

# 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 considered 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 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 hetero-

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1. These three categories of decisions all involve placement of children. ART is the use of noncoital 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). With respect to ART, there is no child, so the policy issues focus on allocating the opportunity to have a child, rather than child placement. For ease, I use the term "placement" for all three categories of decisions.

2. Many other 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). For reasons discussed *infra*, see notes 30–32 and accompanying text, I agree that adults' interests are relevant, especially those regarding access to ART. However, since I am focusing here

sexual parent or parents.<sup>3</sup> I therefore focus on whether consideration of sexual orientation is likely to promote children's well-being.

Our society does not assess the competence of individuals to become biological parents; no one needs permission to have a child. 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 couples; even in the absence of statutory bars, child welfare workers may be reluctant to place children with gay adults.<sup>4</sup> In contested custody disputes, the fact that a parent is gay may be considered as a negative factor, based on rules adopted by state appellate courts or the views of individual trial judges. No state currently denies lesbians or gay men access to ART. At least one legislator has introduced legislation that would restrict access to married couples.<sup>5</sup> The absence of government

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on policy from a children's perspective, I analyze all the issues primarily in terms of children's well-being and rights. I focus on the claims that an adult's homosexuality should be treated as a potentially negative factor because this is 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 considered a negative in some instances, for example with respect to placements of gay youth. For an insightful discussion of how policymakers 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].

3. There is a large literature focusing on the policy issues related to gay adults as parents. Most focuses on the question of same-sex marriage, not on placement issues. 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 with respect to marriage. See Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 335-40 (1997) [*hereinafter* Wardle, *Homosexual Parenting*]. Law Professor Lynn 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 syndicated columnist Maggie Gallagher, David Blankenhorn, founder of the Institute for American Values, and the Family Research Council, a major advocacy group on family issues. I focus on the writings of these commentators because they are the most active writers on the issues. All of these commentators appear to believe that homosexuality is immoral or a sickness. See 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/maggiegallagher/2001/05/10/166382.html>; Family Research Council, *The Bible, The Church, and Homosexuality* (2005); FAMILY RESEARCH COUNCIL, *GETTING IT STRAIGHT* (2005). They generally present their arguments in terms of child well-being, however.

4. See EVAN B. DONALDSON, *ADOPTION INSTITUTE, EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES?* 11-12 (2006).

5. See Brooke Adams, *Controversial Surrogacy Law Fix Proposed*, SALT LAKE TRIB., July 17, 2003, at A1.

regulation leaves control to individual doctors or to clinics; some doctors and clinics refuse to provide services to lesbians or unmarried couples.<sup>6</sup>

In assessing the desirability of different policy options, 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” family setting, which is then defined as a heterosexual, married couple household. I next look at the social science research assessing the family-related factors that influence the academic, social, and emotional development of children, especially the research on the development of children living with gay parents. Finally, I examine the implications of this research with respect to 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, an adult’s sexual orientation should be considered only as one of a number of factors in situations where there are multiple prospective placements available for the child. In custody disputes, a parent’s sexual orientation should be irrelevant, except in situations where an older child indicates that the parent’s sexual orientation is relevant to them. Regarding ART, same-sex couples and gay individuals should have access on the same terms that a state permits for heterosexual couples and individuals.

## **II. The Relevance of Sexual Orientation: A Framework for Analysis**

### *A. The Policy Options*

When the state is involved in placing children for adoption/foster care or determining custody arrangements, all states make the child’s well-being the primary focus, usually by stating that the decision should be based on the “best interests of the child.”<sup>7</sup> I agree with that value judgment. As noted by many commentators, the term “best interests” does not tell decision-makers what outcomes constitute a child’s interests or what

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6. *See Benitez v. N. Coast Women’s Care Med. Group, Inc.*, 131 Cal. Rpt. 2d 364 (Ct. App. 2003) (challenging doctor’s refusal to provide insemination to lesbians); Elizabeth Weil, *Breeder Reaction*, *MOTHER JONES* 33 (July–Aug. 2006). Many other countries have adopted restrictions. These 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).

7. 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].

factors found in alternative home environments are likely to produce these outcomes. In the past, many legislatures and courts adopted presumptions that certain categories of people should be favored or disfavored, often focusing on the proposed parent's gender or race.<sup>8</sup> Today, family law policy generally is based on the premise that presumptions in favor or against particular categories of people do not serve the interests of children.<sup>9</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>10</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, these statutes direct attention to parental behaviors, not characteristics of the parent.

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>11</sup> Others propose a presumption against placement of children with gay couples or individuals with respect to all placement decisions.<sup>12</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>13</sup>

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8. Until relatively recently, in many states, mothers were presumed to be the preferred caretaker, especially of young children, and statutes or agency regulations favored adoption placement with adults of the same race as the child. *See* Levy, *supra* note 7, § 3.2 (discussing maternal preference); *Id.* § 3.5 (discussing race matching).

9. *See id.* §§ 3.2, 3.5; ALI, *supra* note 2, § 2.12. Over the past twenty years, family law policies have moved from a focus on parental characteristics to a focus on behavior.

10. ALI, *supra* note 2, § 2.02 cmts. b & c.

11. Congregation for the Doctrine of the Faith, Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons § 7 (2003), available at [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).

12. Wardle, *Homosexual Parenting*, *supra* note 3, at 893–99.

13. *See, e.g.*, ALI, *supra* note 2, 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

Policymakers must determine which approach is likely to best serve the interests of children. In a system that focuses on the best interests of each child, a bar on placements with gay adults would be justified only if placement with gay individuals would always, or almost always, be a worse alternative than any other option. A presumption against placement with gay adults would be justified only if there was strong reason to believe that children will usually do better if placed with a heterosexual adult(s), regardless of any other characteristics of the adults, such as their education, income, mental health, or parenting history.<sup>14</sup> A third alternative, a preference for heterosexual families, other things being equal, would reflect the decision that sexual orientation is relevant and should receive some extra weight when there is little to choose between alternative placements. Finally, excluding consideration of sexual orientation must rest on the judgment that a parent's sexual orientation is irrelevant to the child's development, in ways that are policy-relevant, or that allowing decision-makers to consider sexual orientation is likely to lead to worse 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 use this framework in assessing the policy options.

### *B. Optimality or Best Interests*

Currently, most states direct courts and agencies charged with making custody or adoption/foster care decisions to choose the placement, *among the available homes*,<sup>15</sup> which best meets the overall needs of the specific child. The goal is to ensure that all children receive at least adequate care in that placement. Many opponents of placing children with gay parents propose a different standard. They contend that the state should place children only in optimal homes, which they then define as a married, hetero-

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shown to be harmful to an individual child.”); Levy, *supra* note 7, § 3.8; sources cited in note 79 *infra*.

14. 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.

15. 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). Some children require residential placement.

sexual couple.<sup>16</sup> They also would limit access to ART to such couples. As I will discuss later, 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 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. Thus, I believe that sexual orientation should generally be irrelevant even under an optimality framework.

Moreover, regardless of one's assessment of the research, framing placement decisions in terms of optimality is neither conceptually coherent nor sensible from a policy perspective. Application of an optimality standard would be harmful to the interests of the child. Yet, the optimality concept has been attractive to many policymakers.<sup>17</sup> Therefore, I examine it in some detail here.

#### 1. PLACEMENT DECISIONS RARELY INVOLVE CHOOSING BETWEEN HETEROSEXUAL AND SAME-SEX COUPLES

First, the proposal that children should 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 often 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. Excluding gay couples or individuals from becoming foster or adoptive parents means that some children will have to live in institutional settings or in nonpermanent homes. Most custody disputes are between two biological parents. The question is which parent should have primary care of the child and what type of relationship the child should have with

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16. See, e.g., Helen Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1 (2003); 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); Wardle, *Homosexual Parenting*, *supra* note 3, at 841; David Blankenhorn, *Presentation to the Danish Institute for Human Rights: The Rights of Children and the Redefinition of Parenthood* (June 2, 2005), available at [www.americanvalues.org/html/danish\\_institute.htm](http://www.americanvalues.org/html/danish_institute.htm). 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.

17. 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.” See, Benedict Carey, *Experts Dispute Bush on Gay-Adoption Issue*, N.Y. TIMES, Jan. 29, 2005, at A16.

the noncustodial parent. In most situations, both parents will be a single parent. Whether children do better with two parents (heterosexual or gay) is beside the point.

Access to ART presents a somewhat different situation. Restricting access to certain family structures might be feasible. It is argued that access to ART should be restricted to heterosexual married couples because the state has an obligation, with respect to assisted reproduction, to ensure that children are brought into the world only if they will enter an optimal household. This claim seems patently wrong from both a children's and societal perspective.<sup>18</sup> No child exists when people seek to conceive using ART. 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. 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>19</sup>

From a children's interest perspective, the policy issue is whether an unborn child is better off not coming into existence unless guaranteed an optimal set of parents and environment. How can we decide this question? Obviously, we cannot ask the unborn this question. David Chambers has examined this issue in the context of child custody disputes where the child is too young to speak for herself. He proposed that the decision-maker ask herself what the child realistically would have wanted to happen, once reaching adulthood.<sup>20</sup> I believe that using this test, the vast majority of children born to gay parents would not wish that they had not been born; it certainly is not the view of children who live with gay parents or adults who were raised by gay parents.<sup>21</sup> In fact, there is no basis for concluding that most children would think it better not to be born unless they were provided optimal homes. It seems likely 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. While an adult who has experienced a life filled with great pain, physical or emotional, might say they wished they had not been born, most people are more than happy

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18. I discuss the issue from a child's perspective here. I address societal interests at notes 124–129 and accompanying text *infra*.

19. 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.

20. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 488–89 (1984).

21. See ABIGAIL GARNER, *FAMILIES LIKE MINE* (2004).

with a reasonable existence test.<sup>22</sup>

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 stated, “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>23</sup> This legislator 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 these children faced challenges associated with being in a family viewed by some parts of the community as “different,” these children were more than happy to have grown up in their families. 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>24</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 SCIENTIFICALLY MEANINGFUL

The claim that there is such a thing as a single optimal type home for rearing children also is flawed from a scientific perspective. 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

22. This test is consistent with the way ethicists have assessed the question who should have children. See, J.S. MILL, ON LIBERTY, at ch. V (David Bromwich & George Kateb eds., 2003) (1869). Some philosophers argue that even this is too high a standard; for example, philosopher Derek Parfit argues that from the perspective of the unborn, any existence is better than not to exist at all. DEREK PARFIT, REASONS AND PERSONS 359 (1984). See also, John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004); Philip. G. Peters, Jr., *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 488 (1989).

23. ACLU Lesbian & Gay Rights Project, *Too High a Price* 106 (2003) (quoting Mississippi state representative Tom Cameron).

24. 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).

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>25</sup> The importance of any given factor may be influenced by the child’s abilities, temperament, attitudes, and psychological resources. No one family type constitutes an optimal environment as a general rule, let alone with respect to a specific child.

The problem with the claim that a particular family structure is optimal 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 is 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 whom 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 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>26</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,

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25. 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>.

26. See Greg J. Duncan & Katherine A. Magnuson, *Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?*, *FUTURE OF CHILDREN*, 35, 40–42 (Spr. 2005); Jeanne Brooks-Gunn & Lisa B. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, *FUTURE OF CHILDREN*, *supra* 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).

in terms of all school related variables, including grade point, graduation, and college entrance exam test scores.<sup>27</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>28</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>29</sup> The list of other factors that might be relevant to assessing the relative benefits provided by any particular home is long.

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 might be considered in making placement decisions. However, there is no clear rank ordering of factors such that a given factor should always be the determinative element in placement policy or decisions. No single factor or family form makes a home optimal. In fact, commentators arguing for optimality as a basis for rejecting placement with gay adults do not actually support a general optimality test; for example, they are 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. Despite its superficial appeal, the optimality standard should be rejected.

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

Ultimately, the choice of placement policies involves value judgments. While I support the judgment that furthering the interests of children should be a primary goal of all placement decisions, I believe that the interests of adults deserve consideration. The opportunities to have, and care for, children are critical aspects of happiness for most adults.<sup>30</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. 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. Increased opportunities for self-realization are a moral good.

27. See Duncan & Magnuson, *supra* note 26, at 40; McLANAHAN & SANDEFUR, *supra* note 26, at 88–91.

28. 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).

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

30. 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.

Policymakers also should consider the implications of potential policies with respect to the fundamental American commitment to equal treatment. Our laws reflect special concern with treatment differences based on an individual's choice of identity.<sup>31</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 other characteristics are predictive of less desirable outcomes. 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. The importance of considering interests beyond the immediate interests of children is reflected in many aspects of family law policy, including those related to child placement. A policy that might provide a small advantage to children might be rejected if that policy has a large detrimental impact on other values. 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>32</sup>

As noted, balancing of competing values is not necessary with respect to most placement decisions, since the evidence indicates that children's development is not negatively influenced by their parent's sexual orientation. There are, however, some situations, where an adult's sexual orientation (like other factors such as religion or gender) may be relevant. I examine how these interests should be balanced when I discuss each type of decision. 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 are not thought of as relevant in placement decisions. In assessing whether consideration of a parent's or couples' sexual orientation is relevant to placement decisions, policymakers should want evidence on the relation-

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31. *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.”). 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 likely would be seen as illegitimate and empirical research would be deemed irrelevant.

32. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

ship, 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 generally make three claims regarding how a parent's sexual orientation might affect a child's well-being. The central claim is that the absence of two parents of the opposite sex negatively impacts children's development, especially with respect to the child's developing an adequate sense of "gender identity." Second, some commentators see the absence of a father as especially problematic; they contend that children are more likely to develop behavioral problems without a male in the household. A third claim is that gay parents have a style of parenting that causes children to develop in less desirable ways, or that sexual orientation is related to lifestyles that may negatively affect children. In this part, I examine the social science evidence relevant to these claims.<sup>33</sup> 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 review the research regarding family structure in heterosexual families, which is cited as demonstrating the need for opposite sex parents.

I examine the research from two perspectives. 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 is the only family placement available. If gay adults are barred from becoming parents, these children will be denied the opportunity to have a family, which is detrimental for children. 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>34</sup> The same considerations apply with respect

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33. There is a vast academic literature on these subjects. Opponents of placement with gay adults claim this research supports their position. However, few academic child-welfare researchers seem to oppose lesbians or gay men as parents. To the contrary, several prominent researchers have indicated that they do not believe 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 25; DAVID POPENOE, LIFE WITHOUT FATHER 77, 147 (1996). As discussed in *supra* note 3, most opponents of placement are not from the research community.

34. In terms of harm, the appropriate question probably should be "would the child be bet-

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 custody cases and those adoption or foster care placements when there is more than one family available to take the child, the placement will be with 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. Therefore, I also 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?

### B. Research Assessing Children Living with Gay Parents

While there is a substantial body of research examining children living with gay parents and the characteristics of gay parents and same-sex couple households, I focus on twenty to thirty studies that I consider sufficiently sound methodologically to be probative on the policy questions.<sup>35</sup> Most of these assessed the development of children being raised by lesbian parents (there are no studies assessing children living with gay fathers) and included a comparison group of children being raised by heterosexual parents. Some did not include a special comparison group but used well-standardized tests to assess the children's development. These studies compare the children's development with national norms.

The majority of studies, especially those done in the 1970s and 1980s, involved children living with a lesbian parent following that parent's divorce or separation from the child's father. Almost all of the children

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ter off adopted or left in foster care or an abusive family?"

35. 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 placed on the various studies. Other reviewers might reach somewhat different conclusions with respect to the utility of any particular study. 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 1c. *infra*. My conclusions regarding the findings are consistent with all of the professional groups that have reviewed the body of literature. See, 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 OF CHILDREN 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).

had lived for a period of time with both biological parents. When studied, some of the children were living with a single lesbian mother; the majority were living with their mothers and new same-sex partners. Six more recent studies looked at children conceived by donor insemination and raised from birth by a lesbian mother.<sup>36</sup> In the majority of these house-

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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 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. AUSTR. 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 Hoeffler, *Children's Acquisition of Sex Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981).

36. See Bos et al., Brewaeys et al., Chan et al., Flaks et al., Gartrell et al., Golombok et al., *Families with Children Conceived by Donor Insemination*, *supra* note 35. Some of these samples have been followed for a number of years and there are additional reports on the children's development over time.

holds the biological mother had a partner and they treated the child as their joint child; in a few instances, the nonbiological 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 of these studies involved families recruited to participate. Four recent studies are based on data from two large data sets, one in the U.S. and one in England, which tracked thousands of families over a period of years.<sup>37</sup> The data had been gathered originally by researchers interested in general child development, not on the impact of parent's sexual orientation. Researchers interested in the relevance of sexual orientation identified the children living with gay parents and compared these children's development with that of the other children in the sample, who were living with heterosexual parents.

In reviewing the findings from these studies, I look first at the question: Is there evidence that children are actually harmed by living with a lesbian parent? I then ask: Are there any areas of development in which children may do better or worse, on average, in households with a heterosexual or homosexual parent(s)?

#### 1. 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. 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 a high level of 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.

(b.) *Serious Behavioral Problems.* The great majority of children living with lesbian parents scored within the normal range on both parent and teacher ratings with respect to serious emotional or behavioral problems. 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 prob-

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37. See Wainright et al., Golombok et al., *Children with Lesbian Parents*, *supra* note 35.

lems, on average, than children from nondivorced families. While only a very small number of studies included teenage children, these studies did not find problem levels any higher than in the general population of children in comparable heterosexual families. 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 well-being.<sup>38</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 and that this is bad.

(i) *Gender Identification.* 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 reporting a desire to be the opposite sex came equally from the gay and heterosexual households. Critics of gay parents also sometimes express concern that these 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 value-laden concept.<sup>39</sup> In any case, research consistently finds that children living with gay parents generally do not differ significantly from those in heterosexual households in terms of those behaviors that are seen as gender linked.<sup>40</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 being gay is an undesirable out-

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38. TASKER & GOLOMBOK, *supra* note 35.

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

40. 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, and schools are among the extrafamilial contexts in which children learn about gender. Thus, the multiple sources influencing gender roles makes it very doubtful that it will be a disadvantage for children to grow up with gay or lesbian parents with respect to gender identification.

come. Many people, including myself, reject the premise that this is an undesirable outcome. Regardless, the research indicates that the vast majority of children raised by gay parents will identify as heterosexual in adulthood, although they may be somewhat more likely to consider or experience a same-sex relationship at some point in their lives.

Determining whether a parent's sexual orientation influences a child's sexual orientation or behavior is difficult. 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. Thus, it is not clear what numbers should be used in comparing outcomes for children raised by gay parents. In addition, 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 sample children had lived with a heterosexual parent at some point. Thus, any conclusions are somewhat speculative.

Overall, the studies do not report differences related to parents' sexual orientation. There is some indication, in a few studies, that the adolescent children living with gay parents 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, although the differences were not statistically significant.<sup>41</sup> I believe that the number of youth in these studies is too small to draw any conclusions from trends in the data that are not statistically significant. Nonetheless, it does not seem unreasonable to hypothesize that children living with a gay parent might be more open to considering a same-sex relationship than children in heterosexual families, since there is a parental role model and these children generally would assume that homosexual relationships are not bad. 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>42</sup>

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41. 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 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. Timothy Biblarz & Judith Stacey, *(How) Does the Sexual Orientation of Parents Matter?* 66 AM. SOC. REV. 159, 170-71 (2001). Because these researchers are supporters of same-sex marriage and gay parents, their paper is frequently cited for proof that children raised by gay parents are more likely to be gay.

42. See, GLENN WILSON AND QAZI RAHMAN, *BORN GAY: THE PSYCHOLOGY OF SEX ORIENTATION* (2005).

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>43</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. Should policymakers be concerned? 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 nongay youth.<sup>44</sup> 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>45</sup> But even if the suicide rates are somewhat higher, this does not support policies 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. 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. However, gay adolescents may be far less likely to commit suicide if they live with gay parents than if they live with heterosexual parents, since they will not face parental rejection and will have parental support in dealing with societal stigma. 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>46</sup>

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43. 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 lives and that approximately 2.8% of adult men and 1.4% of adult women self-identify as homosexual. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 295–297, 305 (1994). Other studies find somewhat higher reports of a same-sex relationship, which may reflect sample differences.

44. Wardle, *Homosexual Parenting*, *supra* note 3, at 856.

45. 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).

46. See Ritch Savin-Williams, *Coming Out to Parents and Self-Esteem Among Gay and*

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.

(d.) *The Negative Impact of Community Attitude.* 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. It is clear that children living with gay parents experience 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>47</sup> Some children report being embarrassed to tell their friends about their parent's sexual orientation or living arrangement. 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>48</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 children in all the studies was well within normal range. Interviews of adults who lived with gay parents during childhood indicate that, while living with a gay parent or parents could present varied challenges and some painful experiences, they did not experience major developmental problems or long-term disadvantages.

## 2. COMPARATIVE WELL-BEING

Even if children raised by gay parents develop adequately, 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.

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*Lesbian Youths*, 18 J. HOMOSEXUALITY 1 (1989).

47. Sarantakos, *supra* note 35.

48. GARNER, *supra* note 21, at ch. 3. 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 35, at 58-74; Gershon et al., *supra* note 35; Javaid, *supra* note 35; Karen G. Lewis, *Children of Lesbians: Their Point of View*, 25 SOC. WORK 198 (1980).

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>49</sup>

None of these studies found significant differences in children's development related to their parent's sexual orientation.<sup>50</sup> In every critical aspect of well-being, the children who were being raised by lesbian parents appeared to be doing as well as the children being raised by heterosexual parents. They 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-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 policy debates. Opponents of allowing lesbians and gay males to become parents contend that the body of research on children living with gay parents is so flawed methodologically that it is of no relevance to policymakers.<sup>51</sup> Their

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49. 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.

50. As discussed below, see notes 51–53 and accompanying text, the sample sizes in many of these studies may have been too small to allow for detection of any differences between the two groups. In another vein, Biblarz and Stacey, *supra* note 41, 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.

51. 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 3, at 841–52; 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.marriage Debate.com/pdf/MothersFathersMatter.pdf>.

primary critique is that the research does not prove that there are no differences in children's development related to their parent's sexual orientation. They contend that while no study has found differences, the sample sizes in most studies were too small to detect differences and that future research may show differences, especially relatively small, subtle differences.<sup>52</sup> A second critique is that because in 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. Therefore, the findings cannot be generalized to all lesbian parents and not at all to gay men as parents.<sup>53</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 provide no support for the claim that children are harmed by being raised by gay parents, with respect to the aspects of child development that always have been considered relevant for public policy—mental health, social relations, and academic performance. Altogether, these studies included hundreds of children, with very few children showing any significant problems, no more than the comparison children. While the findings from most studies cannot be generalized beyond the study population because the samples were not random,

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52. In technical terms, it is argued that the research has not established the “null hypothesis” and that it has not established that there are no differences between children in the two types of households. See Affidavit of Steven Lowell Nock, *Halpern v. Toronto*, 60 O.R.3d 321 (Ontario Div. Ct. 2003) (No. 684/00, 39/2001) at ¶¶ 116-19; Lerner & Nagai, *supra* note 51, at 98–106. Individual studies ranged from fewer than ten 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. These same issues would apply, of course, if differences had been found.

53. Many studies, especially the earlier ones, utilized clinical interviews or used psychological tests that have not been standardized on large samples. Use of standardized tests allows for greater confidence in generalizing from the findings. In addition, the sample participants generally were volunteers, usually higher income lesbian couples. 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. Moreover, volunteers may not be typical of the general population. Finally, most 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 developmental 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.

the four studies based on random populations also found no differences in children's well-being or parent-child attachment. In addition, although the sample sizes in individual studies often were small, they were large enough to detect differences related to factors other than parents' sexual orientation. For example, 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). Differences related to family income, parental education, high family conflict, and parental behavior toward the child also were found.<sup>54</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. Thus, the absence of findings of differences related to sexual orientation is significant. Overall, even with the methodological limitations, the research supports the conclusion that a parent's sexual orientation does not affect the quality of their parenting nor, in and of itself, negatively influence children's development.

#### *D. Evidence Offered by Opponents of Gay Parents*

##### 1. THE NEED FOR FATHERS AND MOTHERS

Recognizing that direct evidence from studies of children with gay parents does not warrant a focus on sexual orientation, opponents of placing children with gay adults contend that other social science research justifies rejecting or limiting placement. 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>55</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, on average, being raised by always married parents who get along with each other appears to be somewhat more advantageous for children than being raised by a single heterosexual mother or by a divorced

54. See, e.g., MacCallum & Golombok; Golombok et. al., *Children with Lesbian Parents*; Perry et al.; Wainright et al. Chan et al., *supra* note 35.

55. See, e.g., DAVID BLANKENHORN, FATHERLESS FAMILIES: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 25 (1995).

parent. 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 do better, on average, in school.

However, while research indicates that children do better, on average, when raised by two-always-married biological parents, it does not demonstrate that the gender of the two parents matters. In fact, 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 due to: (1) the advantages generated by the fact that two-parent families generally 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>56</sup> None of these advantages turn on the sex of the two adults. 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. Thus, while this body of research provides evidence that living with two biological parents may be preferable to 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. Reliance on this literature to justify policies against placement of children with gay adults is totally inappropriate.

There is some evidence that children living with their biological, heterosexual married parents do better than children living with two unmarried, biological heterosexual parents. The hypothesis is that cohab-

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56. 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 or the causes for the effects that many studies find. Many of the issues are discussed in *THE FUTURE OF CHILDREN ON MARRIAGE AND CHILD WELL-BEING*, which contains a particularly good summary by Paul Amato, who has written extensively about divorce and family structure. Paul Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well Being of the Next Generation*, 15 *FUTURE OF CHILDREN* 75 (2005). Amato concludes that "the estimated effects of parental divorce on children's development are modest rather than strong." Amato, 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 other than the gender of the parents. See MCLANAHAN & SANDEFUR, *supra* note 26; Sigle-Rushton & McLanahan, *supra* note 26, at 126-39.

iting couples make 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 is no consensus as to whether there are systematic differences. Moreover, this research is inapplicable to same-sex couples who do not have the option of marrying and therefore can only cohabit. There is no reason to believe that their cohabitation reflects a lack of commitment to their relationship.

Opponents of placing children with gay adults also refer to both theory and research that focuses on the role of fathers in child development. Some theorists believe that there are appropriate gender roles to which females and males should conform and that mother–father interactions may provide children with models of adult behaviors and relationships.<sup>57</sup> The fatherhood research looks at the different roles of each parent in heterosexual marriages. Some studies 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 the activities of fathers are critical to children’s socialization, especially to that of boys.<sup>58</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>59</sup>

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57. Much of classic psychoanalytic 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); Ross Parke et al., *Fathering and Children’s Peer Relationships*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT*, 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*, at 287.

58. See POPENO, *supra* note 33, at chs. V & VI (1996). Wardle argues that 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, *HOMOSEXUAL PARENTING*, *supra* note 3, at 21.

59. Michael Lamb, *The Role of the Father: An Introduction*, *supra* note 57, at 7. 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*

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. Many “fathers are critical” proponents appear to be concerned with the situation of male children 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, as well as mother, is a protective factor, lessening the chances that children will experience difficulties. But there is no evidence that children in general do better with a father and mother than with two mothers or two fathers.<sup>60</sup> It is not necessary to conclude that father involvement is unimportant in order to reject the claim that the law should disfavor gay adults in placement decisions.

## 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 promiscuous or other irresponsible sexual behavior; (b) that gay couples are likely to break up at higher rates than heterosexual couples; and (c) that gay adults have higher mortality rates and therefore are more likely to leave children parentless.<sup>61</sup>

There is evidence that gay men generally are likely to have more sexual partners than heterosexual men; this is true, even for men in committed relationships. This is not true for lesbians. But none of this research looks at couples with children. 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

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CARE FOR YOUR CHILD 18 (2000); *see also* Parke et al., *supra* note 57, at 330. 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. For example, *see* POPENOE, *supra* note 33, at 147.

60. 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 57, 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 35.

61. Wardle, *Adoption*, *supra* note 3, at 291. Wardle presumes that there is such a thing as homosexual parenting or homosexual lifestyle. Numerous studies show, however, that people whose love and sexual interests are to others of the same-sex have many different lifestyles and gay, like heterosexual, parents have many different parenting styles.

men with children are at higher risk of life-threatening disease than similarly situated heterosexual men.<sup>62</sup> There is some indication 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, although the available evidence is that differences are not great and the majority of couples with children have lasting relationships. There is substantial evidence that marriage and the presence of children significantly alters the behavior of heterosexual men, so the group differences may disappear as marriage and civil unions become more widely available.<sup>63</sup> There is no evidence, moreover, 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. While the relation between sexual orientation and stability is still unclear, there are a number of factors that are correlated with relationship stability, such as income, race, and the religious affiliations of the partners. The evidence does not provide a basis for singling out gay applicants with respect to family stability.

While critics of placing children with gay adults speculate about potential harm, the best evidence on issues of harm comes from the studies of children living with gay parents; as discussed, nothing in these studies supports the types of claims made by opponents of placing children with gay parents.

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62. While opponents of gay parents have criticized the research looking at children raised by gay parents, they often present totally unsupported 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 3, at 291. He offers no evidence in support of a seemingly indefensible prediction. Moreover, opponents refer to research that has been discredited, in particular the work of Paul Cameron & Kirk Cameron, such as *Homosexual Parents*, 31 *ADOLESCENCE* 757, 770-74 (1996). The American Psychological Association expelled Paul Cameron, and the American Sociological Association cited him for willfully misrepresenting research. See Biblarz & Stacey, *supra* note 41, 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. See *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).

63. 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.

#### **IV. Applying the Research in Establishing Policy: Burden of Proof**

Neither the research nor widely accepted theory provides a basis for policymakers 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. Nonetheless, advocates like law professor Lynn 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>64</sup> In essence, his contention is that supporters of placing 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.

A presumption against placement with gay adults 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 comparable two-parent families, differing only in gender composition, are likely to be small and irrelevant for policy purposes. 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>65</sup> 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>66</sup> Moreover, virtually every organization of professionals working with children and families has adopted the

64. Wardle, *Adoption*, *supra* note 3, at 291. 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).

65. Am. Psychological Ass'n, *Sexual Orientation, Parents, & Children: Policy Statement* (2004), available at <http://www.apa.org/pi/lgbcpolicy.parents.html>.

66. Am. Psychiatric Ass'n, *Adoption and Co-parenting of 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).

position that same-sex households should be treated equivalent to heterosexual households with respect to placement policies.<sup>67</sup> While the positions of such organizations are not incontestable, these are the best available reflections of professional and scientific consensus. The burden should be on those who seek to reject this level of consensus.<sup>68</sup>

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. 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>69</sup>

Moreover, 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>70</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

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67. 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. See Am. Psych. Ass'n, *supra* note 65; Am. Psych. Ass'n, *supra* note 66; Am. Acad. of Child and Adolescent Psychiatry, Policy Statement: Gay, Lesbian, and Bisexual Parents (1999), available at <http://www.aacap.org/page.ww?=publications+store&name=Policy+Statements>.

68. 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).

69. See Levy, *supra* note 7, §§ 28:1-28:4.

70. 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. For example, even if every research study finds no harm, it remains possible that future studies might find situations that could be thought of as harm. 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 51, at 16-21. But this would only make sense if there were good reasons to believe that preserving the status quo would benefit children. As I discuss throughout this article, there are many reasons why preserving the status quo is bad for children. In fact, in most jurisdictions acceptance of gay adults as parents is now the status quo.

structure on children.<sup>71</sup> So many factors affect children's well-being, designing studies that prove the impact of any particular factor is extremely difficult. Thus, any presumptions disfavoring gay adults are likely to remain permanent if they can only be changed by indisputable social science.

In fact, it is unlikely that the research situation will 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>72</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. 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. Thus, most research will come from studies that recruit families and thereby encounter the problems associated with using nonrandom samples.

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 transracial 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 noncustodial parent, or the impact of grandparent visitation.<sup>73</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 are subject to a different arrangement. Yet, legislatures have opted for joint custody, abandoned custodial preferences for mothers, and supported transracial adoption, basing their decisions on the best inferences that could be drawn from the limited research. The research looking at children with gay parents is at least as developed and reliable as the research relied on by legislatures in making policy in these other areas. The implications of the research are clear and provide the best basis for establishing policy.

Moreover, as I discuss in the next sections, allowing decision makers to generally consider sexual orientation when making placements is likely to have many negative consequences for children. Finally, in the

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71. See Amato, *supra* note 56, at 76–78.

72. It is from such large scale studies that evidence about the impact of variables such as income and family structure have been obtained.

73. See Brinig, *supra* note 68, at 141–43.

absence of any data indicating harm to children, placing the burden on the group that is being denied an opportunity, especially an opportunity as important to adults as parenthood, is unfair.

For all these reasons, the burden should be on those who claim that sexual orientation is relevant. Policymakers should presume that children will do as well raised by gay parents with heterosexual parents. There may, however, be some situations where an adult's sexual orientation may be relevant. I examine the implications of the research with respect to designing policies in each of the placement arenas in the remainder of this article.

## V. Adoption and Foster Care

### A. Adoption

#### 1. CURRENT POLICIES

All states regulate the adoption process. At present, five states have legislation or regulations that limit adoption by gay adults.<sup>74</sup> Legislation to ban adoption by gay adults has been introduced, but not passed, in at least seven other states. In contrast, at least ten states either provide for adoption by gay couples and individuals or bar discrimination based on sexual orientation.<sup>75</sup> In states without 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, mostly religiously affiliated, indicated that they would not place a child with a gay person.<sup>76</sup> There is little research indicating how the relevance of

74. In 1977, Florida enacted legislation prohibiting adoption by gay couples or individuals. More recently, Mississippi enacted legislation that bars adoption by gay couples, but not gay individuals. Utah and Virginia bar adoption by any unmarried couples, effectively precluding gay couples, but not gay individuals. Leslie Cooper & Paul Cates, *Too High a Price* 6 (ACLU Lesbian & Gay Rights Project 2d ed., 2006). 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). 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. The ability of gay adults to adopt also is affected by court opinions and administrative 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 26, at 32–36.

75. 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).

76. See David Brodzinsky et al., *Adoption Agency Perspectives on Lesbian and Gay*

adults' sexual orientation is assessed by caseworkers in the remaining agencies. 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>77</sup>

## 2. PROPOSED APPROACH

(a.) *Total Ban.* In terms of children's interests, legislative and agency bans on placing children with gay individuals are irrational and harmful to children. Currently, over 100,000 children await adoptive homes; there are not anywhere near enough individuals or families wanting to adopt these children.<sup>78</sup> Many hard to place children are adopted by gay individuals or couples. Obviously, barring adoption by gay individuals or couples will mean that fewer children will be adopted. Child development spe-

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*Prospective Parents: A National Study*, 5 ADOPTION Q. 5 (2002); See also EVAN B. DONALDSON, ADOPTION INSTITUTE, ADOPTION BY LESBIANS AND GAYS: A NATIONAL SURVEY OF ADOPTION AGENCY POLICIES, PRACTICES, AND ATTITUDES (2002).

77. See EVAN B. DONALDSON, ADOPTION INSTITUTE, EXPANDING RESOURCES FOR CHILDREN, *supra* note 4, at 4, 11–12. There are some agencies generally considered gay-friendly to which gay couples, especially men, look for children.

78. Administration for Children & Families, U.S. Dep't of Health & Human Services, *The AFCARS Report: Preliminary FY2003 Estimates as of April 2005*, available at [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). Most of these children entered foster care through the child welfare system. In most states, there are two different processes by which children are adopted—*independent adoptions* and *agency adoptions*. The majority of 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. The state role in these 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 chose 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.

cialists all agree that adoption is the best means of promoting the well-being of most children who cannot be reunited with their parents, since it provides children with the most committed caretakers, the greatest stability, the most emotional security, and the most legal protection.<sup>79</sup> A preference for adoption is recognized in federal law and is the public policy of every state, including the states with bans.<sup>80</sup> All leading professional child-welfare organizations oppose exclusion of gay men and lesbians as potential adoptive parents.<sup>81</sup>

The irrationality of a total ban is reflected in other policies in states with bans. For example, Florida banned adoption by homosexuals in 1977 following an antigay crusade led by singer Anita Bryant who argued that homosexuality was immoral. Yet, Florida allows gay individuals to become foster parents and legal guardians of foster children. Many gay foster parents raise children from birth until adulthood. Obviously, the

79. 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). 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. In contrast, William Duncan, a leading opponent of adoption by gay individuals writes that the purpose of adoption law is “fashion adoption in imitation of procreation.” Duncan, *supra* note 30 at 788–89; no state makes this the goal of adoption. Duncan rejects the idea that a child’s best interests are met if she is ensured the “best” available emotional, physical, and economic context. He makes no effort to address the question whether children are better off left in foster care or in a residential institution if an “ideal” family is not available. Yet, Duncan accepts adoption by single individuals, 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.

80. See Adoption Assistance and Child Welfare Act of 1980, *supra* note 15; *The Adoption and Safe Families Act of 1997*, *supra* note 15; FLA STAT. ch. 39.001(1)(h); 39.621 (2).

81. 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/lgbcpolicy/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, available at <http://headlines.agapepress.org/archive/7/afa/292003e.asp>. American College of Pediatricians, *Homosexual Parenting: Is It Time for Change?* 2004, available at <http://www.acped.org/?CONTEXT=art&cat=10005&art=50&BISKIT=2684987796>.

Florida legislature and placement agencies believe that these homes are suitable. If a child is to be raised by a gay family, it is irrational not to allow the child to be adopted by that family.

The Florida policy has been challenged in court a number of times; it was recently upheld by the Eleventh Circuit Court of Appeals in the case of *Lofton v. State of Florida*.<sup>82</sup> The Florida Attorney General argued that the ban was justified in order to keep open the possibility of adoption by a heterosexual couple at some point in the child's life. This position was accepted by the court as a rational basis for Florida's ban. Regardless of whether this claim is sufficient to pass muster under a rational basis review of the statute's constitutionality, it is indefensible policy from a child-welfare perspective. First, it is generally agreed that adoption by suitable foster parents is best for children who often have bonded with these parents and should not be moved to a new home. Moreover, delay in placing a child for adoption decreases the ultimate likelihood of adoption. This was recognized by Congress in passing the Multi-Ethnic Placement Act (MEPA) in 1994, legislation that addressed transracial adoption.<sup>83</sup> It was the practice, if not the official 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 for 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 without being adopted.

There was, and remains, substantial debate regarding the desirability of racial matching. But, even those who favored a preference for same-race placements recognized that delay of adoption placement in the hope that a same-race family would materialize does harm children. Often, delay means denial of adoption. Delay often causes decreases in a child's emotional health, making adoption less likely. Moreover, there is little reason to believe that for hard-to-place children, same-race adoptive families will materialize. Therefore, MEPA bars states from delaying placements in order to find a so-called more "suitable" home—that is, a same-race

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82. *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).

83. The Multi-Ethnic Placement Act of 1994, as amended, P.L. 103–382 [42 U.S.C. § 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.

home. As MEPA recognizes, denying a child a good adoptive home on the possibility that a "better" home will become available at some point goes against every element of good adoption practice.

Mississippi bars gay couples, but not gay individuals, from adopting. Why bar gay couples? It cannot be because the legislature thought that children do best with single parents. Mississippi law prefers heterosexual married couples over heterosexual individuals as candidates for adoption. Utah and Virginia ban adoption by unmarried couples, regardless of sexual orientation, but not by gay or heterosexual individuals. The ostensible rationale is that cohabiting couples have higher breakup rates than married couples and that such breakups are difficult for children. Yet, 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. A more sensible, child-oriented policy would be to allow agencies to consider likely stability on a case-by-case basis. In fact, the policy would only make sense if it was better, on average, for children to remain in foster care or a residential placement, or with a single parent, than in two-parent homes with unmarried parents because some of them may breakup. This is highly unlikely.

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. It 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.

*(b.) Consideration of Sexual Orientation When Alternative Placements Are Available.* Should sexual orientation be viewed as a factor in choosing among families where there is more than one family seeking to adopt a child? If so, how? 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. Think again about Jennifer and Linda. Therefore, a presumption against placement with gay adults is not justified, even when a heterosexual family is available. Instead, agencies should treat each child individually, focusing on his or her specific needs and the suitability of specific caregivers in meeting those needs.<sup>84</sup>

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84. This is the position of the Child Welfare League of America, the preeminent professional organization dealing with children in the child welfare system. According to the League,

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 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 “nonnormal” family. As previously discussed, children with gay parents will face challenges that they would not face if raised in a heterosexual household. Some, perhaps most, ultimately may see these challenges as having had a beneficial impact. But this will certainly not be true for all children. While facing such 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.

Nonetheless, there are major problems with a preference for heterosexuals, even if limited to situations where adoptive families reasonably comparable in all respects except sexual orientation are available (which may be a rare event). In fact, there is a strong case for discouraging agencies from considering sexual orientation at all. Choosing a normality standard is problematic. What factors should be considered as nonnormal? 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.

In addition, policymakers need to examine how a given policy is likely to be implemented. Adoption placements involve highly discretionary decisions by workers in public and private adoption agencies. Under current practices, most agencies instruct their staffs to try to match the child with the family they consider most suitable. A staff member reviews the characteristics of the pool of families that have applied to the agency for a child. The worker considers any preferences a family has with respect to the type of child it wishes to adopt. The agency then assesses the adults' capacity to meet any special needs the child might have, for example, their ability to raise a child with a disability or a child of a different race or ethnicity. A final decision should involve weighing multiple factors, including family structure, marital status of couples, education levels, income,

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“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 lifestyle, 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).

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 the needs of the specific child should be the focus.

At their best, placement decisions reflect sound clinical judgments by experienced, well-trained adoption specialists, using their clinical experience. 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 to the task 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>85</sup>

Allowing consideration of sexual orientation on a case-by-case basis raises another problem. A major reason the sexual orientation of the family might be considered relevant is because of the stigma the children may experience. 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 policymakers allow community bias to influence policy?<sup>86</sup>

This issue was considered by the U.S. Supreme Court in the case of *Palmore v. Sidoti*,<sup>87</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

85. The historical record is not encouraging. Beginning in the early 1900s, 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, 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. While agency practices have become more sophisticated over time, worker competence and attitudes are still highly variable. See BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION*, at chs. 2–3 (2002). There are many other books and articles describing these practices. See Hong, *supra* note 74, at 3 n. 7, 4 nn. 8–9.

86. 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.

87. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

judge in rural Florida transferred custody to the father to protect the child from the social stigma that he believed would accompany living with an interracial family.<sup>88</sup> The Supreme Court reversed, holding that a court cannot ratify such prejudices, even if this requires disregarding one aspect of the child's best interests. The Justices 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>89</sup> and living in an environment free of these stresses might benefit the child. Nonetheless, it 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>90</sup>

Due to the legal differences between adoption and custody,<sup>91</sup> and the special constitutional concern with distinctions based on race,<sup>92</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 on where they live, children could face stigma and teasing based on their families' religion, race, or cultural practices. It is highly undesirable to allow community biases against any groups to 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, whether a prospective parent's sexual orientation is relevant to the best interests of the child. Case-

88. 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

89. *Palmore*, 466 U.S. at 433.

90. *Id.*

91. The rights of an existing parent are accorded substantial protection, whereas 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).

92. 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 factor but not the only factor in determining whether foster parents may adopt).

workers or courts could consider 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 policymakers. Children are voiceless and easily made victims of adults' agendas. They have no ability to avoid the costs. This is especially true of children 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>93</sup> Legislatures therefore should 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. Foster children generally benefit when adopted by their foster parents, thereby providing stability and continuity in their lives. In addition, nondiscrimination laws, like those found in a number of states, should be adopted. 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>94</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 nor-

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93. 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. Dep't Health and Human Services, Protection from Racial Discrimination in Adoption and Foster Care, Summary of Selected OCR Compliance Activities, available at <http://www.hhs.gov/ocr/mepa/complianceact.html>.

94. 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 74, 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).

malcy 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 consider in choosing the prospective adoptive home. When a gay applicant(s) is passed over, the agency could be required to document the reason(s), 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 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 difficult to monitor whether agencies in fact weigh the relevance of sexual orientation appropriately or end up giving it too much weight. It generally is 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 attempts to enforce MEPA have demonstrated.<sup>95</sup> Therefore, letting the current low-visibility process remain may be best. Gay adults already are permitted 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. While the laws in Florida, Mississippi, Utah, and Virginia should be repealed, the current process might be satisfactory elsewhere.

## *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 because their parents are unable to adequately care for them.<sup>96</sup> Child welfare agencies and courts must choose the family in which the child will be placed. Foster placements are not intended to be permanent. The goal is to reunify the child and parent when possible. However, if 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.

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95. Cindi Andrews, *Report Finds Rights Were Violated in Interracial Adoption Case*, THE CINCINNATI ENQUIRER, Oct. 26, 2003.

96. About ten percent are placed in group homes or other residential facilities, not foster family homes.

At present, no state formally excludes gay individuals as foster parents; Utah precludes placement of children with unmarried couples, which effectively precludes same-sex couples.<sup>97</sup> Arkansas enacted a ban in 1999, but the ban has been declared unconstitutional, as was a similar policy in Missouri.<sup>98</sup> 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, they generally are older; only four percent are infants; over forty percent are teens.<sup>99</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.

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 hard-to-place children needing adoptive homes, most of whom 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.

97. UTAH CODE ANN. § 78-30-1 (2005).

98. *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). Missouri recently settled a similar suit. Policy on gay foster parents is unclear in Nebraska.

99. U.S. Dep't of Health and Human Servs., *The AFCARS Report: Preliminary FY 2003 Estimates as of April 2005 (10)* (2005).

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 adoption, however. As noted, children tend to enter foster care at older ages and 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 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 age ten. 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, or other characteristics, 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.

## **VI. Custody Disputes**

### *A. 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. The courts in many states have established policies through case law, however. In a few states, courts have adopted rules that specifically disfavor gay parents both with respect to custody and visitation.<sup>100</sup> Other courts have created a

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100. For an extensive discussion of the statutes and case law, see Julie Shapiro, *Custody and*

presumption that placement with a gay parent who is in a relationship is harmful to the child; the gay parent bears the burden of overcoming this presumption. 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. In some states, 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.

The majority of state courts have moved away from presumptions or assumptions that a parent's homosexuality or same-sex relationship 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. Many courts now seem to focus on the quality of the parent-child relationship, not on sexual orientation. However, even under the *nexus* test, courts 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. For example, in recent years, courts have ruled that the likelihood of harm can be inferred if a gay parent openly engages in affectionate conduct with a partner, including handholding or kissing, or from the fact that the gay parent shared a bed with his partner,<sup>101</sup> and have changed custody from a mother to a father because her child attended the mother's commitment ceremony.<sup>102</sup> These courts expressed concern that the children will be harmed because the parent will be stigmatized or that the child will be attracted to homosexuality.

Indeed, some judges treat sexual orientation as more important than any other aspect of the child's home environment. For example, in a 1997 Missouri decision, an appellate court transferred custody to a father because the mother was in an open same-sex relationship. In dissent, one judge noted:

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*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 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*].

101. 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).

102. Hertzler v. Hertzler, 908 P.2d 946, 951 (Wyo. 1995).

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>103</sup>

It has long been recognized that making custody decisions under a general best-interest standard is problematic. 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>104</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. The positions taken by trial court judges may influence the assessments of court-appointed evaluators. Thus, court-established policies that place inappropriate emphasis on a parent's sexual orientation can have a significant negative impact on many children.

## *B. Proposed Approach*

### 1. FACTORS RELEVANT TO DESIGNING CUSTODY RULES

In considering the potential relevance of an adult's sexual orientation, it is critical to focus on the overall values that are reflected in current poli-

103. *G.A. v. D.A.*, 745 S.W.2d 726, 729-30 (Mo. Ct. App. 1987).

104. See Levy, *supra* note 7, § 3:8. For an very interesting discussion of trial court practices, see Kimberly Richman, *Judging Knowledge: The Courts and Arbiter and Purveyor 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.) 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).

cies related to custody decisions. With respect to initial custody determinations, all states instruct courts to select the custodial arrangement that furthers the child's "best interests." 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. This presumption reflects the judgment that a significant relationship with both parents generally is best for children, absent severe parental conflict. 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 best interest to have regular contact with a noncustodial 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.

To preserve continuity of care and to discourage continued litigation over children, most state statutes also 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. When a nonparent 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 when the nonparent has cared for the child. It is not enough to claim that living with the nonparent would be in the child's best interests.

The relevance of sexual orientation should be assessed in light of these policies. In addition, policymakers must consider that the rules established by legislatures and courts with respect to factors that may be considered by decision makers will influence parents' behaviors prior to the divorce, during the divorce, and after an arrangement has been established.<sup>105</sup> Custody rules 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 breakups involving a gay parent, since a nongay parent may react very negatively to a previous partner's 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>106</sup> Many children

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105. 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).

106. For general descriptions of the custody process, see Levy, *supra* note 7, §§ 1:1-1:5;

experience loyalty conflicts and a sense of guilt about “siding” with one parent. Parents regularly try to influence the child’s attitude towards the other parent. 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 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>107</sup> The children may be 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.

In light of these factors, caution is urged in 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. 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. The nature of the child’s 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. It is critical to keep this relationship at the center of all determinations.

Moreover, 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 care giving, 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.

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ALI, *supra* note 3, § 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).

107. Levy, *supra* note 7, § 25.1; Johnson & Campbell, *supra* note 106, at ch. 8.

Of special concern, such rules may encourage nongay 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>108</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. Because the child starts with a relationship with each parent, anything that significantly alters that relationship can have a large effect on the child. The divorce itself is usually painful for the child and requires significant adjustments. When the divorce is accompanied by, or 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>109</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

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108. The problem of parents trying to influence children is common in many divorces, not just those involving gay parents.

109. 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 35; 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 SMITHSTUD. 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 homosexuals). 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.

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>110</sup> 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 have identified a number of factors that should be considered by courts because they are important to children's well-being such as 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 noncustodial parent. 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. Moreover, a presumption would encourage heterosexual parents to contest 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 caretaking abilities.

### 3. THE NEXUS TEST

In part to avoid these problems, many courts have adopted a nexus test. This has the clear advantage of directing trial court judges to focus on the alleged impact of the parent's sexual orientation on the child, and not to base decisions on the judges views of homosexuality. Still, there are significant problems with this test. 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. Singling out sexual orientation, and no other parental characteristic, implies that a parent's sexual orientation is of special concern. It makes it too easy for judges to speculate that any behavior problems a child may be exhibiting result from the gay parent's sexual orientation.<sup>111</sup> It can encourage heterosexual parents to disparage the gay parent's sexuality in the presence of the child. Demonstrating a nexus requires a potentially lengthy and intrusive evaluation process on the impact of the parent's sexual orientation on the child that can be quite harmful in and of itself. The nexus test certainly constitutes an improvement over the prior situation.

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110. Cf. Wardle, *Homosexual Parenting*, *supra* note 3, 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").

111. This has been recognized recently by a number of appellate courts. See, e.g., *In re Marriage R.S. & S.S.*, 677 N.E.2d 1297 (Ill. App. Ct. 1996).

Nonetheless, even if trial courts are instructed to consider only allegations of current harm, the nexus test is undesirable. It should be abandoned.

#### 4. PROPOSED APPROACH

Rather than a special test for disputes involving gay parents, courts should apply the same standards as are applied in all other cases.<sup>112</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. These factors also should be central in disputes involving gay parents. 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>113</sup>

Under current laws, if one parent is granted primary physical custody, the goal is to 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. In fact, courts generally have been very reluctant to limit or deny visitation, except for proven serious risk to the child. 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. In contrast, courts have been reluctant to order a parent not to expose the child to particular religious views, even when these conflict with the views of the primary custodian. 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>114</sup> This is not to say

112. 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 2, at 299–307.

113. Levy, *supra* note 7, § 3:8–3:9. The American Law Institute also reached this conclusion. See ALI, *supra* note 2, at 2.12 & cmt. e.

114. 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 noncustodial parent, even if the

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, for example, sexual relations in front of the children, should be considered when the behavior impacts the child. But it is the particular behaviors, not the parent's sexual orientation or relationships that are relevant.

Finally, no special rules should be applied with respect to requests for modification of custody. Modification should be discouraged.<sup>115</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 toward the other and may have little to do with the children. 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 community stigma or their difficulty in accepting the parent's sexual orientation. Some children indicate a preference to live with the heterosexual parent; other children may not want to make a choice, but may indicate significant concerns about the parent's homosexuality.<sup>116</sup> A number of states have legislation requiring courts to consider the child's preference, at least with respect to adolescents.<sup>117</sup> Child welfare experts

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child is uncomfortable during the visit. *See* Levy, *supra* note 7, § 12.5; ALI, *supra* note 2, § 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.

115. 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).

116. 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).

117. 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. *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).

are divided regarding the weight to be given children's views. Some 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>118</sup>

I believe that the views of children, especially older children, are relevant and that a child should not be forced to live with a parent when this is very painful or difficult for the child. However, a special rule in cases involving a gay parent is inappropriate. There are many reasons that a child does not want to live with a parent. For example, a child may not like a parent's religious beliefs. Yet, courts are very reluctant to listen to children who do not like one parent's religious beliefs. 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. Moreover, it must be stressed that it is the child's views, not the parent's sexual orientation, which becomes the relevant factor.

Courts need to be vigilant in adopting rules and procedures that discourage each parent from trying to turn a child against the other parent. A general problem in many divorce situations, 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>119</sup> There are now some very good guidelines for judges with respect to practices that can ameliorate conflict in such situations.<sup>120</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>121</sup> In such situations, there needs to be a very careful evaluation of the child's well-being and the causes of any disturbances. Taking children to gay religious services is not different than tak-

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118. 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 Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988), with Levy, *supra* note 7, §§ 6.3–6.8.

119. The particular problems faced in adopting sound rules in cases involving gay parents are discussed in Doolittle, *supra* note 116.

120. See Levy, *supra* note 7 *passim*; 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). Some judges have rejected children's desires when they believe that they have been improperly influenced or are making a very poor decision. See MAB 134 Misc. 2d 317 (N.Y. 1987).

121. *Marlow v. Marlow*, 702 N.E.2d 733 (Ind. Ct. App. 1998).

ing 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. Perhaps the child was under intense pressure from the other parent to turn against the gay parent.

The issue of how to treat the actual impact of stigma is challenging in the case of younger children. Courts certainly should not be able to speculate about the potential for stigma. 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>122</sup> the Ohio Supreme Court considered a custody dispute between parents of differing religions. The mother, a Jehovah's Witness, prevented the child from participating in various extracurricular activities and from socializing with non-Witnesses. The father argued that subjected the child to ostracism. Suppose the evidence showed that the child felt stigmatized. Should this be a basis for granting the father custody?

I believe the answer is no. The same is true with respect to sexual orientation. Custody situations differ from adoption. Despite the pain some children may experience from stigma, any other policy is likely to encourage heterosexual parents<sup>123</sup> to contest custody issues and to try to influence the child's view of the gay parent. 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 their heterosexual parent, will benefit most children whose parents

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122. See *Pater v. Pater*, 588 N.E.2d 794 (Ohio 1992). This situation could arise in many other contexts. Suppose two parents are divorcing; one parent is Christian, the other Jewish. The couple lives in an area where there are few Jews, and many in the community believe that Jews are immoral.

123. The same considerations apply, even more strongly, to custody challenges by nonparents. The law in all states places a heavy burden on nonparties 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). To discourage disputes, the standard should be one of substantial detriment. See ALI, *supra* note 2, at § 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.

are contesting, or considering contesting, custody issues.<sup>124</sup> Most 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.

## VII. Access to Assisted Reproductive Technologies

### A. Current Policies

At present, no legislation prevents lesbians or gay men from using assisted reproductive technologies (ART). However, some aspects of existing law and practice make it more difficult for gay individuals or couples to create families in this manner.<sup>125</sup> The absence of laws requiring physicians to provide insemination on a nondiscriminatory basis means 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 nonbiological mother or father to adopt a child born through donor insemination or surrogacy, or to automatically be deemed parents, also are a major barrier to the full use of ART by gay couples; 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>126</sup> There may be reasons to regulate some aspects of

124. This is the position adopted by ALI. See ALI, *supra* note 2, at § 2.12(d) & cmt. e. The comments, however, do not discuss the rationale for adopting this position. As a practical matter, if a child is evidencing significant behavioral problems, some type of evaluation generally will be appropriate 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 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.

125. For a description of the various legal impediments, 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, 162–73 (2000).

126. See, e.g., Alvaré, *supra* note 16, at 11–13; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV.

ART based on one or more of these concerns. However, these factors are the same regardless of the sexual orientation of the applicant. With respect to sexual orientation, policymakers 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*

As previously discussed, barring access to gay adults does not benefit children. I examine here whether there are other societal interests that would justify policies limiting access to heterosexual couples or individuals. It is argued that limiting access to married couples would reduce the number of potential legal or ethical problems associated with ART. A few commentators also contend that married, infertile couples have the greatest "right" to have children.<sup>127</sup>

These contentions are not persuasive. 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>128</sup> 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. It 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 the 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 suboptimal. 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>129</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>130</sup> Those who can afford it

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83 (2000).

127. Alvaré, *supra* note 16, at 47–51, 62.

128. 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.

129. In fact, because ART is expensive, the parents are likely to be of reasonably high incomes. 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.

130. Many women perform insemination at home, with sperm acquired from known donors

will travel to states or countries that grant access, creating more inequality of opportunity.

In a society that values diversity, there is no moral case for preventing gay individuals or couples from having children through ART, absent 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. 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 nonbiological mother or father to become the legal parent of the child.

### **VIII. Conclusion**

I believe that a truly child-focused analysis leads to the clear conclusion that an adult's sexual orientation generally is irrelevant with respect to placement decisions. Children need homes where they are wanted and receive love and steady care, qualities that are not related to the adult's sexual orientation. Consideration of sexual orientation in placement decisions is likely to be harmful to children. All of the evidence supports this conclusion.

Unfortunately, the interests of children often get lost in debates that really are about adults' visions of the good society. I have tried to present information and analyses that will help policymakers 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. Policymakers 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. Hopefully, this trend will continue. Both children and gay adults will be the beneficiaries.

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or donors contacted via the Internet or sperm banks. In five states, however, only doctors may inseminate women. Lesbians also could choose to have a child through intercourse.