COMMENT

FLORIDA'S INCONSISTENT USE OF THE BEST INTERESTS OF THE CHILD STANDARD

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I. INTRODUCTION

> John is my son. I am committed to caring for him and providing for all his needs. I have been his parent in every way. For example, every day, I wake him up in the morning and help him get dressed and ready to go to school; I help him with his homework when he comes home from school; we have a family dinner together every night, cooked by Roger; and we spend our evenings engaged in a variety of family activities. . . . Roger and I teach John household responsibilities such as yard work, car maintenance and cooking. I discipline him appropriately when he misbehaves. I hug and comfort him when he is upset. I teach him manners, respect and other values that I consider important. I make sure he is safe. He calls me "Dad." . . . John is eager to be adopted. For the last couple of years, he has been asking me when his adoption will be complete. . . . I love John deeply and want to protect him. But I cannot protect him unless I can adopt him.[1]

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I would like to dedicate this Comment to my parents, James and Janette Turbe, who have devoted their lives to loving, supporting, and guiding me and my brother Scott into the people we are today. I am forever indebted to them both. Also, I would like to thank Dereck Capaz for being my source of encouragement and motivation over the last few years. And finally, I am grateful to the *Law Review* advisors, editors, and associates, particularly Ms. Wendy Short, for their help in publishing this Comment.

1. Aff. Steven K. Lofton ¶¶ 11, 21, 24, *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001). The court issued Lofton's foster child the name "John Doe" because he was a minor. Br. of Appellant at 7, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. July 29, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

The above quote is an excerpt from Steven Lofton's court affidavit describing his relationship with his eleven-year-old foster child John Doe. Lofton and his partner of nearly twenty years, Roger Croteau, have raised John since he was two months old.[2] John was born HIV-positive but sero-reverted as a young child.[3] Now that he is HIV-negative and healthy, John is considered a desirable, adoptable child.[4] Florida is threatening to separate John from the only family that he has ever known because the two men to whom he refers to as "Dad and Rodge" are gay. Florida law prohibits homosexuals from adopting children.[5] Therefore, even though Lofton and Croteau have loved, supported, and parented John for eleven years as foster parents, the State does not consider them fit to become John's legal parents.

The number of children awaiting the love, care, and stability of a permanent home is alarming.[6] Despite the growing need for suitable homes, Florida disqualifies many qualified prospective parents from adopting children solely because of their sexual orientation.[7] Courts have upheld the statutory ban on homosexual adoption and have asserted that it is in the best interests of children to have heterosexual role models and parental figures who can provide stable home environments.[8] Yet, Florida frequently relies upon homosexuals, such as Lofton and Croteau, to serve as foster parents because they have proved to be qualified individuals capable of opening their lives to children in need of care, stability, and guidance.[9]

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2. *Id*. at ¶¶ 2, 7.

3. *Id*. at ¶ 7. HIV (human immunodeficiency virus) is the virus responsible for AIDS. When someone sero-reverts, his or her antibodies test HIV-negative. *See* Med. Dictionary Search Engine, http://www.books.md/S/dic./seroreversion.php (accessed Oct. 6, 2003) (explaining the term sero-reversion).

4. *Id*. at ¶ 22.

5. *Amer v. Johnson*, 4 Fla. L. Wkly. Supp. 854, 854 (Fla. 17th Cir. Ct. July 27, 1997).

6. In 2000, the United States Department of Health and Human Services reported that of the 556,000 children in foster care, 131,000 children are awaiting adoption. U.S. Dept. of Health & Human Servs., Admin. for Children & Fams., Admin. on Children, Youth & Fams., Children's Bureau, *The AFCARS Report*, http://www.acf.hhs.gov/programs/cb/publications/afcars/report7.htm (last updated Aug. 20, 2002).

7. Fla. Stat. § 63.042(3) (2002) (prohibiting homosexuals from becoming adoptive parents, even if they otherwise qualify under the statute).

8. *Infra* nn. 64–74, 86–97 and accompanying text (providing examples of caselaw upholding Florida's ban on adoptions by homosexuals).

9. *E.g. Matthews v. Weinberg*, 645 So. 2d 487, 490 (Fla. 2d Dist. App. 1994) (holding homosexuals eligible to become foster parents).

This Comment advocates consistent standards between these two contradicting policies—the foster care and adoption policies. To provide as many suitable homes as possible for children, prospective adoptive parents should be evaluated individually based upon parental fitness, as they are under the foster care policy. Such a consideration would fulfill the purpose and goals of the best interests of the child standard. This change would also reflect the principles recently announced by the United States Supreme Court in *Lawrence v. Texas*.[10]

Part II of this Comment briefly describes the history of adoption and foster care in the United States. Additionally, Part II details Florida's history of discrimination against homosexuals and the Florida caselaw leading up to today's controversial topic—Florida's homosexual adoption ban. Part III of this Comment discusses Florida's standards when placing children with either adoptive or foster parents, as well as several myths and assumptions that courts and society often associate with homosexual parenting. Part III also analyzes the inconsistency between Florida's adoption and foster care policies; recommends a solution to the inconsistency; and briefly discusses pending litigation in Florida and possible outcomes that could be in store for adoption in the State of Florida.

II. HISTORY

A. Brief History of Adoption

The earliest documentation of adoption is found in the code of laws enacted during the reign of Hammurabi, the King of Babylon, almost 4,000 years ago.[11] Instead of intending to provide

10. *Lawrence v. Tex.*, 123 S. Ct. 2472, 2481 (2003). In *Lawrence*, the United States Supreme Court questioned the validity of Texas's law against sodomy, which made "it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Id.* at 2475. On June 26, 2003, the Court held that it is unconstitutional for a state to criminalize same-sex sexual conduct. *Id.* at 2484. Justice Anthony M. Kennedy, delivering the majority opinion, stated that, "[l]iberty protects [us] from unwarranted government intrusions into [our] dwelling[s] . . . and other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." *Id.* at 2475. Further, "The State cannot demean [our] existence or control [our] destiny by making . . . private sexual conduct a crime." *Id.* at 2484. In essence, the Court held that, under the Fourteenth Amendment's Due Process Clause, gay men and women are entitled to the same right of privacy as heterosexuals. *Id.* And, it is this liberty right that grants people the full right to engage in sexual conduct without government intervention. *Id.*

11. Ann E. Weiss, *Adoptions Today: Questions and Controversies* 21 (Twenty-First

needy children with homes, the Code of Hammurabi indicated that the purpose of adoption was to provide a childless couple or an individual with an heir.[12] Other ancient-world societies, such as China, India, Greece, and Rome, also practiced adoption.[13]

English common-law did not recognize adoption; therefore, Colonial America did not inherit a common-law for adoption.[14] In 1851, Massachusetts passed the first adoption statute in the United States, which created a "legal procedure to provide permanent and healthy homes for children whose parents were unable or unwilling to care for them."[15] Today, adoption exists purely as a privilege afforded by state statute.[16] Each state creates its own law to govern this legal proceeding.[17] Although adoption laws vary from state to state, each statute is liberally construed to ensure that the best interests of the child are served.[18]

Traditionally, agencies permitted adoption only when every aspect of the adoption reflected an ideal match between the child and the potential adoptive parent.[19] A match was considered ideal when the child's personal characteristics, such as physical features, intellectual ability, and religion, were similar to the adoptive parent's characteristics.[20] By contrast, the present goal of adoption is more general: to provide a permanent home that is suitable for the child and that is in his or her best interests.[21]

Century Bks. 2001). Today, Babylon is the country of Iraq. *Id*.

12. *Id*.

13. *Id*. at 22. Similar to Babylon, these other societies practiced adoption to obtain an heir. *Id*.

14. Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 Fam. L.Q. 347, 349 (1991). From colonial times until the 1830s, indenture systems were the most common means of providing for orphaned children. Weiss, *supra* n. 11, at 38. This system, which demanded hard work from children, developed into today's adoptive-placement system, which treats adopted children as if they are the biological offspring of the adoptive parents. Evall, *supra*, at 349.

15. *Joint Adoption: A Queer Option?* 15 Vt. L. Rev. 197, 200 (1990). This was the first statute to consider the child's welfare and the adoptive family's rights. Weiss, *supra* n. 11, at 45.

16. *In re Palmer's Adoption*, 129 Fla. 630, 633 (1937).

17. Jodi L. Bell, *Prohibiting Adoption by Same-Sex Couples: Is It in the "Best Interests of the Child?"* 49 Drake L. Rev. 345, 346–347 (2001).

18. *Id*. at 347.

19. *Id*.

20. *Id*.

21. *Id*. at 348.

B. Brief History of Foster Care

Foster care in the United States dates back to 1832.[22] The system arose out of concern for orphaned and poor children.[23] Foster care, like adoption, emerged through indenture, a system that forced needy children to learn trades or crafts, or to work as servants.[24] Until the end of the nineteenth century, this care-taking system focused on a "child rescue philosophy."[25]

Under the modern system, foster care is a child-welfare service that provides children with substitute familial care, protection, and support when biological families are unable to maintain care for a temporary or an extended time period, and "when adoption is neither desirable nor possible."[26] Foster care consists of placement in group homes, adoptive homes, institutions, and family foster homes, all of which provide substitute parental figures and role models.[27] However, foster care emphasizes the need to place children in family foster homes.[28] Foster parents assume most of the functions and responsibilities associated with legal custody, including supervising the foster child in his or her daily activities[29] and providing basic life necessities such as food, shelter, clothing, and education.[30] Although intended as a temporary safe haven, foster care often becomes the "final stopping ground" for many children.[31] The average time span for a child in foster

22. Timothy Arcaro, *Florida's Foster Care System Fails Its Children*, 25 Nova L. Rev. 641, 646 (2001).

23. *Id*.

24. Nancy Millichap Davies, *Foster Care* 19 (Franklin Watts 1994).

25. Arcaro, *supra* n. 22, at 646. Helping children meant permanently removing them from their original homes. Davies, *supra* n. 23, at 17–18. This philosophy progressed into a plan to preserve the child's biological family whenever possible. *Id*. at 26–27.

26. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 823 (1977). Placement of children in foster care often occurs when "physical or mental illness, economic problems, or other family crises make it impossible for natural parents . . . to provide a stable home life for their children for some limited period." *Id*. at 824.

27. *Id*. at 824 n. 8.

28. Kristin J. Brandon, Student Author, *The Liberty Interests of Foster Parents and the Future of Foster Care*, 63 U. Cin. L. Rev. 403, 407 (1994). The term "family foster home" refers to the placement of a child with a particular foster parent in his or her own private residence. Fla. Stat. § 409.175(2)(e) (2002).

29. *Smith*, 431 U.S. at 827.

30. *Id*. at 828 n. 17; *supra* n. 1 and accompanying text (describing Lofton's role as a foster parent).

31. Arcaro, *supra* n. 22, at 647.

care is more than two years on the national level and more than three years in Florida.[32]

C. Florida's History of Discrimination against Homosexuals

Florida has a long history of discrimination against homosexuals that dates back to 1868, when the State, in its original sodomy law, characterized the same-sex sexual act as a "crime against nature."[33] Until recently, Florida was one of only thirteen states that prohibited private, consensual same-sex sexual activity.[34] The State refused to recognize homosexuals as a defined entity, and it instead criminalized homosexual acts and allowed violations of the sex-offense statute to define homosexual individuals.[35] In the past, when contemplating an issue that dealt with homosexual rights, Florida continued to remind society that gay men and women were criminals because performing homosexual acts was a statutory crime.[36] It was, and still is, difficult for homosexual Florida residents to overcome social stigma because, historically, the State has been unable to see past their sexual preference. The following examples demonstrate the discrimination that homosexuals have suffered in Florida.

In 1955, police arrested and charged Harris L. Kimball, a civil-rights attorney, with lewd and lascivious conduct after he had sex with another man.[37] Within thirty days, The Florida Bar began disbarment proceedings against him, claiming Kimball vio-

32. *Id*. In Florida, on average, seventy-nine percent of foster children remain in the system for more than two years, fifty-four percent for more than three years, and thirty-six percent for more than four years. Reply Br. of Appellant at 2–3, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. July 29, 2002) (available at http://www.lethimstay.com/pdfs/ Lofton-AppealReply.pdf); *contra* Fla. Stat. § 39.45(2) (2002) (asserting that it is the Florida Legislature's intent "that no child remain in foster care longer than [one] year").

33. *Franklin v. State*, 257 So. 2d 21, 22 (Fla. 1971).

34. Florida does not have a specific sodomy law; instead, it characterizes the sexual act as an "unnatural and lascivious act." Fla. Stat. § 800.02 (2002). Section 800.02 provides that both homosexuals and heterosexuals who commit an unnatural and lascivious act with another person are guilty of a second-degree misdemeanor, punishable by imprisonment not exceeding sixty days or a fine not exceeding $500. *Id*. However, the Supreme Court's recent decision in *Lawrence* likely renders the statute unconstitutional because, like homosexual sodomy, heterosexual sodomy is a private, consensual sexual act. *See Lawrence*, 123 S. Ct. at 2482 (invalidating Texas's anti-sodomy law).

35. Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 Nova L. Rev. 793, 798 (2000).

36. *Id*. at 794 (citing Abby R. Rubenfeld, *Lessons Learned: A Reflection upon* Bowers v. Hardwick, 11 Nova L. Rev. 59, 60 (1986)).

37. Terl, *supra* n. 35, at 795; *Fla. B. v. Kimball*, 96 So. 2d 825, 825 (Fla. 1957).

lated a state law prohibiting homosexual sexual relations and engaged in action contrary to good moral and ethical behavior.[38] In 1957, the Florida Supreme Court deemed Kimball's conduct to be unprofessional and disbarred him.[39]

In 1956, the Florida Legislature started an investigative committee that "researched" homosexuality.[40] The Committee employed spies and undercover informants to frequent places that homosexual men and women were known to socialize, and to lure homosexuals to places where the Committee's staff waited with cameras.[41] College students and educators were targeted specifically in Gainesville, Tallahassee, and Tampa.[42] If the Committee suspected a student, faculty member, or staff member of being homosexual or of participating in homosexual-like behavior, it would report him or her to the campus police.[43] Typically, after questioning, the university would expel or discharge the suspect.[44] By the spring of 1963, seventy-one teachers had their teaching certificates revoked, and thirty-nine deans and professors had been removed from various universities.[45]

In 1970, Hillsborough County denied the marriage-license petitions of two lesbian couples.[46] Judge William C. Brooker of the Hillsborough County Court reasoned that, although Florida law did not specifically prohibit homosexual unions, "the main object of marriage is the procreation of progeny, and it would therefore

38. *Kimball*, 96 So. 2d at 825.

39. *Id*. Twenty-five years later, in 1982, the Florida Supreme Court readmitted Kimball to The Florida Bar, contingent upon his successfully passing the Florida Bar Examination. *In re Petition of Kimball*, 425 So. 2d 531, 534 (Fla. 1982).

40. Johns Comm., *The Florida Legislature Investigation Committee*, http://www.jtsears.com/johnsmain.htm (accessed June 28, 2003). Under the leadership of former Governor Charley Johns, these committees that, "investigate[d] all organizations whose principles or activities include[d] a course of conduct [that] . . . would constitute violence, or a violation of [state laws]" became known as "Johns Committees." *Id*.

41. Terl, *supra* n. 35, at 796 (quoting Ellen McGarrahan, *Florida's Secret Shame*, Miami Herald, Tropic 9 (Dec. 8, 1991)). The purpose was to catch individuals engaging in homosexual-like behavior. *Id*.

42. *Id*.

43. *Id*.

44. *Id*.

45. Johns Comm., *supra* n. 40. The number of students expelled from educational facilities is unknown. Terl, *supra* n. 35, at 796. In 1966, the Committee was disbanded. Fla. Memory Project, *Highlights of Florida History*, *Reports of Investigations on Meetings of the Southern Christian Leadership Conference and the Ku Klux Klan*, http://www.floridamemory.com/FloridaHighlights/investigation/ (accessed June 29, 2003).

46. Terl, *supra* n. 35, at 801.

be contrary to public policy to grant them the licenses applied for."[47]

In 1977, Florida became the first state to ban gay adoptions by statute when it enacted the homosexual adoption provision.[48] Florida Statutes Section 63.042(3) provides that, "[n]o person eligible to adopt under this statute may adopt if that person is homosexual." Although two other states—Mississippi and Utah—do not permit homosexual adoption,[49] Florida is the only state that expressly prohibits all gay men and women from adopting children.[50]

The Florida Legislature passed the statutory ban without engaging in any fact-finding regarding the pros and cons of homosexual adoption.[51] Former Senator Don Chamberlain, of Clearwater, Florida, was the lone senate member who spoke out against the bill when it was debated.[52] He questioned the legislative reasoning because there was no demonstrable evidence that Florida had a problem regarding homosexual adoptions.[53] "Chamberlain argued that the purpose of the bill had *nothing* to do with adoption and *everything* to do with discrimination."[54] Boldly, the bill's sponsor, Senator Curtis N. Peterson, Jr., of Lakeland, Florida, informed a newspaper that, "[t]he problem in Florida has been that homosexuals are surfacing to such an extent that they're beginning to aggravate the ordinary folks, who have a few rights of their own."[55] Additionally, he said, "We're trying to send [homosexuals] a message, telling them: 'We're really tired of you. We wish you'd go back into the closet.'"[56]

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47. *Id*.; *see* Fla. Stat. § 741.212 (2002) (asserting that Florida does not recognize same-sex marriages).

48. *Lofton*, 157 F. Supp. 2d at 1374 n. 1.

49. Miss. Code Ann. § 93-17-3(2) (2002) (prohibiting "adoption by couples of the same gender"); Utah Code Ann. § 78-30-1 (2002) (prohibiting adoption by any unmarried couple or individual).

50. *Lofton*, 157 F. Supp. 2d at 1374 n. 1.

51. Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 Duke J. Gender L. & Policy 207, 222 (1995).

52. *Id*. at 223.

53. *Id*.

54. *Id*. (emphasis added).

55. ACLU Lesbian & Gay Rights Project et al., *Too High a Price: The Case against Restricting Gay Parenting* http://www.lethimstay.com/pdfs/gayadoptionbook.pdf (accessed June 29, 2003).

56. *Id*.

Because of the homosexual adoption provision, very few Florida courts have actually heard cases regarding the eligibility of homosexuals to adopt. However, those few opinions reveal that Florida holds the same bias and prejudice toward homosexuality as it did in the 1950s.[57]

D. Florida Caselaw

In 1990, the American Civil Liberties Union of Florida (ACLU) filed the first challenge against Florida's adoption statute.[58] In *Seebol v. Faire*,[59] the plaintiff, a well-respected resident and businessman of Key West, Florida, applied to adopt a special-needs child.[60] Seebol had participated in state-guardianship programs, worked in AIDS education, and assisted HIV-infected individuals.[61] However, the Florida Department of Health and Rehabilitative Services (HRS) denied his adoption application because Seebol was a homosexual.[62] The Sixteenth Judicial Circuit for Monroe County ruled in Seebol's favor and held Florida's homosexual adoption ban to be unconstitutional because it violated Seebol's constitutional rights to privacy, due process, and equal protection.[63] However, the ruling stands as precedent only in Monroe County, Florida, because HRS did not appeal the decision.[64]

Almost immediately following *Seebol*, a second challenge to Florida's homosexual adoption statute arose. The ACLU filed *Cox v. Florida Department of Health & Rehabilitative Services*[65] on behalf of a male homosexual couple whose adoption applications had been denied solely because of their sexual orientation.[66] HRS argued that allowing homosexual adoptions was not in children's best interests, that homosexual adoptions would deprive children of an opposite-sex role model, and that homosexual parents would

57. *Infra* nn. 58–100 and accompanying text (discussing the caselaw pertaining to homosexual adoption).

58. Terl, *supra* n. 35, at 821.

59. 16 Fla. L. Wkly. C52 (Fla. 16th Cir. Ct. Mar. 15, 1991).

60. *Id*. at C53.

61. *Id*. at C54.

62. *Id*.

63. *Id*. at C55–C56.

64. Terl, *supra* n. 35, at 822.

65. 627 So. 2d 1210 (Fla. 2d Dist. App. 1993).

66. *Id*. at 1211.

limit a child's choice of sexual preference.[67] The trial court, which relied heavily on the *Seebol* opinion, held Florida Statutes Section 63.042(3) to be void for vagueness and a violation of homosexuals' rights to privacy and equal protection.[68]

However, the Second District Court of Appeal reversed the trial court's decision[69] and held the statute to be constitutional with regard to guarantees of the right to privacy, due process, and equal protection.[70] The court defended its decision by stating,

> Statistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect that parents will provide this education to teenagers in the home. . . . It is in the best interests of a child if his or her parents can personally relate to the child's problems and assist the child in the difficult transition to heterosexual adulthood. Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years. . . . HRS maintains that the legislature may still decide that the best interests of children require[s] that they be adopted by persons who can and will serve as heterosexual role models.[71]

In 1995, the Florida Supreme Court affirmed the Second District's decision that upheld the constitutionality of Section 63.042(3), reasoning that the plaintiffs had failed to present evidence that showed homosexual adoption was not detrimental to children.[72] The Court rejected the argument that homosexual adoption could promote the welfare of children.[73] However, it remanded the equal protection issue to the trial court for further proceedings.[74]

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67. *Id*. at 1220.
68. *Id*. at 1212.
69. *Id*. at 1213.
70. *Id*. at 1215, 1217–1219.
71. *Id*. at 1220.
72. *Cox v. Fla. Dept. Health & Rehabilitative Servs.*, 656 So. 2d 902, 903 (Fla. 1995).
73. *Id*.
74. *Id*. In December 1995, *Cox* was voluntarily dismissed before the retrial could be-

During the *Cox* proceedings, a case emerged that showed great promise for homosexual caregivers in Florida. In 1992, Bonnie Lynn Matthews and Elaine Kohler filed suit against HRS for the Department's application of an unwritten policy against licensing homosexual foster parents, after HRS removed a six-year-old foster child from the plaintiffs' care upon learning of their sexual orientation.[75] The Second District held that the Florida Legislature had not barred homosexuals or unmarried couples from consideration as foster parents; therefore, HRS had exceeded its delegated authority when it failed to follow the statutory-rulemaking procedure.[76] Thus, following *Matthews*, Florida permits homosexual foster parenting.

Florida courts took another step forward in *Maradie v. Maradie*,[77] when a lesbian mother challenged a trial court's ruling that, "a homosexual environment is not a traditional home environment, and can adversely affect a child."[78] The First District Court of Appeal held that, when considering a parent's moral fitness, the court should focus on whether the parent's behavior directly impacts the child's welfare.[79] In addition, although the mere possibility or assumption of a negative impact upon a child is not enough, a trial court can base its decision upon proof of the likelihood of prospective harm.[80]

During the same year, however, the First District took a step backward when it awarded child custody to a convicted criminal rather than to a lesbian mother, who had raised her eleven-year-old daughter since birth.[81] The court asserted that the focus was not on the mother's sexual orientation, but rather on the child's best interests.[82] Instead of suggesting that a parent's sexual orien-

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gin. Terl, *supra* n. 35, at 824.

75. *Matthews*, 645 So. 2d at 488. During the same month that *Matthews* arose, lesbian Sharon McCraken of Broward County became the first openly gay person to receive a foster-parent license, but only after she threatened suit. Terl, *supra* n. 35, at 824–825.

76. *Matthews*, 645 So. 2d at 489–490.

77. 680 So. 2d 538 (Fla. 1st Dist. App. 1996).

78. *Id*. at 540.

79. *Id*. at 542 (citing *Dinkel v. Dinkel*, 322 So. 2d 22 (Fla. 1975)).

80. *Id*. at 543. *Maradie* is an exception to Florida's per se rule. The court applied the nexus approach, which considers homosexuality merely as a factor that is relevant only if the parent's sexual orientation will adversely affect the child. *Id*. For a discussion on the nexus approach, consult *infra* notes 191–206 and accompanying text.

81. *Ward v. Ward*, 742 So. 2d 250 (Fla. 1st Dist. App. 1996).

82. *Id*. at 252.

tation justifies a custody change, the court noted that, "the central questions must be what is the conduct the child has been exposed to and what is the effect upon the child."[83] The court concluded that exposure to the mother's lifestyle harmed the child;[84] therefore, it was in the child's best interests to be placed with her father, who had been convicted of murdering his first wife and had served eight-and-one-half years in prison.[85]

The most recent case challenging the constitutionality of Florida's homosexual adoption provision came in August 2000, after three sets of homosexual plaintiffs were denied the right to adopt children.[86] At the time, the primary plaintiff, Steven Lofton,[87] had been a licensed foster parent for twelve years and had acted as a foster parent to eight children, all of whom had some form of the HIV virus.[88] Because caring for children with HIV was so demanding, Lofton gave up his career as a pediatric nurse and devoted his full-time attention to the children.[89] For his efforts, the Children's Home Society, a licensed child-placement agency for the Florida Department of Children and Families (DCF), not only honored Lofton and his partner, Roger Croteau, with the "Outstanding Foster Parent of the Year" Award, but also named it the "Lofton-Croteau" Award.[90]

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83. *Id*. at 254.

84. *Id*. at 253–254.

85. *Id*. at 252.

86. *Lofton v. Butterworth*, 93 F. Supp. 2d 1343, 1344–1345 (S.D. Fla. 2000).

87. *Supra* n. 1 and accompanying text (providing Lofton's personal statement that describes his relationship with his foster child John).

88. Br. of Appellant at 7, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf). The second plaintiff was Douglas Houghton, Jr., a clinical-nurse specialist and legal guardian of child-plaintiff John Roe. *Lofton*, 157 F. Supp. at 1375. Roe's father voluntarily left him with Houghton, who had taken care of Roe since he was four years old. *Id*. After Roe's biological father's rights were terminated, Houghton sought to adopt Roe with the father's consent. *Id*. at 1375–1376. The State informed Houghton that, "but for his homosexuality and the homosexual adoption provision he would have received a favorable preliminary home study evaluation" and would have been permitted to adopt Roe. *Id*. at 1376. The third plaintiff group was Wayne Larue Smith and Daniel Skahen, who had obtained a license to become a family-foster home and cared for three foster children. *Id*. Smith and Skahen submitted at-large adoption applications, not requesting any particular child. *Id*. However, DCF denied their applications because the homosexual adoption provision prohibits all homosexuals from adopting children. *Id*.

89. Br. of Appellant at 7, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

90. *Id*.

The *Lofton* proceeding involved eight-year-old foster child John Doe, whom Lofton and Croteau had raised since he was two months old.[91] John was born HIV-positive but successfully sero-reverted and no longer tested positive for HIV.[92] In 1994, John became available for adoption when his biological mother died, and, at that time, the State asked Lofton to adopt John.[93] Lofton submitted an adoption application, but DCF automatically disqualified Lofton because he was gay.[94] The trial court held that placing children in married homes was in the best interest of Florida's children.[95] Additionally, the court supported the State's argument that, "married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes."[96] To defend the opinion, the court asserted that, "homosexuals cannot marry or be recognized as a marital unit and, thus, cannot meet this State's asserted interest underlying the homosexual adoption provision."[97]

Today, John is eleven years old and still lives with his "parents," Lofton and Croteau, and his four siblings.[98] John's future has yet to be determined, as the *Lofton* case is currently before the Eleventh Circuit. On March 4, 2003, the Eleventh Circuit Court of Appeal heard oral arguments concerning the constitutionality of Florida's homosexual adoption provision.[99] The pending outcome of the *Lofton* proceeding is sure to have a considerable impact on John and other foster children whose lives are on hold while their futures remain undetermined.[100]

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91. *Lofton*, 93 F. Supp. 2d at 1344.

92. *Lofton*, 157 F. Supp. 2d at 1375; *supra* n. 3 (explaining the term "sero-revert").

93. Br. of Appellant at 9, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

94. *Lofton*, 93 F. Supp. 2d at 1344–1345.

95. *Lofton*, 157 F. Supp. 2d at 1384.

96. *Id*. at 1383.

97. *Id*. at 1385 (footnote omitted); *see* Fla. Stat. § 741.212(1) (2002) (providing that same-sex marriages are not recognized in Florida).

98. ACLU Lesbian & Gay Rights, *Let Him Stay*, http://www.lethimstay.com/loftons.html (accessed June 30, 2003). Currently, Lofton and Croteau are foster parents to four other children. *Id*. Lofton and Croteau welcomed Frank and Tracy in 1988, John in 1991, and Wayne and Ernie in 1999. Lofton Aff., ¶¶ 4, 5, 7, 9, *supra* n. 1.

99. Maya Bell, *Gay Men Fight for Right to Adopt Kids in Florida*, Orlando Sent. A1 (Mar. 4, 2003) (available at 2003 WL 14541210).

100. *Infra* pt. III(E) (discussing pending litigation in Florida).

III. ANALYSIS

A. Florida's Child-Welfare Standards

In all proceedings relating to children, the Florida Legislature's intent is,

> To provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the [S]tate's care.[101]

Children are to be protected from abuse, neglect, and exploitation; provided with a safe, permanent, and stable home that preserves personal dignity and integrity; provided with food, shelter, clothing, and education; and given adequate attention to address their physical, social, and emotional needs.[102]

1. Foster Parenting

The Legislature proposes that each child in foster care be given "care, guidance, and control in a permanent home [that] will serve *the best interests of the child's* moral, emotional, mental, and physical welfare."[103] Florida's primary goals include providing stable and permanent placements for all children, and ensuring that no child remains in foster care for more than one year.[104]

Florida has set forth several requirements that an applicant must satisfy before he or she becomes a licensed foster parent.[105] The State uses similar guidelines to evaluate whether it is in the child's best interests to be placed with a particular foster parent or in a particular foster home.[106] A placement that satisfies a child's best interests secures custody, care, and discipline that is equivalent to the environment a child's biological parents should have provided.[107] First and foremost, the prospective foster parent must be of good moral character.[108] The applicant must be willing

101. Fla. Stat. § 39.001(1)(a) (2002).
102. *Id*. at § 39.001(3).
103. *Id*. at § 39.45(2) (emphasis added).
104. *Id*.
105. *Id*. at § 409.175(5)(a) (2002).
106. *Id*. at § 39.001.
107. *Id*. at § 39.001(1)(i).
108. *Id*. at § 409.175(5)(a)(5). Whether an applicant is of good moral character is deter-

and financially able to provide food, clothing, educational opportunities, and other services and supplies necessary to ensure a child's healthy physical, emotional, and mental development.[109] In addition, the applicant's home must provide a potential foster child with a safe, healthy, and nurturing environment.[110] Overall, a prospective foster parent must lead a stable lifestyle.[111]

Once a foster parent undertakes the care of a foster child, the "temporary" parent becomes a parental figure and assumes the daily tasks and responsibilities that are associated with legal parenthood.[112] The State holds foster parents responsible for providing foster children with sufficient support, guidance, and supervision.[113] In addition, Florida regards foster parents in the highest esteem because they are "special people . . . [who] possess the gift of being able to open their hearts and homes to children in need of safety, love and nurturing," as if those children were their own.[114]

2. Adoptive Parenting

The Florida Adoption Act defines adoption as,

> the act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents and their heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock.[115]

The Act specifies that it is the Florida Legislature's intent to protect and promote the well-being of adoptable children.[116] The primary concern in all adoption proceedings, similar to foster-care

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mined through a lengthy screening process. *See id*. § 409.175(2)(K) (screening may include employment history checks, criminal history checks, and fingerprinting).

109. *Id*. at § 409.175(5)(a)(2).

110. *Id*. at § 409.175(5)(a)(3).

111. My Florida, Fla. Dept. of Children & Fams., Health & Human Servs., *Foster Care: Am I Ready to be a Foster Parent?* http://www.state.fl.us/cf_web/myflorida2/healthhuman/fostercare/amiready.html (accessed June 30, 2003).

112. Fla. Stat. § 39.002(3).

113. *Id*. at § 39.001(5).

114. My Florida, Fla. Dept. of Children & Fams., Health & Human Servs., *Foster Care: About Foster Care*, http://www.state.fl.us/cf_web/myflorida2/healthhuman/fostercare/about.html (accessed June 30, 2003).

115. Fla. Stat. § 63.032(2) (2002). Florida Statutes Section 63.012 labels Chapter 63 as the "Florida Adoption Act."

116. *Id*. at § 63.022(1).

proceedings, is to promote and protect the best interests of the child.[117]

Agencies consider several factors when evaluating a child's best interests. However, no single factor is given greater weight than another; rather, each is weighed to provide a placement that furthers the child's best interests and satisfies the child's individual needs.[118] Under the best interests of the child standard, prospective adoptive parents are evaluated based upon the following: (1) an ability and willingness to provide a loving and nurturing home that promotes the child's individual needs; (2) an ability and willingness to promote and encourage the child's education and personal potential; (3) having the energy, physical stamina, and life expectancy to raise the child; (4) having adequate income and financial stability to support the child's social, physical, and financial needs; (5) an ability to supply a healthy and safe home environment; (6) a clear record of physical, mental, and emotional health; (7) intelligence to act as an adequate person and parent, and to provide the child with stimulation that measures up to his or her capacities; and (8) good moral character.[119]

Once an agency determines that a particular placement will serve a child's best interests, the adoption is legalized before a judge.[120] Afterward, an amended birth certificate is issued that lists the adoptive parent as the legal parent.[121] Now, the adoptive parent acts in every way that a biological parent would act.[122]

B. Florida's Child-Welfare Policies Are Inconsistent and Are Based upon Myths and Assumptions Associated with Homosexual Parenting

As previously discussed,[123] Florida applies the best interests of the child standard to all proceedings involving child welfare.[124]

117. *Id*. at § 63.022(2)(l) (providing, in pertinent part, as follows: "In all matters coming before the court pursuant to this act, the court shall enter such orders as it deems necessary and suitable to promote and protect the *best interests of the person to be adopted*." (emphasis added)).

118. Fla. Admin. Code R. 65C-16.005(5) (1998).

119. *Id*. at R. 65C-16.005(6).

120. Weiss, *supra* n. 11, at 133.

121. *Id*.

122. *Id*.

123. *Supra* nn. 101–102 and accompanying text (explaining the application of the best interests of the child standard).

124. *See Lofton*, 157 F. Supp. 2d at 1383 (examining the child's best interests); *Ward*,

Typically, in matters relating to both foster care and adoption,[125] it is Florida's intent to promote and protect the best interests of children by considering various factors to help determine whether a certain living situation will maximize a child's opportunity to develop into a stable, well-adjusted adult.[126]

Although the Legislature appears to have the same intent toward foster care and adoption proceedings, an inconsistency exists when a homosexual applies to become an adoptive parent. Even though Florida permits homosexual foster parenting[127] and frequently places children in the care of homosexual foster parents because doing so is in the child's best interests,[128] the State strictly prohibits homosexual adoptive parenting.[129] The Florida Supreme Court has upheld the homosexual adoption provision, which provides that, "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[130] According to the Court, it is in children's best interests to have adequate heterosexual role models who can educate, guide, and personally relate to them; assist with the difficult transition into heterosexual adulthood; and provide a stable-heterosexual household.[131] This rationale, and other arguments which Florida courts have ad-

742 So. 2d at 254 (stating that the issue is the child's best interests); *Rushing v. Bosse*, 652 So. 2d 869, 873 (Fla. 4th Dist. App. 1995) (recognizing that, "adoption . . . is a civil proceeding intended to serve the best interests of the child"); *Ramey v. Thomas*, 382 So. 2d 78, 80 (Fla. 5th Dist. App. 1980) (holding that, "[i]n an adoption proceeding, as well as any other kind of proceeding regarding the custody of a child, the primary issue is the best-interest and welfare of the child"); *Seebol*, 16 Fla. L. Wkly. at C53 (asserting that, "[i]n adoption proceedings, as in child custody proceedings, the court's primary duty is to serve the best interests of the child").

125. Fla. Stat. § 39.45(2); *id*. at § 63.022(2)(l).

126. *See id*. at § 61.13(3) (2002) (listing various factors that affect a child's welfare and interests, including, but not limited to the following: "[t]he capacity and disposition of the parents to provide the child with food, clothing, medical care . . . and other material needs"; "[t]he moral fitness of the parents; [t]he mental and physical health of the parents"; and "[t]he willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship").

127. *Matthews*, 645 So. 2d at 490 (holding homosexuals eligible to become foster parents).

128. *Lofton*, 157 F. Supp. 2d at 1380, 1385 (implying it has been in John's best interests to have been in the care of his homosexual foster parents for eleven years, yet it is not in his best interests to be legally adopted by his homosexual foster parents).

129. Fla. Stat. § 63.042(3) (providing that, "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual").

130. *Id*.

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

hered to when upholding the adoption provision, exhibits reliance upon stigmas that society often associates with homosexuality.

When asserting that it is in the best interests of children to prohibit homosexual adoption, courts often rely upon myths commonly associated with homosexuality.[132] Such notions include that homosexuals are inadequate role models, homosexuals lack the necessary parenting skills, children with homosexual parents will become gay, and homosexuals molest children.[133] Social-science research has struck down these assumptions and fears as having absolutely no merit.[134] In fact, not one study has shown that children of homosexual parents are harmed or adversely affected.[135]

Under the role-model theory, it is suggested that parental figures are the primary role models after whom children pattern their behavior and lifestyle;[136] therefore, a homosexual is not an adequate role model for a child because the gay lifestyle will harm the child's moral and sexual development.[137] Florida, in particular the *Cox* court, emphasized this theory when it maintained that, because most adopted children will develop heterosexual preferences, it is in the best interests of the child to have an appropriate, heterosexual role model who can personally relate to the child and assist him or her with the difficult transition into heterosexual adulthood.[138] The court implied that homosexuals are unable to give children "education and guidance after puberty concerning

132. Elovitz, *supra* n. 51, at 210–211.

133. *Id*. at 211–213.

134. *Id*. at 211.

135. *Id*.

136. *Opinion of the Justices*, 525 A.2d 1095, 1099 (N.H. 1987).

137. *Id*. (finding that the State's interest in providing appropriate role models for children was rationally related to the exclusion of homosexual adoptive and foster parents because of the fear and concern that the child's sexual identity would be adversely affected); *e.g. In re Appeal in Pima County*, 727 P.2d 830 (Ariz. 1986) (questioning whether a bisexual man would convert his child into a homosexual); *S. v. S.*, 608 S.W.2d 64 (Ky. 1980) (denying custody to a homosexual mother because her child might have trouble achieving heterosexual identity); *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (Mo. App. 1980) (asserting that the child might be inclined toward homosexuality). "There seem to be two separate ideas underlying this concern. First, can a homosexual parent serve the 'modeling' needs of a child who will grow up to be a heterosexual adult? Second, is the sexuality of a child influenced by the sexuality of his or her parent?" Kif Skidmore, *A Family Affair: Constitutional and Prudential Interests Implicated When Homosexuals Seek to Preserve or Create Parent-Child Relationships*, 89 Ky. L.J. 1227, 1258 (2001).

138. *Cox*, 627 So. 2d at 1220 (implying that homosexuals are neither adequate nor appropriate role models for children).

relationships with the opposite sex."[139] However, the court provided no support for its assumption that homosexuals are unable to relate to children. Additionally, the State's use of homosexuals as foster parents contradicts the court's decision because trained professionals ensure that foster children are placed with foster parents who are adequate role models, who exhibit good moral behavior, and who can provide home environments equivalent to those that biological parents should have provided.[140]

Sexual orientation is irrelevant to one's ability to be a good parent.[141] Studies have found a "remarkable absence of distinguishing features between the lifestyles, childrearing practices, and general demographic data" of homosexual parents and heterosexual parents.[142] Dr. Charlotte J. Patterson, a University of Virginia psychology professor, reported that homosexuals and heterosexuals do not differ in terms of mental health or child-rearing ability.[143] Further, research affirms that lesbian and gay romantic and sexual relationships neither detract from a homosexual's ability to care for children nor categorize a homosexual as an unfit parent.[144]

Will children with homosexual parents grow up to be either lesbian or gay? Will boys grow up acting feminine, or will girls behave in a masculine manner? Dr. Patterson conducted social-science research that answered these questions concerning chil-

139. *Id*.

140. *Supra* nn. 106–111 (providing several considerations used to help determine whether a potential foster parent can satisfy a child's best interests). In fact, Florida's use of homosexual foster parents completely undermines the State's rationale for denying homosexual adoption.

141. Jeffrey G. Gibson, *Lesbian and Gay Prospective Adoptive Parents: The Legal Battle*, 26 SPG Human Rights 7, 8 (1999); *see Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980) (holding that a mother's sexual preference is irrelevant when considering her parental skills). In *Bezio*, Clinical Psychologist and University of Massachusetts Psychology Professor Dr. Alexandra Kaplan testified that a parent's sexual preference is not an issue that influences child-rearing ability. *Id*.

142. Gibson, *supra* n. 141, at 8 (citing Beverly Hoeffer, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 Am. J. Orthopsychiatry 536 (1981)). Studies conclude that lesbian and heterosexual mothers share similar maternal interests and child-rearing practices. Elovitz, *supra* n. 51, at 211. Further, gay and heterosexual fathers display similar parenting styles and paternal roles. *Id*.

143. Charlotte J. Patterson, *Lesbian and Gay Parenting*, http:www.apa.org/pi/parent.html (accessed June 29, 2003). In 1973, the American Psychiatric Association recognized that homosexuality was neither a mental illness nor a mental disorder. Am. Psychiatric Assn., Pub. Info., *Gay, Lesbian, and Bisexual Issues*, http://www.psych.org/public_info/gaylesbianbisexualissues22701.pdf (revised May 2000).

144. Patterson, *supra* n. 143.

dren's sexual identity with a firm "no."[145] Evidence has revealed that children of gay parents do not suffer difficulties with gender identity, gender-role behavior, or sexual orientation.[146] In fact, research confirms that children of homosexual parents do not suffer any more personal-development problems than those of heterosexual parents.[147]

Courts sometimes deny custody to homosexual parents out of fear that the gay parent or the parent's gay friends might sexually molest the child.[148] Such decisions reflect an assumption that homosexuals, especially gay men, because of their sexual orientation, are inclined to abuse children.[149] However, legitimate, scientific evidence indicates that there is no connection between homosexuality and pedophilia.[150] "Research with adult gay men demonstrates that the use of force is 'rare in homosexual activity' and that 'homosexuals as a group are not sexually oriented toward children.'"[151] To the contrary, statistics reveal that heterosexual males are the most likely group to molest children.[152]

The strongest argument against homosexual adoption focuses on the social prejudices that children of gay and lesbian parents might face because society, as a whole, stigmatizes homosexuals.[153] Several courts have addressed concerns that children might be subjected to teasing and ridicule from peers.[154] Although this is

145. *Id*. The study researched three aspects of sexual identity—gender identity or self-identification as male or female, gender-role behavior, and sexual orientation or one's choice of sexual partners. *Id*.

146. *Id*.

147. *Id*.

148. *See In re Appeal in Pima County*, 727 P.2d at 838 (Howard, J., dissenting) (questioning whether a bisexual man would molest a minor child); *J.L.P.(H.) v. D.L.P*, 643 S.W.2d 865, 869 (W.D. Mo. 1982) (claiming that a homosexual father might seduce a minor boy).

149. Steve Susoeff, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. Rev. 852, 880 (1985).

150. ACLU Lesbian & Gay Rights, *Let Him Stay*, *Why It's Wrong*, *What to Say: Arguments against Gay Families, and Why They're Wrong*, http://www.lethimstay.com/wrong_say.html (accessed June 29, 2003).

151. Susoeff, *supra* n. 149, at 881.

152. *Id*. at 880–881.

153. *Id*. at 887–888.

154. *See Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. App. Div. 2 1987) (asserting that peers would ridicule the child); *L. v. D.*, 630 S.W.2d 240, 244 (Mo. App. 1982) (expressing concern that the child would be teased); *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (asserting that society will stigmatize the children); *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (expressing concern that the child would be teased); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (expressing concern that society would condemn the child).

the only argument that actually takes children's best interests into consideration, it should be noted that studies have demonstrated that children of gay parents have normal peer relationships.[155] However, this argument should not be overlooked because concerns about homosexual prejudice and discrimination are very real.[156] At the same time, we should remember that children tend to tease other children based upon perceived differences. These differences not only include coming from a homosexual household structure, but also include coming from a household comprised of a different racial, cultural, ethnic, or socioeconomic structure.[157] Thus, social stigmatism should not be the overriding concern upon which to base a "best interests" decision.[158]

The United States Supreme Court rejected a similar argument in *Palmore v. Sidoti*.[159] In *Palmore*, a white mother lost custody of her daughter after she began living with a black man, whom she later married.[160] A Florida trial court granted the white father's petition for custody because of the damaging impact of the "social stigmatization that is sure to come" to a child in a racially mixed household.[161] Chief Justice Warren E. Burger reversed Florida's decision and asserted that, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[162]

The statistics and scientific research indicate that children of homosexual parents do not suffer from any detrimental or adverse effects.[163] In fact, the evidence reveals that children of homosexual households develop as successfully as do children from

155. *Joint Adoption: A Queer Option? supra* n. 15, at 208.

156. Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 Duke J. Gender L. & Policy 191, 200 (1995).

157. *Id*.

158. *Id*. at 200–201.

159. 466 U.S. 429 (1984).

160. *Id*. at 430.

161. *Id*. at 431.

162. *Id*. at 433. The Supreme Court again advocated this viewpoint in *Lawrence v. Texas*. *Lawrence*, 123 S. Ct. at 24712. In the concurring opinion, Justice Sandra Day O'Connor proposed that, "[m]oral disapproval of a group cannot be a legitimate governmental interest . . . ." *Id*. at 2486 (O'Connor, J., concurring).

163. Patterson, s*upra* n. 156, at 191.

heterosexual households.[164] Assertions that homosexuals cannot act as effective role models or parental figures are false and misleading.[165] Florida's use of homosexuals as foster parents further supports these research findings. The State continues to place children with homosexual foster parents for short-term and long-term care.[166] This trend implies that Florida, despite its harsh adoption provision, views homosexuals as appropriate role models and effective parental figures for children in need of care. Following the State's legislative intent, homosexuals can "serve the best interests of [children's] moral, emotional, mental, and physical welfare."[167] In summary, there is no factual basis for claims that homosexual adoption is harmful to children;[168] thus, the assertions are unsubstantiated and purely discriminatory.[169]

C. Florida Is Doing More Harm than Good

Florida needs consistency between its adoption and foster care policies. The current inconsistency and blanket disqualification of homosexual, adoptive parent applicants is contrary to the goals of promoting the best interests of children.[170] Misapplication of the best interests standard has led to the placement of children in abusive and unstable homes,[171] and to an overabundance of children without homes.[172]

"The State of Florida does not know of a single child who is now in foster care because of any harm associated with the [sex-

164. *Id.*

165. *See* Br. of Amici Curiae, Am. Acad. of Child & Adolescent Psych., Am. Psychol. Assn., Natl. Assoc. of Soc. Workers, Inc., Va. Ch. of the Natl. Assoc. of Soc. Workers, Inc., and Va. Psychol. Assoc., in Support of Appellee at 31, *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. App. 1994) (concluding that, "relevant social science research shows that an individual's sexual orientation does not correlate with the person's fitness as a parent").

166. Br. of Appellant at 30, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf). The *Lofton* case is an example of Florida's use of homosexuals for long-term foster care.

167. Fla. Stat. § 39.45(2).

168. Patterson, *supra* n. 156, at 191.

169. *Id*. at 201.

170. *See Nadler v. Super. Ct.*, 63 Cal. Rptr. 352 (Cal. App. 3d Dist. 1967) (implying that disqualification, as a matter of law, based upon a single personal characteristic of an applicant is contrary to the goals of the best interests of the child standard).

171. *See Ward*, 742 So. 2d at 252 (granting custody to a child's father, a convicted murderer, rather than to the child's homosexual mother).

172. *Supra* n. 6 (revealing statistics from the Department of Health and Human Services).

ual] orientation of parents or caregivers."[173] Yet, while Florida places a categorical exclusion on homosexuals[174]—the very people which the State frequently relies upon to provide childcare—it approves custody decisions and adoption applications of individuals known to represent a threat to the safety and welfare of children, such as individuals who are substance abusers or who commit domestic violence.[175] Child-welfare officials agree that parental substance abuse and violence pose serious dangers to children, yet the State does not prohibit applicants who exhibit such behavior from adopting children.[176] Instead, after individual case-by-case evaluations, the State excludes only those abusers who personally present a danger and a threat to children.[177] Homosexuality is neither a danger nor a threat to children, yet all gay people are automatically prohibited from becoming adoptive parents.[178]

Florida's per se rule, which categorically deprives all homosexuals of the opportunity to become adoptive parents strictly because of their sexual preference, defeats the State's intent and purpose of providing all children with a permanent family life.[179] The State argues that the homosexual ban increases a child's likelihood of being raised by a married mother and father.[180] But it is irrational for the State to assert that prohibiting homosexual

173. Br. of Appellant at 30–31, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

174. Fla. Stat. § 63.042.

175. *See Ward*, 742 So. 2d at 251–252 (denying custody to a lesbian mother, yet granting custody to a father who killed his first wife, served eight years in prison for murder, spouted racial views, and failed to pay child support); *Weigand v. Houghton*, 730 So. 2d 581, 586–587 (Miss. 1999) (holding that the immorality demonstrated by a father's homosexuality outweighed other custody factors in his favor, including the mental and emotional abuse the son suffered due to his stepfather's physical abuse of the mother).

176. Br. of Appellant at 32, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

177. Reply Br. of Appellant at 11, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. July 29, 2002) (available at http://www.lethimstay.com/pdfs/LoftonAppealReply.pdf).

178. *Id*.

179. *See* Fla. Stat. § 63.022 (explaining that the Legislature's intent is to "protect and promote the well-being of persons being adopted"); *Seebol*, 16 Fla. L. Wkly. at C55 (asserting that a court's duty is to consider the best interests of the child). Under a per se rule, all applicants who are classified in a particular category are "considered unfit or undesirable." Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 Ind. L.J. 623, 633 (1996). Thus, in Florida, all homosexuals are automatically disqualified from becoming adoptive parents, and "it is never in the interests of any child to be in the custody of a lesbian or gay parent." *Id*. at 637.

180. *Lofton*, 157 F. Supp. 2d at 1384.

adoption would increase prospective adoptions by married heterosexual couples.[181] After giving primary consideration to qualified, married couples, the State recruits single, adoptive parent applicants.[182] In fact, unmarried applicants account for over twenty-five percent of the adoption placements in Florida each year.[183] However, despite all of the adoption placements that occur with heterosexual married and single applicants, more than 3,000 Florida children remain eligible for adoption.[184] With this statistic, it is reasonable to assume that the majority of adoptable children will spend most of their childhood in foster care or "bouncing from placement to placement, with no home at all."[185] Even if Florida were to permit homosexual adoption, not every child would be assured a loving family home. However, the current statutory ban "deprives [thousands of] children [of] . . . the possibility of adoption by an entire group of individuals [who have proven] to be fit and capable parents."[186]

Florida's failure to assess rationally the children's best interests has caused both a shortage of qualified adoptive parents and an abundance of children to remain in foster care for longer periods of time.[187] This trend means that children are either exposed to life with foster parents for significant periods of time, if not indefinitely, or left without any type of home environment.[188] This practice defeats and undermines Florida's rationale for prohibiting homosexual adoption because there is a significantly high possibility that children will be placed in the care of homosexual foster parents before finally, if ever, being placed in a permanent adoptive home. The amount of time, whether short or extended, spent with foster parents can have lasting effects on children.

181. Br. of Appellant at 27, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

182. Fla. Admin. Code R. 65C-16.005(6)(f); *see* Fla. Stat. § 63.042 (permitting unmarried adults to adopt, regardless of whether they plan to marry in the future).

183. Br. of Appellant at 28, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

184. *Id*. at 29.

185. *Id*.

186. *Seebol*, 16 Fla. L. Wkly. at C56.

187. Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?* 39 Harv. J. on Legis. 375, 375 (2002). The term "qualified" refers to applicants who are eligible and permitted to adopt. *Id*.

188. *Supra* n. 6 (revealing statistics from the Department of Health and Human Services).

Florida's use of homosexuals as foster parents makes it clear that the State recognizes that homosexuality neither threatens children nor prevents a gay person from providing the love and care that children need.[189] Further, the frequent placement of foster children in the care of homosexuals discredits the State's defense in favor of the homosexual adoption provision[190]—that it is in the best interests of children to be placed with heterosexual adoptive parents who can act as adequate parental figures and role models, and who can provide stable homes.[191] Essentially, the per se ban affords the State of Florida the opportunity to impose prejudice and discrimination on homosexuals while hiding behind the best interests of the child standard.

To the detriment of children, Florida's homosexual adoption provision has shifted the focus of the best interest standard. Instead of looking at a child's well-being, Florida now looks at an applicant's sexuality and at society's misonceptions.[192] Taking a look back in time to 1977, it seems that discrimination, rather than the best interests of children, has always been the essential purpose of the homosexual adoption provision.[193] However, former state legislators have recently released a written statement saying,

> In 1977, we were among the state legislators who helped pass Florida's law prohibiting gay people from adopting children. We now realize that we were wrong. This discriminatory law prevents children from being adopted into loving, supportive homes—and we hope it will be overturned.[194]

Florida should listen to its former legislators and rid itself of its moral bias towards homosexuals because the discrimination is

189. *See* Skidmore, *supra* n. 137, at 1259 (explaining that in the role of either a foster parent or an adoptive parent, the adult acts as a parent and serves as a role model to the child).

190. *Id*.

191. *Cox*, 627 So. 2d at 1220; *Lofton*, 157 F. Supp. 2d at 1383–1384.

192. Shaista-Parveen Ali, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. Davis L. Rev. 1009, 1035 (1989); *see supra* pt. III(B)(1) (diffusing myths and misconceptions concerning homosexuals and parenting).

193. *Supra* nn. 51–56 and accompanying text (providing that the main sponsor of the homosexual adoption provision admitted that the purpose was to send a discriminatory message to homosexuals).

194. Am. Civ. Liberties Union, Lesbian & Gay Rights, Press Releases, *'We Were Wrong,' Say Former Legislators Who Voted for Florida Gay Adoption Ban Nearly 25 Years Ago*, http://www.aclu.org/LesbianGayRights/LesbianGayRightsMain.cfm (Mar. 7, 2002).

inevitably harming the children that the State originally intended to protect.

D. Adoption of the Nexus Approach Would Harmonize Florida's Adoption and Foster Care Policies

Florida's application of the best interests of the child standard, when refusing to place children with homosexual adoptive parents, implies a sense of inequality between adoptive and foster children.[195] It begs the question: Why is it in a foster child's best interests to be placed with a homosexual foster parent, but not in an adoptable child's best interests to be placed with a homosexual adoptive parent?[196] A simple answer would be that there should not be a different application of the best interests standard, and that all children should be given the same benefits and considerations when being placed with either a foster parent or an adoptive parent. The State has a duty to provide children with safe and nurturing environments, whether the placement is for a short or an extended time period.[197] Florida should apply the best interests of the child standard to potential, homosexual adoptive parents in the same manner that it applies the standard to potential, homosexual foster parents.[198]

An examination of whether a potential adoptive parent's sexuality would have an adverse impact upon the child could resolve the underlying question of whether a particular adoption is in the child's best interests.[199] This approach has been named the "nexus test" because it depends solely upon a court to find a connection between an applicant's homosexuality and his or her parenting abilities.[200] If the applicant's sexuality would not have an

195. Timothy P.F. Crowley, Lofton v. Kearney*: The United States District Court for the Southern District of Florida Holds Florida's Statutory Ban on Gay Adoption Is Not Offensive to the Constitution*, 11 L. & Sexuality 253, 265 (2002).

196. *Id*.

197. Fla. Stat. §§ 39.001(1)(b), 39.002(1), 39.45, 63.022.

198. Florida should use a potential parent's sexual orientation merely as a factor in determining whether the specific placement is in the child's best interests. *Seebol*, 16 Fla. L. Wkly. at C55.

199. Sheryl L. Sultan, *The Right of Homosexuals to Adopt: Changing Legal Interpretations of "Parent" and "Family,"* 10 J. Suffolk Acad. L. (1995) (available at http://www.tourolaw.edu/Publications/suffolk/vol10/part3.htm).

200. *Id*.

adverse impact on the child, then the applicant's sexuality is not pertinent in determining the best interests of the child.[201]

Adopting a nexus approach would harmonize the standards used in Florida's adoption and foster care policies. Florida should abandon its per se rule, which actively discriminates against potential adoptive parents solely because of their sexual preference, and apply the nexus test when considering adoption placements. Such an approach offers an objective, case-by-case analysis that examines fitness, parenting ability, and any other characteristic or conduct, on an individual basis, to determine whether the particular characteristic or conduct makes the applicant a less desirable parent.[202] Commentators agree that the nexus approach "is consistent with the general family law principle that most parental characteristics are relevant only if they can be shown to have an [adverse] impact on the child."[203]

Several of Florida's lower courts have applied the nexus approach to determine the best interests of the child, and the results remain consistent—a parent's homosexuality does not have an adverse impact on the child's emotional, psychological, or physical well-being.[204] Additionally, national organizations such as the

201. Shapiro, *supra* n. 179, at 633.

202. *Id*.

203. *Id*. at 636. The Supreme Court's decision in *Lawrence v. Texas* suggests that after *Lawrence*, a court should not consider sexual orientation at all. *See Lawrence*, 123 S. Ct. at 2486 (finding that liberty interests protect all persons from certain government intrusions). However, *Lawrence* does not necessarily invalidate all government-sanctioned discrimination. Am. Civ. Liberties Union, Lesbian & Gay Rights, *Why the Supreme Court Decision Striking Down Sodomy Laws Is So Important*, http://www.aclu.org/LesbianGayRights/LesbianGayRightsMain.cfm (accessed Sept. 5, 2003) [hereinafter *Supreme Court Decision*]. Thus, until Florida's homosexual adoption provision is amended, the "nexus test" approach would be a permissible way to counter Florida's current per se rule.

204. *See Maradie*, 680 So. 2d at 542–543 (relying upon *Dinkel*, 322 So. 2d 22, and asserting that parental fitness should be determined by examining whether certain behavior will have a direct impact on the child's welfare; "the mere possibility of negative impact . . . is not enough."); *Seebol*, 16 Fla. L. Wkly. at C55 (asserting that homosexuals should be evaluated for adoption fitness based upon the same criteria that prospective, heterosexual adoptive parents are evaluated). The *Seebol* court also discussed an unreported case from Florida's Seventeenth Judicial Circuit in which that court applied the nexus test. *Id*. at C53; *see also Nadler*, 63 Cal. Rptr. at 354 (implying that a "blanket disqualification" based upon one factor of a person's personhood is contrary to the goals of a "best interest of the child" evaluation); *Beizo*, 410 N.E.2d at 1216 (asserting that a parent's sexual orientation is not determinative when applying the best interests of the child standard); *In re Adoption of Charles B.*, 552 N.E.2d 884, 889 (Ohio 1990) (applying the best interests of the child standard, the court evaluated all surrounding circumstances to determine whether placement with a homosexual applicant would provide an environment best suited for the

Child Welfare League of America, the oldest children's advocacy organization, and the North American Council on Adoptable Children agree that gay men and women who seek to adopt should be evaluated just like all other applicants.[205]

The nexus approach would allow Florida to focus upon the best interests of children, rather than its moral biases and misconceptions against homosexuality. Courts and agencies could evaluate prospective homosexual parents solely on their parenting ability, which would allow for more adoption placements because potentially qualified individuals would not be automatically eliminated because of societal, agency, or judicial prejudices.[206] Essentially, the nexus approach would serve as a means to improve the consistency between Florida's adoption and foster care policies.

Applying the nexus test to Lofton's situation demonstrates the rationale for the case-by-case evaluation. Lofton has been John's parent in every way for eleven years.[207] Lofton has loved, supported, and guided John through difficult and emotional times. His actions display his strong parenting skills, which the DCF recognized and awarded when it honored Lofton and his partner with the "Lofton-Crouteau" Award.[208] Lofton has been a wonderful parent and role model, not only for John, but also for his four other foster children—Frank, Tracy, Wayne, and Ernie.[209] It is clear that Lofton has had an impact on John; however, it is a strong, healthy, and effective impact. If a court were to apply the nexus test to the *Lofton* case, Lofton's homosexuality would not be an issue, and John's wish would come true—his adoption would be complete.[210]

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child); *In re Burrell*, 388 N.E.2d 738, 739 (Ohio 1979) (asserting that sexual conduct should only be questioned if it will have an adverse impact upon the child); *Whaley v. Whaley*, 399 N.E.2d 1270, 1275 (Ohio 1978) (finding that immoral conduct must have a direct or an adverse impact on the child's welfare).

205. Joanne Smith, Natl. Resource Ctr. for Foster Care & Permanency Plan., Hunter College Sch. of Soc. Work, *Information Packet: Gay & Lesbian Foster Care and Adoption*, http://www.hunter.cuny.edu/socwork/nrcfcpp (May 2002).

206. David P. Russman, *Alternative Families: In Whose Best Interests?* 27 Suffolk U. L. Rev. 31, 64 (1993).

207. Lofton Aff. ¶ 7, *supra* n. 1.

208. Br. of Appellant at 7, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. Feb. 13, 2002) (available at http://www.lethimstay.com/pdfs/appealbrief.pdf).

209. Lofton Aff. ¶¶ 4,5,9, *supra* n. 1.

210. *Id*. at ¶ 21.

E. Pending Litigation in Florida

As mentioned earlier, while *Lofton v. Kearney* is currently before the Eleventh Circuit, the fates of eleven-year-old foster child John and thousands of other foster children are still up in the air.[211] Depending upon the outcome, Florida could face significant change in its legislation.

The United States Supreme Court's recent decision in *Lawrence v. Texas* added fuel to the fight against Florida's homosexual adoption ban. *Lawrence* held that it is unconstitutional for a state to criminalize same-sex sexual conduct[212] because such a "declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[213] The Supreme Court asserted that the Constitution allows homosexuals the right "to enter relationship[s] in the confines of their homes and their own private lives and still retain their dignity as free persons."[214] Further, "Persons in a homosexual relationship may seek autonomy for [personal decisions relating to intimate relationships, marriage, raising children, and sex], just as heterosexual persons do."[215] Essentially, *Lawrence* recognized that gay men and women have the same liberty interest in forming intimate, personal relationships that heterosexuals have.

The *Lawrence* decision is definitely a turning point—or at least a starting point—for the gay community. With help from the principles established in *Lawrence*, *Lofton* may open the doors for homosexual adoption.[216] Florida's homosexual adoption ban hides behind the best interests of the child standard as a means to dis-

211. *Supra* nn. 98–100 and accompanying text (explaining that the court heard oral arguments in *Lofton* on March 4, 2003, but the decision is still pending).

212. *Lawrence*, 123 S. Ct. at 2484. In doing so, the Court rejected the State of Texas' justification—promotion of morality—for its anti-sodomy law, which made it a crime for two persons of the same sex to engage in intimate sexual conduct. *Id*.

213. *Id*. at 2482.

214. *Id*. at 2478.

215. *Id*. at 2481–2482.

216. On July 18, 2003, the *Lofton* appellants filed a Supplemental Brief with the Eleventh Circuit Court of Appeals. In it, the appellants argue that,

> [i]n *Lawrence*, the Court recognized for the first time that lesbians and gay men have the same liberty interest in forming intimate, personal relationships that heterosexuals have. . . . Now that this constitutional right is recognized, the State cannot penalize people for exercising it—as the challenged adoption law does—absent an important and narrowly tailored justification for doing so.

Supp. Br. of Appellant at 7–8, *Lofton v. Kearney*, No. 01-16723-DD (11th Cir. July 18, 2003) (available at http://www.lethimstay.com/pdfs/supplementalbrief.pdf).

guise the obvious discrimination. "Ultimately, sex and relationships are what lies at the heart of all discrimination against [gay men and women] because ultimately, it is [their] relationships and [their] sexuality that [distinguishes them] from heterosexuals."[217] Therefore, after *Lawrence*, the *Lofton* case has a stronger position in court because, now, the Constitution protects and recognizes homosexual relationships.[218]

In *Cox*, the district court implied that with the appropriate case, facts, and circumstances, the constitutionality of Florida's adoption provision could be overturned when it remarked that, "[i]t may be that the legislature *should revisit* this issue in light of the research that has taken place in the last fifteen years, but we cannot say that the limited research reflected in *this record* compels the judiciary to override the legislature's reasoning."[219] If the Eleventh Circuit deems *Lofton* to be the "appropriate case" to resolve the constitutional issues surrounding Florida's per se ban, it could be the starting point for allowing homosexual adoption in Florida.[220]

However, historically, courts have been reluctant to resolve the debate surrounding homosexual adoption. In *Amer v. Johnson*, the Seventeenth Judicial Circuit Court for Broward County asserted, "[i]f the State Legislature chooses to allow children . . . to languish in foster care drift, instead of opening the doors to homosexual households, it has that authority."[221] *Amer* also referred to the *Cox* opinion, which stated that, "the debate . . . cannot and should not be resolved today in this Court. . . . [T]he legislature is the proper forum in which to conduct this debate."[222]

Lofton may or may not be the turn-around point for homosexual adoption in Florida. However, it is certain to spark debate and additional proceedings involving homosexual adoption, which may eventually lead to change in the legislation.

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217. *Supreme Court Decision*, *supra* n. 203.

218. *Lawrence*, 123 S. Ct. at 2481–2482.

219. *Cox*, 627 So. 2d at 1220 (emphasis added) (questioning whether *Cox* was the appropriate case to resolve the constitutional issues concerning Florida's homosexual adoption provision).

220. If the Eleventh Circuit upholds Florida's homosexual adoption provision, it is likely that legislation will remain the same until further proceedings and litigation.

221. 4 Fla. L. Wkly. Supp. at 858.

222. *Id*. (quoting *Cox*, 627 So. 2d at 1212).

IV. CONCLUSION

Every child deserves a permanent home and all the love and care that a good parent can provide. Florida should evaluate all prospective adoptive parents based upon their individual character and ability to parent, not merely upon their sexual orientation. Florida's current use of the best interests of the child standard, as applied to adoption proceedings, does an injustice to children because it allows societal prejudice and discrimination to determine what is in children's best interests. With thousands of children in foster care, Florida must open its "blind eye" and realize that there are many different family structures that can provide the love, security, and stable environments that children need. Adoption of the nexus approach would allow courts to determine what is actually in a child's best interests, rather than what is furthering the State's moral beliefs. *Lawrence* recognized that society is shifting its view on homosexuality and is beginning to acknowledge that gay people are just people. It is time for the State of Florida to do the same.