility from the other spouse.<sup>264</sup>

What about disputes in which the child has not expressed a preference but the heterosexual parent claims that the child is experiencing emotional problems related to the sexual orientation of the other parent? For example, in one case the court concluded that the children experienced bed wetting, difficulty sleeping, and nightmares after their father took them to gay religious services and social events and discussed in detail his homosexuality with them.<sup>265</sup> In such situations, there needs to be a very careful evaluation of the child's well-being and the causes of any disturbances. All of the research indicates that gay parents engage in essentially the same parenting behaviors as heterosexual parents. Taking children to gay religious services is not

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<sup>261</sup> Beyond the issue of children's rights, older children may run away from homes they strongly dislike or behave in such a way as to force the custodial parent to accede to their wishes.

<sup>262</sup> See note \_\_\_ *supra*.

<sup>263</sup> For very useful suggestions on how judges can minimize the impact of conflict, see Levy, *supra* note 17, *passim*; see also Janet R. Johnson, *Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child* 38 FAM. L.Q. 757 (2005)

<sup>264</sup> The particular problems faced in adopting sound rules in cases involving gay parents are discussed in Doolittle, *supra* note 259.

<sup>265</sup> Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998).

different than taking children to any other religious services. It would seem highly desirable that the parent discuss her or his homosexuality with the child, just as parents discuss their religious beliefs, political beliefs, and other aspects of their identity.

Thus, a court should want to know why the children were experiencing these problems. In the above cited situation, the child might have been depressed or very upset because she was rejected by friends who were biased against gay adults. Or perhaps the child had strong views about homosexuality derived from her absorption of societal attitudes. Another possibility is that the child was under intense pressure from the other parent to turn against the gay parent.

The issue of how to treat the impact of stigma is challenging in the case of younger children. Courts certainly should not be able to speculate about the potential for stigma. A number of courts, including those in conservative states, recently have rejected the possibility of stigma as a reason for denying gay parents custody.<sup>266</sup> Allowing consideration of the potential impact of stigma plays into judicial, as well as community, biases.<sup>267</sup>

But there may be cases where stigma is occurring and impacting the child. As discussed previously, the U. S. Supreme Court has ruled that this cannot be a basis for deciding custody if the stigma is related to the race of the parents. The importance of this principle can be seen by contemplating another situation. In *Pater v. Pater*,<sup>268</sup> the Ohio Supreme Court considered a custody fight between parents of differing religions. The court accepted the assumption that the mother, a Jehovah's Witness, would prevent the child from participating in various extracurricular activities and from socializing with non-Witnesses. The father argued that this would harm the child because it might subject the child to ostracism and because it would interfere with proper

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<sup>266</sup> See *Van Driel v. Van Driel* 525 N.W. 2<sup>nd</sup> 37 (S.D. 1994).

<sup>267</sup> Mnookin, *supra* note 18, at 257. (“[T]he judge would require information about how each parent had behaved in the past, how this behavior had affected the child, and the child’s present condition. Then the judge would need to predict the future behavior and circumstances of each parent if the child were to remain with that parent and to gauge the effects of this behavior and these circumstances on the child.”)

<sup>268</sup> See *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992).



socialization of the child. Suppose the evidence showed that the children felt stigmatized, were experiencing difficulties at school, and hated engaging in Witness activities.<sup>269</sup> Should this be a basis for granting the father custody? I believe the answer is no. It might be claimed that cases involving race or religion are different, since the Constitution forbids state discrimination on the basis of race or religion, but not on the basis of sexual orientation. But the wrongness of racial or religious prejudice does not turn on the fact that such discrimination is forbidden by the Constitution. We should not allow courts to base decisions on community prejudices as a matter of policy, regardless of whether the Constitution requires this outcome. Despite the pain some children may experience, it is in children's and society's best interest that children learn that such prejudices are wrong and should be opposed, not given state sanction. Moreover, any other policy is likely to encourage heterosexual parents<sup>270</sup> to contest initial custody, visitation, or move for modification and to try to influence the child's view of the gay parent. It also opens the door for judicial manipulation of criteria based on their views of homosexuality.

A rule that leaves some children in parental homes in which they are unhappy obviously is not desirable. On balance, however, a rule barring consideration of sexual orientation, other than in cases involving adolescents who express a preference to be with the heterosexual parent, will benefit most children.<sup>271</sup>

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<sup>269</sup> This situation could arise in many other contexts. Suppose two parents are divorcing; one parent is Christian, the other Jewish. And the couple lives in an area where there are few Jews and that many people in the community believe Jews are immoral.

<sup>270</sup> The same considerations apply, even more strongly, to custody challenges by non-parents. The law in all states places a heavy burden on non-parties seeking custody. Yet, some courts have seemed to require less in cases involving a gay parent. *See* *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). In order to discourage disputes, the standard should be one of substantial detriment. *See* ALI § 2.18 & cmt. b. Similarly, with respect to visitation, in most states, visitation usually can be denied or restricted only if it will be detrimental to or will endanger the child. *See, e.g.*, MO. REV. STAT. § 452.400 (Supp. 1998); 750 ILL. COMP. STAT. ANN. 50/607(c) (West Supp. 1999) (“[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health.”); KAN. STAT. ANN. § 60-1616(a) (1997 & Supp. 1998) (entitling a parent not granted custody to reasonable visitation rights unless the court finds that visitation would seriously endanger the child's physical, mental, moral, or emotional health); *In re* *Marriage of McKay*, No. C6-95-1626, 1996 WL 12658 (Minn. Ct. App. Jan. 16, 1996) (stating that Minnesota utilizes an “endangerment standard” in determining visitation restrictions).

<sup>271</sup> This is position adopted by ALI. *See* ALI, *supra* note 4, § 2.12(d) & cmt. e. The comments, however, provide no discussion of the rationale for adopting this position. As a practical matter, if a child is evidencing significant behavioral

In the end, legislatures and courts need to focus on the fact that in virtually all situations children respond to the quality of love and parenting they receive from their parents, not to their parents' sexual orientation. Parents should not have to hide their identity in order to get or keep custody or to spend time with a child following divorce.

## VI. ACCESS TO REPRODUCTIVE TECHNOLOGIES

### A. Current Policies

Until recently, most gay parents became parents as part of a heterosexual relationship, generally a marital relationship that ended in divorce. A smaller number entered a sexual relationship solely to have a child. In recent years, this situation has begun to change. At present, many gay individuals and couples are having children through various types of assisted reproductive technologies, especially donor insemination (DI), in vitro fertilization (IVF), or surrogacy.<sup>272</sup>

As noted previously,<sup>273</sup> U.S. legislatures have done little to regulate ART. However, while no legislation prevents lesbians or gay men from using ART, some aspects of existing law and practice make it more difficult for gay individuals or couples to create families in this manner.<sup>274</sup> The absence of laws requiring physicians to provide insemination on a non-discriminatory basis means

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problems, some type of evaluation generally will be appropriate, in order to determine whether the custodial arrangement is harmful to the child. The fact that the child is living with a gay parent will undoubtedly become known. Evaluators and judges can be instructed not to focus on sexual orientation, but it seems highly likely that at least some of them will assume a relationship between the child's situation and the parent's sexual orientation regardless of the legal rules.

<sup>272</sup> DI is far more common than IVF or surrogacy. While both lesbians and gay men can have children using donor insemination, the process is far easier for women, since they only need to have access to donated sperm, while a male must find a woman willing to carry the child. It appears that most lesbians who conceive through DI utilize the services of a sperm bank and physician assistance in order to ensure donor screening and anonymity, although some women achieve insemination without medical help or sperm banks, using sperm donated by a person known to the woman or found through the Internet. See Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES, Mar. 19, 2006, §6 (magazine), at 44. Some of these women are single; others are in a committed relationship where both partners wish to be considered the child's parent. Most gay males use surrogacy. Virtually all are in domestic partnerships. Recently, some potential surrogates have indicated a preference for entering into surrogate arrangements involving gay male couples. See Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005 at A1.

<sup>273</sup> See notes \_\_\_ - \_\_\_ and accompanying text *supra/infra*.

<sup>274</sup> For a description of the various legal impediments, see DeLair, *supra* note 12, at 162-73.

that some lesbians have trouble accessing services; this can be a major barrier in the five states that criminalize donor insemination unless it is performed by a licensed physician. Limits on the right of the non-biological mother or father to adopt a child born through donor insemination or surrogacy also are a major barrier to the full use of ART by gay couples. In many states, the consenting husband of a woman who gives birth via ART is deemed the father of the child; the sperm donor is specifically denied any legal rights. This protection is available only to married couples, however, so the non-biological mother in a same-sex couple does not have parental rights and, in many states, the sperm donor retains the right to claim parentage. Finally, in some states, surrogacy contracts are enforceable only if the intended parents are a married couple, which means that gay men cannot enter into an enforceable surrogacy contract.

Conception through ART raises difficult issues wholly unrelated to the sexual orientation of the potential parent. These include legal and ethical questions about the sale or transfer of human genetic material or embryos, the rights of children to know and have a relationship with their genetic parents, and the rights of donors of genetic material (or of their bodies in the case of surrogacy) to a relationship with children born through the use of these material.<sup>275</sup> These are serious concerns. There may be reasons to regulate some aspects ART based on one or more of them. However, these factors are the same regardless of the sexual orientation of the applicant; therefore I do not address them here. With respect to sexual orientation, policy-makers face a single basic question: should gay individuals or couples be treated differently from heterosexual individuals or couples regarding access to ART?

## B. Proposed Approach

Some commentators suggest that the U.S. should restrict ART to married couples, which would exclude gay couples in virtually all states.<sup>276</sup> Others would limit access to heterosexuals, even if gay

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<sup>275</sup> See, e.g., Alvaré, *supra* note 15, at 11-13; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 83 (2000).

<sup>276</sup> See Alvaré, *supra* note 15, at 62; MINOT, *supra* note 14, at 130.

couples are able to marry.<sup>277</sup> These approaches should be rejected. As a society, we now accept that there are many reasons that government should not attempt to regulate who may have children through coital conception, aside from the facts that it would be unconstitutional and impractical.<sup>278</sup> These reasons apply equally to the regulation of conception through ART. It is a mistake to think of ART in allocation or placement terms. It is better thought of as an aspect of reproductive freedom.

The central premise of those who would limit access to ART to heterosexual married couples is the optimality rationale, a position which, as previously discussed, does not make sense from a children's perspective.<sup>279</sup> I therefore examine here whether there are other societal interests that would justify policies limiting access to married, heterosexual couples. It is argued that limiting access to married couples would reduce the number of potential legal or ethical problems associated with ART.<sup>280</sup> In addition, a few commentators, who are opposed to ART in principle because they believe that birth through artificial means is generally morally problematic, would support ART only for married, infertile couples, on the premise that these couples have the greatest "right" to have children. Allowing married couples to conceive a child fulfills these commentators' view of the natural meaning of marriage, the union of a man and a woman to produce a child.<sup>281</sup>

These contentions are not persuasive. In addition to the benefits to children of being born, the benefits to the adults and to society as a whole strongly support allowing gay couples and individuals to conceive a child via ART.<sup>282</sup> There are no costs to society if these children are born; they will contribute to society, not threaten the public welfare. Providing, or at least not barring, access to ART to all adults that are reasonably capable of raising children, benefits society. Parenthood increases the adult's stake in social institutions and helps insure the future of a society's

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<sup>277</sup> See Blankenhorn, *supra* note 15; DAVID BLANKENHORN, FATHERLESS AMERICA 233 (1995).

<sup>278</sup> See Michael Sandmire & Michael Wald, *Licensing Parents – A Response*, 24 FAM. L.Q. 53 (1990).

<sup>279</sup> See notes \_\_\_ - \_\_\_ and accompanying text *supra*.

<sup>280</sup> Alvaré, *supra* note 15, at 47-51, 62.

<sup>281</sup> Alvaré, *supra* note 30, at 156-63.

<sup>282</sup> For these reasons, I would not limit ART to married couples, regardless of the couple's sexuality. I believe that children live perfectly good lives with single parents and that this should be the standard for access to ART.

existence. The case against restricting access is even more compelling when the interests of the potential parents are considered. Parenthood brings great pleasure to most parents. As long as the children will live in households that are perfectly adequate, it seems highly likely that facilitating this desire furthers the overall well-being in society and produces the greatest amount of happiness. Providing gay adults with access also furthers our society's goal of equal treatment. Our society would never consider restricting heterosexual couples from having access to ART on the grounds that their home would be sub-optimal. The equal treatment principle is violated when policy-makers chose to restrict the opportunities of gay adults while granting those opportunities to heterosexual families with characteristics that are associated with poorer outcomes for children. In fact, most children are brought into the world into "sub-optimal" homes. Children born to gay couples through ART are likely to have better opportunities and developmental outcomes, on average, than many, if not most, children born to heterosexual adults without assisted reproduction.<sup>283</sup>

Moreover regulation of access is difficult and costly. Insemination can be done at home with sperm from a known donor. Many women now acquire sperm over the Internet, from known and unknown donors.<sup>284</sup> Those who can afford it will travel to states or countries that grant access, creating more inequality of opportunity. There is no good reason to push people to use means that are more complicated or less desirable from their perspective. Yet, given the enormous desire to have a child, this is certainly likely to occur if access to sperm banks is restricted.

Some commentators argue that gay adults should be denied access to ART because recognition of same-sex couples through facilitating parenthood would send a message that the "traditional" family is not that important, thereby contributing to the perceived decline of the traditional family.<sup>285</sup> As I have written elsewhere, it would benefit children and society, as well as gay couples,

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<sup>283</sup> In fact, because ART is expensive, the parent's are likely to be of reasonably high income. These children will have the same access as children of parents of similar economic status to high quality schools, neighborhoods, and opportunities for intellectual and cultural development, as well as the advantages of highly committed parents.

<sup>284</sup> Lesbians also could choose to have a child through intercourse.

<sup>285</sup> Blanckenhorn *supra* note 15.

if states provided for same-sex couple marriage.<sup>286</sup> Regardless, it seems highly dubious as an empirical matter that recognition of same-sex relationships will cause heterosexual couples to devalue marriage.<sup>287</sup> Moreover, it is wrong to penalize potential children and gay adults because some heterosexuals will act in ways that are perceived of by some as undesirable.

In a society that values procreative liberty and diversity, there is no moral case for preventing gay individuals or couples from having children through ART in the absence of compelling evidence that these children are likely to have inadequate lives. Perhaps if sperm and eggs were a scarce resource, a case could be made for allocating them to certain types of families preferred by a society. In the absence of scarcity, there is no reason to adopt such limitations. Rather than trying to restrict ART to married couples, legislatures should be removing barriers facing lesbians and gay men in accessing and fully utilizing ART. This would include providing for second-parent adoption, combating provider discrimination, and applying the same rules to same-sex couple unions as apply to married couples with respect to the right of non-biological mother, or father, to become the legal parent of the a child born via ART.<sup>288</sup>

## IX. CONCLUSION

I believe that a truly child-focused look at the issues examined in this article leads to the clear conclusion that an adult's sexual orientation generally is irrelevant with respect to adoption, foster care, and child custody decisions and policies regarding access to ART. Children need homes where they are wanted and receive love and steady care, qualities that are not related to adult's sexual orientation. Consideration of sexual orientation in placement decisions is likely to be harmful to children, as well as to gay adults and society in general. All of the evidence supports this conclusion.

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<sup>286</sup> Wald *supra* note 140.

<sup>287</sup> RAUCH, *supra* note 61, at 166-69.

<sup>288</sup> See Robertson, *supra* note 2.

It is too often the case with respect to family law policies that the interests of children get lost in debates that really are about adult's visions of the good society. While the majority of Americans now believe that as individuals lesbians and gay men should not be discriminated against based on their sexual orientation, a large portion of the public remain suspicious of lesbians and gay men as parents.<sup>289</sup> This is not surprising given that homosexuality has begun to be more commonly accepted as "normal" only very recently. Many vocal opponents of gay parents believe that homosexuality is immoral. But other people, less hostile to homosexuality in general, still see parenthood as different. This may reflect cultural norms that lead most heterosexuals to think of gay relationships as being fundamentally different, and less valuable, than heterosexual relationships.

I have tried to present information and analyses that will help policy-makers make an objective assessment of the data and its relevance to family policy. But ultimately, policy rest on values, not data. Social science can inform, but not resolve, policy debates. Policy-makers are more likely to look at public attitudes than social science. As public attitudes towards lesbians and gay men have become more positive, so have the policies of courts and legislatures.<sup>290</sup> Hopefully, this trend will continue. Both children and gay adults will be the beneficiaries.

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<sup>289</sup> See notes \_\_\_ - \_\_\_ *supra*.

<sup>290</sup> See Nathaniel Persily et al., *Gay Marriage, Public Opinion, and the Courts* (Univ. of Pa. Law Sch., Public Law Working Paper No. 06-17).