


10 Years Out of Step & Out of Line: Florida's Statutory Ban of "Lesbi-Gay Adoption" Violates the Adoption and Safe Families Act of 1997 (ASFA)

Cynthia G. Hawkins-León

Anesha Worthy

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/rrgc>

 Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Cynthia G. Hawkins-León, & Anesha Worthy, *10 Years Out of Step & Out of Line: Florida's Statutory Ban of "Lesbi-Gay Adoption" Violates the Adoption and Safe Families Act of 1997 (ASFA)*, 8 U. Md. L.J. Race Relig. Gender & Class 71 (2008).
Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol8/iss1/6>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

10 YEARS OUT OF STEP & OUT OF LINE: FLORIDA'S STATUTORY BAN OF "LESBI-GAY ADOPTION"[†] VIOLATES THE ADOPTION AND SAFE FAMILIES ACT OF 1997 (ASFA)

CYNTHIA G. HAWKINS-LEÓN^{*} AND ANESHA WORTHY^{**}

I. INTRODUCTION

The U.S. child welfare and foster care systems have both received considerable criticism. These criticisms include, for example, that "if a child survives foster care, it's not because of the system, it's despite the system"¹ and "if the nation had deliberately designed a system that would. . . abandon the children who depend on it, it could not have done a better job than the present child welfare system."² Florida, however, faces additional challenges regarding lesbi-gay individuals' adoption of children—which concern the sexual orientation and marital status of their relationship.

A. Florida's Notable Lesbi-Gay Adoption Scenarios

The state of Florida granted Curtis Watson and his partner "long-term, non-relative" custody over a set of sisters who had entered the foster-care system at an early age.³ When the sisters came to live

[†] Thank you to Professor Lynn D. Wardle, Bruce C. Hafen Professor of Law, J. Reuben Clarke Law School, Brigham Young University, who coined this term in a presentation at Stetson University School of Law in 2005. See generally, Lynn Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511 (2005).

^{*} Cynthia G. Hawkins-León, Professor of Law, Stetson University College of Law. J.D., Harvard University Law School; B.A., Wellesley College. The author would like to thank Dean Darby Dickerson for the institutional support over the years, and Professors Ruth Fleet Thurman and Darryl C. Wilson for their input and advice. Finally, the author must thank her family, particularly her son Maurice, for their continued patience and moral support.

^{**} Anesha Worthy, Staff Attorney, 2nd District Court of Appeal of Florida. J.D., Stetson University College of Law, 2008, Senior Associate, Stetson Law Review, 2007-2008; B.A. & B.S., University of Florida, 2001.

1. Megan O'Laughlin, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Termination vs. Reunification*, 51 VAND. L. REV. 1427, 1434 (1998).

2. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 638 (1999).

3. Curtis Krueger, *Gay Dads Get Daughters Plus Praise from Judge*, ST. PETERSBURG TIMES, Sept. 9, 2004, at A1.

with Watson, they exhibited extreme behavioral problems.⁴ Watson and his partner patiently worked with the girls, and their behavior improved.⁵ The girls grew to love Watson and his partner, and called them “Dad” and “Daddy.”⁶

Despite the compatibility between Watson and the girls, caseworker Dana Curley actively looked for an adoptive home for the children.⁷ As a homosexual, Watson was ineligible to adopt the sisters.⁸ Although Curley put forth her best effort, she could not find prospective parents willing to adopt both girls.⁹ By this time, Watson and his partner had been caring for the girls for over a year.¹⁰ The girls were flourishing and Curley decided that it would be best for them to remain¹¹ in Watson’s home.¹²

Watson and his partner received long-term, non-relative custody of the girls,¹³ a step short of adoption that would allow the girls to stay with them permanently — at least, that is what they thought. Shortly after the Florida Department of Children & Families (DCF) granted custody, it reconsidered the decision.¹⁴ The State said that Curley had not ruled out all available permanency options.¹⁵ After

4. *Id.* One sister was so “violent and temperamental” that she had changed foster homes seventeen times within two months. *Id.* According to Watson, she cursed at him and his partner and would “flip” them off. *Id.*

5. Watson testified that he and his partner responded to the girls’ behavioral problems by giving them time-outs when they misbehaved, assigning chores, tutoring them, and taking them to church. *Id.*

6. During testimony in the case, Watson read from a letter written by the older girl. In the letter she told him that she loved him and said, “You love me when I am bad and when I am good. You gave me a home when no one would. I’m here forever.” *Id.*

7. Curtis Krueger, *Gay Foster Parents Fight for Custody*, ST. PETERSBURG TIMES, Aug. 24, 2004, at B3 [hereinafter Krueger, *Gay Foster Parents*]. The caseworker testified that she expected the girls’ placement with Watson and his partner to be temporary and searched for an alternate home for the girls because she believed they needed a mother. *Id.*

8. FLA. STAT. § 63.042 (3) (2002).

9. Curtis Krueger, *Gay Foster Parents Fight for Custody*, ST. PETERSBURG TIMES, Aug. 24, 2004, at B3.

10. *Id.*

11. Witnesses testified that the girls’ behavior had “improved dramatically” and the clinical psychologist appointed to evaluate them testified that even their emotional and intellectual functioning had improved during their stay with Watson and his partner. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Former caseworkers suggested the state had not worked hard enough to find an adoptive home for the girls and a prospective adoptive parent testified that caseworkers rejected her application when she offered to adopt the girls. Curtis Krueger, *Gay Dads Get Daughters Plus Praise from Judge*, ST. PETERSBURG TIMES, Sept. 9, 2004, at A1.

15. *Id.*

a lengthy and tumultuous legal battle, Sixth Circuit Judge Irene Sullivan allowed Watson to retain custody of the girls.¹⁶

Similar to the difficulty that Watson faced, Steven Lofton and his partner Roger Croteau endured a lengthy legal battle when state employees changed their minds about permanently placing a foster child in their care.¹⁷ Their foster son, John Doe, came to live with them when he was two months old.¹⁸ John was born HIV-positive, but eventually sero-reverted¹⁹ and remained HIV-negative.²⁰ Although Lofton could not adopt John because of the state's ban on lesbi-gay adoption, the Department of Children and Families (DCF) did not recruit any prospective parents and told Lofton that John could stay with him permanently.²¹ DCF also gave Lofton permission to take John when Lofton and his partner relocated to Oregon.²² Lofton cared for John for almost ten years when DCF changed John's permanency plan from long-term foster care to adoption.²³ The change meant that John would have to leave Lofton once the state found an adoptive family for him. Lofton then filed suit challenging the constitutionality of Florida's ban on lesbi-gay adoption.²⁴ The United States Court of

16. *Id.*

17. Lofton Aff. ¶ 22 (1999), available at http://marriagelaw.cua.edu/law/cases/fl/lofton/trial/lofton_aff.pdf.

18. Lofton Aff. ¶ 7 (1999), available at http://marriagelaw.cua.edu/law/cases/fl/lofton/trial/lofton_aff.pdf (last visited Jan. 21, 2009); *Kearney*, 157 F. Supp. at ¶ 7.

19. Sero-reversion is when the HIV virus is no longer detected in the blood of a person who previously tested positive for the HIV virus. N.J. Dept. Health & Human Services, *N.J. Health Statistics 1999*, <http://www.state.nj.us/health/chs/stats99/cd.htm> (last visited Sept. 22, 2006). Because infants are born with their mother's antibodies, infants born to HIV positive mothers generally test positive for HIV. Harvard Sch. Pub. Health Aids Initiative, *The Aids Rep.*, http://www.aids.harvard.edu/news_publications/tar/fall93/fall93-5.html (last visited Sept. 22, 2006). If the mother's antibodies leave the infant's system and the infant tests HIV negative, the infant is said to have sero-reverted. *Id.*

20. *Id.* When the state placed John with Lofton and Croteau, he was sick. Not only was he HIV positive, but he also had cocaine and marijuana in his system. Br. of App. at 8, *Lofton v. Kearney*, 157 F. Supp. 1372 (2001).

21. *Lofton v. Kearney*, 157 F. Supp. 1372, ¶¶ 17, 18 (S.D. Fla. 2001). John became eligible for adoption in 1994. *Id.* The state denied Lofton's application to adopt him due to his sexual orientation, but allowed John to remain in his home. *Id.* at ¶10. The state briefly set the goal of John's placement plan as adoption, but specifically changed the goal to long-term foster care in order to allow John to remain with Lofton. *Id.* at ¶ 20.

22. *Id.* at ¶ 19 (2001)(stating that DCF granted Lofton permission to relocate to Oregon with John finding that it was in John's "manifest best interest to go").

23. *Id.* at ¶ 22 (2001). Lofton said a caseworker notified him via telephone that the state changed John's permanency goal to adoption and asked him if he knew anyone who would be interested in adopting him. *Id.*

24. *Id.* Doug Houghton, a gay man wishing to adopt the child he had been caring for since the age of four, and gay foster parents, Layne Smith and Daniel Skahen, were also plaintiffs in the suit. *Id.*

Appeals for the Eleventh Circuit upheld the ban²⁵ and Lofton could not adopt John.

Lofton and Croteau also cared for Frank, a foster child who had lived with them since he was eight months old.²⁶ Like John, Frank relocated to Oregon with Lofton and Croteau.²⁷ Eventually, DCF forced Frank to return to Florida, threatening to cut off his foster-care benefits unless Frank returned to the State.²⁸ Frank testified before the Florida Senate's Children and Families Committee and characterized the move from the only family he had known since infancy as destabilizing.²⁹

B. Florida's Continuing Foster-Care Dilemma

In 2005, over 30,000 children were in foster care in Florida.³⁰ Over 4,000 of those foster children were eligible for adoption.³¹ The legislature intended for foster care to be a temporary place for a child until the State found a permanent home.³² However, in Florida, children typically stay within the foster-care system for nearly twenty-four months before the State places them in a permanent home,³³ falling far short of Florida's one-year goal.³⁴

Recognizing a nationwide problem of foster-care stays, Congress passed the Adoption and Safe Families Act (ASFA) in 1997.³⁵ With the goal of preserving the child's health and safety, the

25. See generally *Lofton v. Sec'y Dept. Children & Family Serv.*, 358 F.3d 804 (11th Cir. 2004).

26. Lofton Aff. ¶ 4 (1999), available at http://marriagelaw.cua.edu/law/cases/fl/lofton/trial/lofton_aff.pdf (last visited Jan. 21, 2009).

27. *Id.* at ¶ 8; Stephen L. Goldstein, *Lily-Livered Lawmakers*, SUN-SENTINEL, Apr. 12, 2006, at A19. Frank was almost fourteen when Lofton and Croteau began battling to keep John. Lofton Aff. ¶ 4.

28. Stephen L. Goldstein, *Lily-Livered Lawmakers*, SUN-SENTINEL, Apr. 12, 2006, at A19. The loss of foster care benefits would have been a difficulty for the family. *Id.* Lofton and Croteau specifically fostered children with HIV or AIDS and Lofton had quit his job as a pediatric AIDS nurse to care for the children full time. See generally *Lofton v. Kearney*, 157 F. Supp. 1372 (S.D. Fla. 2001).

29. Stephen L. Goldstein, *Lily-Livered Lawmakers*, SUN-SENTINEL, Apr. 12, 2006, at A19. Frank also testified that his foster sister, who was also forced to return to Florida, subsequently "got into a lot of trouble." *Id.*

30. The Children's Defense Fund, *Child Welfare in Florida* (2005).

31. Florida Dept. of Children & Families, *Adoption*, available at <http://www.dcf.state.fl.us/adoption/faq.shtml> (last visited Apr. 21, 2006).

32. FLA. STAT. § 39.001(1)(h).

33. The Children's Defense Fund, *Child Welfare in Florida* (2005).

34. FLA. STAT. § 39.001(1)(h) (2002).

35. Adoption and Safe Families Act of 1997, H.R. 867, 105th Cong. (1st Sess. 1997).

Act focuses on finding adoptive families or other permanent placements for children in the foster-care system.³⁶ A primary goal of the ASFA is to decrease the time children spend in the foster-care system by establishing deadlines for state agencies to find permanent homes for children who enter foster care.³⁷ In Florida, however, lesbian and gay individuals are not permitted to adopt children.³⁸ Unfortunately, this blanket ban disadvantages more than 4,000 children awaiting adoption in Florida's foster-care system by failing to take into account whether the health and safety of those children would be preserved in lesbian and gay homes.³⁹

This article argues that Florida's ban on lesbi-gay adoption⁴⁰ is inconsistent with ASFA. Excluding lesbian and gay individuals from eligibility to adopt children directly conflicts with ASFA's mandate to quickly find safe, permanent homes for children in foster care. Repealing the law that bans lesbi-gay adoption would help Florida meet ASFA's goal by increasing the number of potential adoptive parents and, therefore, the likelihood of finding permanent homes for children.

Following this Introduction, Part II gives a cursory overview of the history and development of foster care and adoption in the United States and Florida, and then briefly highlights the history, policies, and rationales behind ASFA. Part III argues that repealing the ban on lesbi-gay adoption is consistent with ASFA because: (1) the number of potential adoptive parents would increase; (2) children are equally healthy and safe with gay and lesbian parents since lesbi-gay adoption is a rising national trend; and (3) children would be more likely to find permanent homes if gays and lesbians were included in Florida's adoptive-parent applicant pool. Part III then addresses the validity of arguments against repealing the adoption ban. Finally, Part IV recommends that Florida repeal its statute banning gays and lesbians from adopting children and discusses why alternatives other than repealing the ban will not work.⁴¹

36. H.R. REP. NO. 105-77, at 7 (1997).

37. Adoption and Safe Families Act of 1997, H.R. 867, 105th Cong. (1st Sess. 1997).

38. FLA. STAT. § 63.042 (3) (2002).

39. FLA. STAT. § 63.022(2) (2002) (stating that adoption proceedings are governed by the best interest of the child standard); *but see* § 63.042(3) (excluding all gay individuals from adopting children before an analysis of what is in the child's best interest).

40. For the sake of brevity, the terms "gay" and "lesbi-gay" will be utilized interchangeably throughout when referring to both gay and lesbian individuals.

41. *See infra* discussion Part IV.

II. HISTORY OF FOSTER CARE AND ADOPTION

To understand the depth and breadth of issues, Part II contains a brief synopsis of the U.S. foster care and child-welfare system in general, and Florida's concomitant system— including statistical and fiscal data.

A. The U.S. Child Welfare and Foster Care Systems: An Overview

The roots of foster care in the United States relate back to the informal English practice of boarding orphaned or out-of-wedlock children with relatives or “legal strangers,”⁴² or indentured servitude.⁴³ In the eighteenth century, children of all socio-economic classes could be indentured to families so that they could learn a trade.⁴⁴ By the nineteenth century, the foster-care system began focusing on poor children, orphaned children, or children with unfit parents, and indentured them to families to learn a trade.⁴⁵ Eventually, the system evolved into placing children with families who either agreed to provide free homes or were paid to board needy children.⁴⁶ The philosophy of this early system was “child rescue” and focused on providing safe living environments for children.⁴⁷ However, in time, the philosophy shifted toward one of rehabilitation and reunification,

42. FAMILIES BY LAW 9 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004). These children were treated like biological children, however, there was no formal legal procedure and the familial relationship was not legally recognized. IRVING J. SLOAN, *THE LAW OF ADOPTION AND SURROGATE PARENTING* 8 (1988).

43. National Foster Parent Association, *History of Foster Care in the United States*, available at http://www.nfpainc.org/aboutFP/FC_history.cfm?page=2 (last visited May 18, 2006).

44. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First Three Years of the Adoption and Safe Families Act*, 39 FAM. & CONCILIATION CTS. REV. 25, 26 (2001) (citing Tim Hasci, *From Indenture to Family Foster Care: A Brief History of Child Placing*, in *HISTORY OF CHILD WELFARE* 155, 156–58 (Eve P. Smith & Lisa A. Merkel-Holguin eds. 1996)).

45. *Id.*; PBS, *The American Experience: Orphan Trains* (transcript), available at <http://www.pbs.org/wbgh/amex/orphan/orphants.html> (last visited Oct. 15, 2008).

46. National Foster Parent Association, *History of Foster Care in the United States*, available at http://www.nfpainc.org/aboutFP/FC_history.cfm?page=2 (last visited May 18, 2006). Charles Loring Brace founded the free foster home movement in 1853 in which poor children were sent to families in the South or West. *Id.* His movement “became the foundation for the foster care movement as it exists today.” *Id.* Following his lead, other social agencies and states began to get involved in the foster care system. *Id.*

47. Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POLICY & L. 177, 182 (1993).

states then began to focus on returning children to their biological families rather than permanent placement elsewhere.⁴⁸

The Federal Government defines foster care as a “24-hour substitute care for children outside their own homes.”⁴⁹ Foster care settings include, but are not limited to, family-foster homes, relative/kinship care, group homes, emergency shelters, residential facilities, child-care institutions, and pre-adoptive homes.⁵⁰

Several federal agencies are responsible for regulating and operating the foster care system and states have various reporting requirements. First, the U.S. Department of Health and Human Services (DHHS), Administration for Children and Families (ACF) is responsible for data collection concerning the foster-care system.⁵¹ Second, the Adoption and Foster Care Analysis and Reporting System (AFCARS) is the repository for case-level information on all children in foster care for whom state child welfare agencies have responsibility, including those children adopted through the individual state’s system.⁵² Third, states must file biannual reports covering the periods October 1 through March 31 and April 1 through September 30th.⁵³ To understand the fiscal magnitude of the U.S. foster-care

48. *Id.* at 182-183 (1993).

49. 45 C.F.R. 1355.57, available at <http://law.justia.com/us/cfr/title45/45-4.1.2.7.17.0.1.23.10.html> (last visited Jan. 24, 2009); see also Natl. Adoption Information Clearinghouse, Foster Care National Statistics (2003), available at <http://www.nccanch.acf.hhs.gov.htm> (last visited Aug. 12, 2005); Natl. Clearinghouse on Child Abuse & Neglect, *Foster Care: Numbers and Trends*, available at <http://www.nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (last visited Apr. 12, 2006).

50. *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 827-28 (1977).

51. Child Welfare Information Gateway, *Child Welfare/Foster Care Statistics* (2007), available at http://www.childwelfare.gov/systemwide/statistics/childwelfare_foster.cfm (last visited Oct. 9, 2008); see generally U.S. Dept. of Health and Human Services, Administration for Children & Families, http://www.acf.hhs.gov/programs/cb/stats_research/index.htm (last visited Dec. 15, 2008).

52. U.S. Dept. of Health and Human Services, *About AFCARS* (2008), <http://www.acf.hhs.gov/programs/cb/systems/afcars/about.htm> (last visited Oct. 9, 2008).

53. *Id.*; see also Emilie Stoltztus, *Child Welfare Issues in the 110th Congress* 5, Cong. Res. Serv., Feb. 26, 2008 (RL34388).

Year	Children Found to Be Victims of Abuse or Neglect		Entering Foster Care During the Year		In Foster Care on the Last Day of the Year	
	Total	Rate	Total	Rate	Total	Rate
1990	860,000	13.4	238,000	3.7	400,000	6.2
1991	911,000	14.0	224,000	3.4	414,000	6.4
1992	998,000	15.1	238,000	3.6	427,000	6.5

system, it is crucial to note that for fiscal year (FY) 2008, Congress allocated nearly \$7.9 billion for child-welfare funding.⁵⁴

In passing ASFA, Congress intended to promote stability and permanency for the 500,000 children in the U.S. foster-care and child-welfare system.⁵⁵ ASFA was a change in scope from the law in effect in 1997 where the goal was reunification for children in foster care.⁵⁶ In 1997, Representative David Price of the Fourth District of North Carolina stated the following:

Congress and the federal government cannot legislate compassion and love for the nation's children, but through this legislation we can take reasonable steps to promote family stability and to give children, especially foster children, a fighting chance to see the loving homes they deserve.⁵⁷

When signing the ASFA bill into law on November 11, 1997, President Bill Clinton reiterated ASFA's intent, stating that, "[t]he new law will help us to speed children out of foster care and into permanent families by setting meaningful time limits for child welfare decisions, by clarifying which family situations call for reasonable reunification

1993	1,025,000	15.3	230,000	3.4	445,000	6.6
1994	1,031,000	15.2	254,000	3.7	468,000	6.9
1995	1,006,000	14.7	255,000	3.7	483,000	7.0
1996	1,015,000	14.7	237,000	3.4	507,000	7.3
1997	953,000	13.7	251,000	3.6	537,000	7.7
1998	904,000	12.9	299,000	4.2	559,000	7.9
1999	828,000	11.8	293,000	4.1	567,000	8.0
2000	883,000	12.2	293,000	4.0	552,000	7.5
2001	905,000	12.5	296,000	4.0	545,000	7.4
2002	897,000	12.3	303,000	4.1	533,000	7.2
2003	893,000	12.2	295,000	4.0	519,000	7.0
2004	879,000	12.0	306,000	4.1	517,000	7.0
2005	899,000	12.1	311,000	4.2	513,000	6.9
2006	<i>Data not yet available</i>				512,000	6.8

54. Emilie Stoltztus, *Child Welfare Issues in the 110th Congress* 8, CONG. RES. SERV., Feb. 26, 2008 (RL34388).

55. 143 CONG. REC. H2013 (daily ed. Apr. 30, 1997) (statement of Rep. Pryce).

56. Adoption Assistance and Child Welfare Act of 1980, H.R. 3434, 103d Cong. (2d Sess.1980).

57. See *supra* note 55.

efforts and which simply do not.”⁵⁸ This emphasis was a shift away from AACWA’s reunification promotion.⁵⁹

While Congress passed the ASFA in late 1997, states took two years to enact and fully implement state legislation that complied with ASFA’s requirement. Therefore, ASFA did not take effect until 1999.⁶⁰ At the end of 1996, prior to ASFA, an estimated 531,311 children resided in “out-of-home” care nationwide – nearly twenty percent of that year’s U.S. child population.⁶¹ By September 30, 1997 (FY1998), approximately 559,000 children were in foster care, nearly twice as many children than were in the system in 1982.⁶² These children spent an average of almost three years in foster care.⁶³ For about 100,000 of these children each year, reunification with family members was not an option.⁶⁴ Furthermore, only 38,221 children were adopted from foster care in 1998.⁶⁵

By September 30, 1999, the number of children in foster care nationwide had risen to 567,000.⁶⁶ This figure reflects statistics compiled from forty-seven states, Washington, D.C. and Puerto Rico.⁶⁷ At that time, only 114,148,000 of the 567,000 children (20

58. Will Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden under Federal Child Protection*

Legislation, 12 B.U. PUB. INT. L.J. 259, 279 (2003).

59. Adoption Assistance and Child Welfare Act of 1980, H.R. 3434, 103d Cong. (2d Sess.1980).

60. U.S. General Accounting Office, *Foster Care, Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain* (June 2002), available at <http://www.gao.gov/new.items/d02585.pdf> (last visited Jan. 19 2008).

61. Cynthia G. Hawkins-Leon, *Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 Cath. U.L. Rev. 1227, 1232 (2002); see also Child Welfare League of America, National Data Analysis System, available at <http://ndas.cwla.org> (last visited Dec. 15, 2008).

62. AFCARS Report, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (last visited Jan. 5, 2009); see also Jim Moye, *It’s a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 376 (2002).

63. Moye, *supra* note 89, at 376.

64. Joan Treadway, *Adoption of Foster Children on the Rise*, TIMES-PICAYUNE, Oct. 20, 2003.

65. U.S. Dept. of Health and Human Services, *The AFCARS Report Final Estimates for FY 1998 through FY 2002* (2006), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (last visited Dec. 15, 2008).

66. AFCARS Report (FY1998 through FY2002 (Report #12)), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (last visited Jan. 5, 2009); see also Jessica Heldman, *Court Delay and the Waiting Child*, 40 SAN DIEGO L. REV. 1001, 1007 (2003).

67. U.S. Dept. of Health & Human Services, *The AFCARS Report: Final Estimates for FY 1998 through FY 2002* (2006), available at <http://www.acf.hhs.gov/programs/cb/>

percent) were available for adoption.⁶⁸ According to a DHHS report for 2000-2005:

Nationally, the number of children reported as having exited foster care has risen from an estimated 250,000 in FY1999 to an estimated 288,000 in FY2005. (However, this is understood as an undercount because some states do not report all exits from foster care.) Nationally, the number of children who entered foster care has been rising. During FY2005 (most recent year for which data are available), the number of children who entered foster care increased to 311,000 compared to 304,000 in the previous year and 293,000 who entered in FY1999. The rate of children entering foster care (per 1,000 in the population) was slightly higher in FY2005 (4.2) than in FY1999 (4.1).⁶⁹

During FY 1999, 293,000 children entered the foster-care system in the United States.⁷⁰ Moreover, 98,153 children, nearly eighteen percent of those children in foster care, were reported throughout the US as not having an established “case plan goal,”⁷¹ while 250,000 left foster care in FY 1999.⁷² The net gain to the foster-care system was 43,000 during FY 1999.⁷³ At the end of FY 2006, approximately 509,000 children were in the U.S. foster-care system.⁷⁴

stats_research/afcars/tar/report12.htm (last visited Oct. 8, 2008).

68. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 2000: Annual Report* (2000), available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo00/index.htm> (last visited Oct. 8, 2008); see also The AFCARS Report: Final Estimates for FY1998 through FY2002 (12), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (last visited Jan. 5, 2009). A child is available and waiting for adoption when the child’s goal is adoption and parental rights have been terminated. *Id.*

69. Emilie Stoltzts, *Child Welfare Issues in the 110th Congress* 8, CONG. RES. SERV., Feb. 26, 2008 (RL34388)(citing discussion following footnotes in U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau, Trends in Adoption and Foster Care, 2000-2005 (according to data submitted as of January 2007)). Children of sixteen years or older who are seeking emancipation are not included in the projected figures.

70. U.S. Dept. of Health and Human Services, The AFCARS Report (final estimates for FY1998 through FY2002 (12), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (last visited Jan. 5, 2009).

71. *Id.*

72. *Id.*

73. *Id.*

74. USDHHS, Trends in Foster Care and Adoption – FY 2002 through FY 2007 (2008), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm (last visited

The U.S. foster-care system reached its highest recorded level in FY 1999 when 567,000 children were in the system.⁷⁵

Before the ASFA, approximately 15,000 children “aged-out”⁷⁶ of foster care annually without being adopted.⁷⁷ Under ASFA, the current foster-care system is based on “permanency planning,” in which states mainly focus on providing children with familial relationships within a limited time frame.⁷⁸ Permanency planning is balanced against the state’s primary goal of child placement in the most stable and permanent living arrangement and to provide the child with the care, custody, and discipline that the biological parents should have given.⁷⁹ State agencies place children with foster parents who supervise the day-to-day activities of the child and provide the child’s daily needs, such as food, clothing, and shelter.⁸⁰ They also strive to reunite children with their biological families or place them with adoptive families within a year.⁸¹

Jan. 5, 2009); Emilie Stoltztus, *Child Welfare Issues in the 110th Congress* 8, CONG. RES. SERV., Feb. 26, 2008 (RL34388).

75. Emilie Stoltztus, *Child Welfare Issues in the 110th Congress* 8, CONG. RES. SERV., Feb. 26, 2008 (RL34388)(citing DHHS reports); see generally Cynthia G. Hawkins-Leon, *Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U.L. REV. 1227 (2002). Typically the median stay in foster care is more than two years. *Id.* In 1998, the average stay was three years. *Id.* The average stay for African American children is fifty months, while the average for white children is substantially less. *Id.* By 2003, the median age of all children in foster care was ten years. *Id.* The number rose continually from the late 1990s until the early 2000s, indicating that children are remaining in the system longer. *Id.* The median age of children entering the foster care system during FY 1999 was 8.6 years old. *Id.* During that same year, thirty-nine percent or 223,751 of all of the children in foster care were identified as “Black Non-Hispanic” (as opposed to “White Non Hispanic — thirty-four percent (199,735) or Hispanic — seventeen percent (98,396). *Id.*

76. The term “age-out” refers to a child reaching the maximum age to remain in foster care — in most jurisdictions, for a developmentally on-target child with minor or no physical disabilities, children statutorily age-out of the system at the age of majority (18 or 21 yrs).

77. Cynthia G. Hawkins-Leon, *Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U.L. REV. 1227, 1232 (2002). In 1999, Congress estimated a figure of 20,000. *Id.*

78. Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POLICY & L. 177, 185 (1993).

79. FLA. STAT. § 39.001(1)(h) (2002).

80. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 827–28 (1977). Foster care settings include placement in relative and non-relative homes, emergency shelters, pre-adoptive homes, institutions, and residential facilities. Natl. Clearinghouse on Child Abuse & Neglect, *Foster Care: Numbers and Trends*, <http://www.nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (last visited Apr. 12, 2006).

81. FLA. STAT. § 39.001(1)(h) (2002).

B. Florida's Requirements and Statistics for Foster Care

To be eligible as a foster parent in Florida, applicants must satisfy detailed criteria. Potential foster parents must have enough space to house a foster child⁸² and “provide for the physical comfort, care, and well-being”⁸³ of the child in a safe and sanitary home.⁸⁴ While foster parents need not meet a minimum income, they must be financially stable enough to meet their own family’s needs⁸⁵ and provide for “the healthy physical, emotional and mental development”⁸⁶ of their foster children. Additionally, foster parents must be physically and emotionally able to care for children and must have maintained their current marital status for at least one year.⁸⁷ Finally, foster parents must prove good moral character by passing a background check designed to identify past criminal offenses.⁸⁸

In FY 2000, the total number of children in the state was 3.6 million, of which 35,656 were in foster care.⁸⁹ By FY 2006, there were 4,067,877 children under 18 years of age living in Florida.⁹⁰ In FY 2000, 18,765 children entered foster care, while 15,507 exited the system.⁹¹ These numbers represent a net increase of almost 17,000 children in Florida’s foster-care system from FY 1998 through FY 2000.⁹² Approximately forty-five percent of children in foster care were African-American, forty-two percent were Caucasian, and ten percent were Hispanic.⁹³ Importantly, 5,318 of the 35,646 children in

82. Florida Department of Children & Families, *Fostercare - Am I ready?*, available at <http://www.dcf.state.fl.us/fostercare/amiready.shtml> (last visited Oct. 9, 2008).

83. FLA. STAT. § 409.175(5)(a) (2002).

84. *Id.*

85. Florida Department of Children & Families, *Fostercare - Am I ready?*, available at <http://www.dcf.state.fl.us/fostercare/amiready.shtml> (last visited Apr. 21, 2006).

86. FLA. STAT. § 409.175(5)(a) (2002).

87. *See supra* note 85.

88. *Id.*; FLA. STAT. § 409.175(5)(a) (2002).

89. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 2000: Annual Report* (2000), available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo00/statedata/fl.htm> (last visited Jan. 19, 2009).

90. CWLA, *Florida's Children 2008*, available at <http://www.cwla.org/printable/printpage.asp> (last visited Oct. 25, 2008).

91. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 2000: Annual Report* (2000), available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo00/statedata/fl.htm> (last visited Jan. 19, 2009).

92. *Id.*

93. *Id.*

foster care were “waiting to be adopted,” but none of these children’s parents’ rights had been terminated.⁹⁴

Originally under ASFA, a state was eligible for a bonus of \$4,000 per child adopted over its “best year’s” total and an additional \$2,000 was awarded for each child with “special needs.”⁹⁵ The Strengthen Americorps Program Act⁹⁶ of 2003 amended these incentives to the following:

States are awarded a bonus of \$4,000 for each adoption that exceeds the overall baseline; \$4,000 for each older adoption that exceeds the relevant baseline; and \$2,000 for each Title IV-E eligible special needs child under the age of nine that exceeds the relevant baseline.⁹⁷

Florida’s number of adoptions from foster care rose from 1,629 (the previous “best year”) for FY 2000 to 2,206 for FY 2002.⁹⁸ For

94. *Id.* In FY 2000, 1,609 children were adopted from foster care in Florida. *Id.* Of those adopted, more than half (53.1 percent) of the children spent more than thirty-six months in foster care. *Id.* Only twenty-two percent of those adopted had been in foster care less than two years. *Id.* Ninety-percent of the children who exited foster care went to permanent homes, which is a higher percentage than the national median of eighty-five percent. *Id.* In Florida, fewer children who enter foster care later are likely to attain permanency than the national average. *Id.* Of those children who aged out of foster care, one-third entered the system at thirteen years of age or younger. *Id.*

95. U.S. Department of Health and Human Services, *HHS Awards \$14.9 Million in Bonuses to States for Increasing the Number of Adoptions of Foster Children* (2003), available at <http://www.hhs.gov/news/press/2003pres/2003901.htm> (last visited Jan. 19, 2009).

96. Strengthen Americorps Program Act, H.R. 2552 (2003) .

97. Emilie Stoltztus, *Child Welfare Issues in the 110th Congress* 8, CONG. RES. SERV., Feb. 26, 2008 (RL34388).

98. See generally U.S. Dept. of Health and Human Services, <http://www.hhs.gov/> (last visited Jan. 19, 2009) Originally under ASFA, a state was eligible for a bonus of \$4,000 per child adopted over its “best year’s” total. An additional \$2,000 is awarded for each child with “special needs.” USDHHS, *HHS Awards \$14.9 million in Bonuses to States for Increasing the Number of Adoptions of Foster Children* (2003), available at <http://www.hhs.gov/news/press/2003pres/2003901.htm>. The Strengthen Americorps Program Act of 2003 amended these incentives to the following:

States are awarded a bonus of \$4,000 for each adoption that exceeds the overall baseline; \$4,000 for each older adoption that exceeds the relevant baseline; and \$2,000 for each Title IV-E eligible special needs child under the age of nine that exceeds the relevant baseline.

STATE OF FLORIDA

Florida Fiscal Year	Number of Children in Foster care	Adoptions from Foster Care	Entering Foster Care	Exiting Foster Care

FY 2002, Florida received a bonus award from the Federal Government in the amount of \$3,520,000 – the largest award of any state that fiscal year.⁹⁹ For adoptions finalized between FY 1998 through FY 2006, collectively, states have garnered 221 million dollars in adoption-incentive bonuses from the Federal Government.¹⁰⁰ Notably, for FY 2009 President Bush has requested \$20 million for adoption-incentive bonuses for the states.¹⁰¹

In early October of 2008, President Bush signed into law the Fostering Connections to Success and Increasing Adoptions Act of 2008. This Act was a bi-partisan measure that passed unanimously in both the House and Senate. Uniquely, the funding needed for implementation of the wide-ranging legislation has been earmarked. Supporters have promised that “[t]he bill] is fully paid for.”¹⁰²

Christine James-Brown, President and Chief Executive Officer of the Child Welfare League of America, heralded the passage of this Act as:

an historic moment for foster children and families. Not since the Adoption Assistance and Child Welfare Act of 1980 [“AACWA”] has this country had a bill that speaks directly to the more than 513,000 children in foster care.¹⁰³

Further, Jack Kroll, Executive Director of the North American Council on Adoptable Children [NACAC] opined: “Though child welfare policy was reformed in 1997 with the Adoption and Safe

FY1998	26,320	1549	13,980	7,934
FY2000	35,656	1629	18,765	15,507
FY2002	31,963	2206		

99. U.S. Department of Health and Human Services, *HHS Awards \$14.9 Million in Bonuses to States for Increasing the Number of Adoptions of Foster Children* (2003), available at <http://www.hhs.gov/news/press/2003pres/2003901.htm> (last visited Jan. 19, 2009).

100. Emilie Stoltzts, *Child Welfare Issues in the 110th Congress* 8, CONG. RES. SERV., Feb. 26, 2008 (RL34388).

101. *Id.*

102. Press Release, Generations United, Congress Passes the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Sept. 23, 2008) (on file with author), available at <http://www.gu.org> (last visited Oct. 12, 2008).

103. Press Release, CWLA Cheers President Bush for Signing Child Welfare Legislation, available at <http://www.cwla.org/newsevents/news081007bush.htm> (last visited Oct. 15, 2008).

Families Act [of 1997 “ASFA”] it has been 28 years since there was any meaningful child welfare **financing** reform (emphasis added).”¹⁰⁴

As previously stated, FCSIAA will influence wide-ranging change within the child welfare system. Generally, FCSIAA creates significant change in a multitude of areas. More specifically, in pertinent part, the Act extends Federal funding to some kinship care families and requires – upon removal of a child – a 30-day search for and notification of adult relatives of the child’s availability. It also provides direct access to Federal funds to Tribal Governments and extends foster care and support to youth in need up to the age of 21 years. Over time, the Act seeks to de-link AFDC eligibility from special needs adoption when implementing the Adoption Assistance Program. In doing so, the Act expands access to Federal child welfare training funds by private agencies and courts, increases access to education for foster children and increases monitoring and access to health care for foster children. Lastly, the Act makes changes to the Federal Adoption Incentives Program by doing the following: (i) extending the program through FY 2013; changing the base year for computation to FY 2007; (iii) doubling the incentive payment amounts for special needs children from \$2,000 to \$4,000 per child & for older children adoptions from \$4,000 to \$8,000 per child; (iv) authorizing Federal funding to the States to increase to \$43 million for the AIP; and (j) requiring states to make reasonable efforts to place siblings together for adoption, foster care and/or guardianship.¹⁰⁵

C. An Overview of Adoption Law in the United States

Ancient laws recognized adoption, such as the Code of Hammurabi¹⁰⁶ and the Hindu Laws of Manu.¹⁰⁷ Many early civilizations allowed its citizens to adopt children, including the

104. Press Release, NACAC, President Signs Landmark Child Welfare Reform into Law (Oct. 8, 2008)(on file with author), *available at* <http://www.nacac.org> (last visited Oct. 20, 2008).

105. *See generally* USDHHS, Administration on Children Youth and Families (Oct. 23, 2008)(on file with author).

106. IRVING J. SLOAN, THE LAW OF ADOPTION AND SURROGATE PARENTING 6 (1988) (noting that the Code of Hammurabi mandated guidelines for adopting sons almost 2,000 years before the birth of Christ); *see also* Rev. Claude Hermann Walter Johns, Babylonian Law – The Code of Hammurabi, YALE LAW SCHOOL, THE AVALON PROJECT, <http://avalon.law.yale.edu/ancient/hammpre.asp> (last visited Dec. 15, 2008).

107. IRVING J. SLOAN, THE LAW OF ADOPTION AND SURROGATE PARENTING 6 (1988).

Hebrew, Egyptian, Greek, and Roman empires.¹⁰⁸ However, unlike foster care, these early civilizations had no English adoption laws.¹⁰⁹ Instead, Spanish and French laws influenced America's adoption statutes.¹¹⁰ Legal adoption formally appeared in the United States in the middle of the nineteenth century.¹¹¹ Mississippi passed the first adoption statute in 1846.¹¹² Texas and Vermont followed with general adoption statutes in 1850.¹¹³

However, Massachusetts is traditionally credited with the first adoption statute.¹¹⁴ The 1851 statute codified legal procedures for transferring parental rights,¹¹⁵ provided judicial supervision for the process,¹¹⁶ and established the "best interest of the child" standard.¹¹⁷ Most states modeled their adoption laws on Massachusetts' statute.¹¹⁸ Today, each state implements its adoption policies and procedures.¹¹⁹

108. *Id.*; see also MORTON L. LEAVY & ROY D. WEINBERG, *LAW OF ADOPTION 1* (1979); Adopting.org, *We Three Kings: A History of Adoption*, <http://www.adopting.org/adoptions/history-of-adoption.html> (last visited Apr. 19, 2005) (noting that the purpose behind adoption was providing a male heir to childless couples and continuing the family line).

109. IRVING J. SLOAN, *THE LAW OF ADOPTION AND SURROGATE PARENTING 8* (1988). England passed its first adoption law in 1926. FAMILIES BY LAW 9 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004). Prior to the passage of the 1926 statute, adoptions were either informal arrangements or legalized by individualized legislative acts. MORTON L. LEAVY & ROY D. WEINBERG, *LAW OF ADOPTION 1* (1979).

110. IRVING J. SLOAN, *THE LAW OF ADOPTION AND SURROGATE PARENTING 9* (1988).

111. *Id.*

112. *Id.*

113. MORTON L. LEAVY & ROY D. WEINBERG, *LAW OF ADOPTION 2* (1979).

114. Massachusetts Adoption of Children's (sic.) Act of 1851, Act of May 24, 1851, Mass. Act 816, Ch. 324.

115. CYNTHIA MABRY & LISA KELLY, *ADOPTION LAW: THEORY, POLICY AND PRACTICE 3* (2006); University of Oregon, The Adoption History Project, Timeline of Adoption History, available at <http://www.uoregon.edu/~adoption/timeline.html> (last visited Nov. 25, 2008).

116. University of Oregon, The Adoption History Project, Timeline of Adoption History, available at <http://www.uoregon.edu/~adoption/timeline.html> (last visited Nov. 25, 2008).

117. *Id.* When children are in the care of the state ...best interests is an important measure of whether [government] services are meeting the child's needs...The best interests standard does not provide specific guidance. *Id.* It is a subjective standard....The phrase has rightfully its special place in American law because of the need to keep the interests and perspectives of the child foremost in the minds of adult decision-makers. *Id.* American Bar Association, Division for Public Education, *What 'Best Interests of the Child' Means*, available at http://www.abanet.org/publiced/lawday/talking/child_bestinterest.html (last visited Jan. 19, 2009); see also Ruth-Arlene W. Howe, *Transracial Adoption: Old Prejudices and Discrimination Float under a New Halo*, 6 B. U. PUBL. INT. L.J. 409, 426 (1997).

118. CYNTHIA MABRY & LISA KELLY, *ADOPTION LAW: THEORY, POLICY AND PRACTICE 3* (2006).

119. Ruth-Arlene W. Howe, *Transracial Adoption: Old Prejudices and Discrimination Float under a New Halo*, 6 B. U. PUBL. INT. L.J. 409, 427 (1997).

D. *The Adoption & Safe Families Act of 1997 (ASFA)*

1. *The Policy Goals and Rationale for ASFA*

As previously stated, ASFA was the first major change in federal requirements for child protection services since 1980.¹²⁰ According to the Supremacy Clause of the United States Constitution, federal law requires state compliance.¹²¹ This federal directive is not different under ASFA. Although all fifty states and the District of Columbia comply with ASFA, most of these state statutes are not uniform.¹²²

ASFA seeks to promote and facilitate permanency through adoption and shortened foster-care stays.¹²³ After all, the legislature intended for foster care to be temporary.¹²⁴ To this end, ASFA has changed the waiting time for a child entering foster care.¹²⁵ Under the AACWA of 1980, a child “entered” foster care when a case went to disposition, which could last two months to two years after the child actually came into care.¹²⁶ Under ASFA, the child “enters” foster care as of the date of fact-finding regarding abuse or neglect, or a maximum of sixty days after the State removes the child from the home.¹²⁷ This change amounts to a substantial temporal difference.

ASFA stresses that the child’s health and safety and a permanent plan for the child are the paramount concerns of the legislation, rather than the parents’ right to have a child returned to

120. Administration for Children and Families, *Guidelines for Public Policy and State Legislation governing Permanence for Children* (2004), available at <http://www.acf.hhs.gov/programs/cb/publications/adopt02.htm> (last visited Jan. 19, 2009); see generally Adoption Assistance and Child Welfare Act of 1980, H.R. 3434 (1980).

121. U.S. General Accounting Office, *Foster Care, Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain* (2002), available at <http://www.gao.gov/new.items/d02585.pdf> (last visited Jan. 19, 2009); see generally U.S. CONST. art. VI, cl. 2.

122. U.S. General Accounting Office, *Foster Care, Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain* (2002), available at <http://www.gao.gov/new.items/d02585.pdf> (last visited Jan. 19, 2009).

123. Jim Moyer, *It’s a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 382 (2002).

124. U.S. General Accounting Office, *Foster Care, Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain* (June 2002), available at <http://www.gao.gov/new.items/d02585.pdf> (last visited Jan. 19, 2009).

125. Will Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 278 (2003).

126. AACWA of 1980, H.R. 3434 (1980); see also Crossley, *infra* note 180, at 278.

127. See generally 42 U.S.C. § 1305 (1997); 42 U.S.C. § 671 (2006).

them.¹²⁸ Thus, the statute pressures parents to work diligently to get their children back because of the greater risk under ASFA that their children will be permanently placed elsewhere if parents do not meet the statutory time limits.¹²⁹

The purpose of ASFA is to promote permanency for children.¹³⁰ With this goal in mind, ASFA requires states to utilize “cross-jurisdictional” resources to facilitate adoptions or permanent placements.¹³¹ Thus, states must focus their child placement efforts nationally, not just locally.¹³² Premised on President Clinton’s “Adoption 2002 Initiative” from 1996/1997, a stated goal of ASFA is to “double the number of domestic adoptions annually to 54,000 by the year 2002.”¹³³

The DHHS reporting system (AFCARS) is reliable only to the extent that the states report their data.¹³⁴ Although the most recent statistics from DHHS show that in FY 1999, DHHS adopted 47,000 children (by its own admission this figure includes cases from previous reporting periods).¹³⁵ To address this problem, Congress has considered allowing DHHS to assess fines to states who fail to file or submit inaccurate information for AFCARS.¹³⁶

2. *The Legislative History of ASFA*

After several attempts to pass reformist child-welfare legislation, the House and Senate negotiated an agreement.¹³⁷ ASFA passed by a 406-7 vote in the House and by unanimous consent in the

128. Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 *FORDHAM URB. L.J.*, 1879, 1898 (2001).

129. *Id.*

130. U.S. General Accounting Office, *Foster Care, Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain* (2002), available at <http://www.gao.gov/new.items/d02585.pdf> (last visited Jan. 19, 2009).

131. *Id.*

132. Child Welfare League of America, *Testimony Submitted to the House Subcommittee on Human Resources for the Hearing on the Implementation of ASFA* (Apr. 8, 2003), available at <http://cwla.org/advocacy/asfatestimony-implementation.htm> (last visited Jan. 19, 2009).

133. Carla Bradley & Cynthia G. Hawkins-Leon, *The Transracial Adoption Debate: Counseling and Legal Implications*, 80 *J. COUNS. & DEV.* 433 (2002).

134. *See infra* note 184.

135. *Id.*

136. U.S. Dept. of Health & Human Services, *The AFCARS Report 10/1/98 through 9/30/99* (2001), available at <http://www.acf.dhhs.gov/programs/cb.htm> (last visited Jan. 19, 2009).

137. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 *MINN. L. REV.* 637, 637 (1999).

Senate.¹³⁸ President Clinton signed the ASFA into law on November 19, 1997.¹³⁹ Congress passed ASFA nearly contemporaneously with the Temporary Aid for Needy Families (TANF)¹⁴⁰ which was an overhaul of AFDC rules.¹⁴¹ Despite any discussion of the connection between the two laws, welfare rules and the child-welfare system are inexorably linked.¹⁴² These two pieces of legislation effect overlapping populations.¹⁴³ Particularly, since TANF places time limits on the receipt of welfare benefits, a child is at greater risk of entering the foster-care system due to a lack of adequate financial support once the benefits end.¹⁴⁴ The public and private sectors have criticized both laws as unduly harsh and burdensome.¹⁴⁵ Indeed, in some cases, families lose their children to the state simply because they are poor.¹⁴⁶

3. *The Key Provisions of ASFA*

The most relevant provisions of the ASFA influencing child-care adoption include the following:

(1) For all children that have been in foster care for fifteen out of the prior twenty-two months, the state must begin to terminate the biological mother's or father's parental rights.¹⁴⁷

(2) ASFA requires a "reasonable efforts" standard for reunification.¹⁴⁸ Under ASFA, the child's health and safety are the paramount concerns when determining permanent placement.¹⁴⁹ "Reasonable efforts" does not entail the reunification of a child with its natural family in the presence of "aggravated circumstances," such

138. *Id.*

139. Adoption and Safe Families Act of 1997, H.R. 867, 105th Cong. (1st Sess. 1997); Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 25 (2001).

140. See 42 U.S.C.A. § 602 (2008).

141. Jim Moye, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 387 (2002).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J., 1879, 1898 (2001).

148. Will Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 291 (2003).

149. See Hort, *supra* note 174.

as a parent committing a felony assault on the child or its sibling, murder or attempted murder of sibling, or the involuntary termination of parental rights to a sibling.¹⁵⁰ ASFA also allows states to make reasonable efforts to reunify the child to its biological family concurrently with efforts to achieve adoption or guardianship.¹⁵¹

(3) Reunification efforts or services (i.e. counseling, substance-abuse treatment, domestic-violence services, and temporary childcare) are limited to fifteen months.¹⁵²

(4) A State Child Welfare Agency holds permanency planning hearings at least twelve months after a child's placement rather than eighteen months.¹⁵³ At this hearing, the Agency makes a determination on a permanency plan, including whether and when to reunify. It also makes a determination on adoption, legal guardianship, or permanent foster care.¹⁵⁴ If reasonable efforts to reunify are not required, the Agency must hold another permanency planning hearing thirty days after that determination.¹⁵⁵ Permanency hearings are an annual requirement.¹⁵⁶

(5) The Federal Government provides monetary incentives to states that increase the number of children adopted over the base-year of FY2007.¹⁵⁷ The Federal Government also award states \$4000 for each child with "special needs." In addition, older children receive a payment of \$8000 each.¹⁵⁸ These bonuses provide a significant "cash cow" to the states.

(6) Criminal-record checks are required for prospective foster or adoptive parent(s).¹⁵⁹ A person is disqualified for any felony conviction of: (a) child abuse or neglect; (b) spousal abuse; or (c) a

150. *Id.*

151. *Id.*

152. *Id.*

153. Will Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 278 (2003).

154. Jim Moyer, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 380 (2002).

155. *Id.*

156. Hort, *supra* note 174, at 1898.

157. See USDHHS, ACY, Program Instruction (memo), FCSAA of 2008 (Pub.L. 110-351), amending section 473A of the Social Security Act (increases payments and extends the Adoption Incentives Program through FY2013).

158. U.S. Dept. of Health and Human Services, *The AFCARS Report 10/1/98 through 9/30/99* (2001), available at <http://www.acf.dhhs.gov/programs/cb.htm> (last visited Oct. 10, 2008).

159. *Id.*

violent crime.¹⁶⁰ States also disqualify the potential parent for any conviction of physical assault, battery, or a drug-related crime within the previous five years.¹⁶¹ However, states are able to pass legislation to override this provision.¹⁶²

(7) States must look for proper placements nationwide rather than focus on local placements.¹⁶³ This national approach assists in the adoption process by broadening the scope and, thus, increasing the pool of perspective adoptive parents.¹⁶⁴

4. State Compliance with ASFA

All fifty states and the District of Columbia have passed legislation that complies with ASFA.¹⁶⁵ The state statutes differ most on the definition of “aggravated circumstances.”¹⁶⁶ Between the various state statutes, “aggravated circumstances” may include the following: (1) parental substance abuse (6 states – AL; CA; ND; OH; OK & WA); (2) failure to comply with reunification plan (7 states – AK; FL; HI; KS; LA; ME & OK); (3) failure to locate parents after the state conducts a “diligent” search (7 states – AK; AZ; CA; CO; LA; PA & UT); (4) a parent’s mental illness/deficiency (6 states – AK; AZ; CA; CO; ND & UT); (5) child removed two previous times (3 states – AK; AK & UT); (6) parental incarceration/institutionalization (5 states – AK; CA; CO; LA & ND); (7) a parent’s decline of services (1 state – CA); and (8) the court’s discretion to decide (14 states – AL; AZ; GA; ID; IL; LA; ME; MN; MS; NE; NC; SC; UT & WI).¹⁶⁷

5. Key Criticisms of ASFA

Despite its good intentions, ASFA has not reached its optimum result for nine reasons. First, ASFA fails to promote kinship adoption

160. Rebecca Dunhem & Elizabeth Oppenheim, *Understanding Criminal Record Checks*, (2002), available at <http://icpc.aphsa.org/Home/Doc/resources/Survey-CRCF.pdf> (last visited Jan. 19, 2009).

161. *Id.*

162. Hort, *supra* note 174, at 1898.

163. *Id.*

164. *Id.*

165. National Adoption Information Clearinghouse, *Child Abuse and Neglect Statutes at a Glance* (2002), available at <http://www.nccanch.acf.hhs.gov/legal/legal/statutes/sag/groundtermin.pdf> (last visited Jan. 21, 2009).

166. *Id.*

167. See generally National Conference of State Legislatures, *State Legislation in Response to ASFA* (1999), available at <http://www.ncsl.org/programs/cyfl/stleg.htm> (last visited Dec. 15, 2008); State Matrix (1999), available at <http://www.ncsl.org/programs/cyfl/master.htm> (last visited Dec. 15, 2008); Aggravated Circumstances (1999), available at <http://www.ncsl.org/programs/cyfl/aggravat.htm> (last visited Dec. 15, 2008).

because kinship situations do not require “fast-track” termination proceedings.¹⁶⁸ Second, it provides inadequate federal funding for reunification services.¹⁶⁹ Third, it treats children the same regardless of age and, generally, older children are harder to place.¹⁷⁰ Fourth, it places the adult’s interests over the child’s interests. For example, kinship adoptions do not require fast-track action.¹⁷¹ Fifth, critics are concerned that deadlines would cause the unnecessary or precipitous termination of parental rights. Indeed, fifteen months may be too short for the rehabilitation of some parents.¹⁷²

Sixth, the ASFA increased the number of termination of parental rights (TPR) petitions, but did not increase the necessary resources to achieve permanency, such as funds for rehabilitative services and decreased caseloads for caseworkers.¹⁷³ Similarly, ASFA fails to provide for more lawyers and judges to handle the increased number of TPR filings.¹⁷⁴ New York Chief Judge Judith Kaye once remarked that, “skyrocketing caseloads. . . are not likely to diminish,” leading to further backlog in an already overloaded system.¹⁷⁵

Seventh, the ASFA requirement to file a TPR petition for any child who has been in foster care for fifteen of the most recent twenty-two months is the most controversial provision.¹⁷⁶ Filing a TPR petition does not bring children permanency.¹⁷⁷ Regrettably, this provision has created “legal orphans” where no adoption is pending.

Eighth, ASFA’s bonus incentives have become a significant “cash cow” to the states which may result in hasty child placement and adoption. For example, on September 10, 2001, California “earned”

168. For example, in FY 1999, only 7,300 children were adopted by relatives and, in FY 1998, 5,400 children were adopted. Cynthia G. Hawkins-Leon, *Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U.L. REV. 1227, 1249 (2002).

169. *Id.* at 1248.

170. *Id.* at 1250.

171. *Id.*

172. Will Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 293 (2003).

173. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 679 (1999).

174. *Id.*

175. Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION CTS. REV. 144, 144 (1998).

176. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 30 (2001).

177. *Id.*

over \$4 million by increasing its adoptions by thirty-one percent.¹⁷⁸ That same year, thirty-five states plus the District of Columbia received a total of \$11 million.¹⁷⁹ Originally, Congress authorized incentive payouts of up to \$20 million per year.¹⁸⁰ Continuing the trend, President Bush proposed \$20 million in incentives in the Federal Budget for FY 2009.¹⁸¹ Further FCSIAA of 2008 includes authorized funding of \$43 million for the Adoption Incentives Program.¹⁸²

On September 12, 2003, HHS Secretary Tommy Thompson announced that approximately \$14 million would be awarded to twenty-five states plus Puerto Rico for increasing the number of children adopted from the foster-care system in FY 2002.¹⁸³ Compared to previous years, an estimated 3,703 more children were adopted in FY 2002.¹⁸⁴

Finally, the Keeping Children and Families Safe Act of 2003 (KCFSA) was signed into law on June 25, 2003 after languishing in Congress the previous term.¹⁸⁵ The purpose of KCFSA was to reauthorize a number of child and family-related statutes,¹⁸⁶ such as the Adoption Opportunities Act and the Child Abuse Prevention & Treatment Act (CAPTA).¹⁸⁷ One of CAPTA's provisions increases the number of older children in foster care placed into adoptive homes by adding a grant program to facilitate interstate placements.¹⁸⁸ CAPTA, which KCFSA reauthorizes and updates, makes the necessary connection between the child-welfare system and issues of domestic

178. See generally Cynthia G. Hawkins-Leon, *Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U.L. REV. 1227 (2002).

179. *Id.* at 1246.

180. Adoption.com, *Summary of The Adoption And Safe Families Act of 1997*, <http://library.adoption.com/Resources-and-Information/Summary-of-The-Adoption-And-Safe-Families-Act-of-1997/article/3522/1.html> (last visited Apr. 2, 2008).

181. The White House, OMB, *Adoption Incentives Assessment*, available at <http://www.whitehouse.gov/omb/expectmore/detail/10003500.205.html> (last visited Nov. 15, 2008). The funding levels were: FY2007, \$5,000,000; FY2008, \$4,000,000; & FY2009 \$20,000,000. *Id.*

182. USDHHS, Administration on Children Youth and Families,, Log No.: ACYF-CB-PI-08-05 (Oct. 23, 2008) (copy on file with author).

183. U.S. Dept. of Health and Human Services, *HHS Awards \$14.9 Million in Bonuses to States for Increasing the Number of Adoptions of Foster Children* (2003), available at <http://www.hhs.gov/news/press/2003pres/20030912.html> (last visited Jan. 21, 2009).

184. *Id.*

185. U.S. Dept. of Health and Human Services, *Children's Bureau Express – Keeping Children & Families Safe Act of 2003* (2003), available at <http://www.cbexpress.acf.hhs.gov.htm> (last visited Jan. 21, 2009).

186. *Id.*

187. *Id.*

188. *Id.*

violence that result in child abuse.¹⁸⁹ However, the two areas of concern still do not seamlessly interface.

III. FLORIDA'S TREATMENT OF LESBIANS AND GAYS AS FOSTER PARENTS AND POTENTIAL ADOPTIVE PARENTS: A DISCONNECT

Florida's goal for child adoption is to protect the child's well-being.¹⁹⁰ The "best interest of the child" standard governs all adoption proceedings and adoption placements.¹⁹¹ Specifically, to adopt a child, applicants must be "able to meet the physical, emotional, social, educational, and financial needs of a child."¹⁹² The court and state agencies determine an applicant's eligibility by evaluating factors, such as, for example: the child's ability to consent to the adoption; the applicant's child-rearing experience; the applicant's marital status; the applicant's residency status or future plans; the applicant's income, employment status and health, housing, and the neighborhood; whether the applicant has other children; and the applicant's moral character.¹⁹³

A. The Root of Florida's Discriminatory Intent

Florida's discriminatory treatment of lesbi-gay individuals and couples within the foster care and adoption system began in 1977 when Florida became the first state to statutorily prohibit lesbians and gays from adopting children.¹⁹⁴ Before passing the bill, the legislature

189. *Id.*

190. FLA. STAT. §63.022(2)–(3) (2002).

191. *Id.*

192. FLA. ADMIN. CODE ANN. r. 65C-16.005(2) (2005).

193. *Id.*

194. Florida is the only state that expressly bans all gays from adopting children. FLA. STAT. § 63.042(3) (2002). The law specifies that "no person eligible to adopt under this statute may adopt if that person is gay." *Id.* Mississippi expressly bans same-sex couples from adopting while Utah effectively prohibits gay couples from adopting by prohibiting adoptions by individuals who are cohabitating. LESLIE COOPER & PAUL CATES, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 8 (2nd ed., 2006) (citing Miss. Code Ann. § 93-17-3 and Utah Code § 78-30-1). In Nebraska, the director of the state's Department of Social Services issued a directive banning people who identify as homosexuals and unmarried couples from adopting in 1995. Natl. Gay & Lesbian Task Force, *The Issues*, available at <http://www.thetaskforce.org/theissues/issue.cfm?issueID=30> (last visited Apr. 24, 2006). Oklahoma does not recognize joint adoptions by same-sex couples performed in other states. LESLIE COOPER & PAUL CATES, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 8 (2nd ed. 2006) (citing OKLA. STAT., title 10, § 7502-1.4 (Supp. 2004)). Conversely, California, Maryland, Massachusetts, Nevada, New Jersey, and New York have

did not order or consult any studies concerning the effects, if any, on children raised by lesbi-gay parents. Additionally, no evidence demonstrated that adoption by lesbian and gay individuals causes any problems.¹⁹⁵

Senator Don Chamberlin was the only senator to speak out against the bill.¹⁹⁶ He argued that the purpose of the bill was to discriminate against gays and lesbians.¹⁹⁷ Chamberlin urged lawmakers to focus on the best interest of children rather than harm to homosexuals, stating that, “[t]he undeniable main concern of any adoption is the welfare of the child — *all* other concerns should yield to that.”¹⁹⁸ No one challenged Chamberlin’s proposition that the bill’s sole purpose was to discriminate against gays and lesbians.¹⁹⁹ Relying on the bill sponsors, Democratic Senator Curtis Peterson of Lakeland, Florida, rhetoric²⁰⁰ and the support from Anita Bryant’s “Save Our Children” Campaign,²⁰¹ the legislature passed the statute with hardly any fact-finding or debate.²⁰²

statutes or state policies expressly prohibiting discrimination against gays in the adoption process while Connecticut, Illinois, Indiana, Pennsylvania, Vermont, and Washington, D.C. have statutes or court decisions that expressly permit gays to adopt their partner’s children. COOPER & CATES, *supra* at 6.

195. See Fla. Sen., JOURNAL OF THE FLA. SENATE, Reg. Sess. 370–371 (1977); see also Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POLICY 207, 223 (1995) (noting that dissenting Senator Don Chamberlin (D) of Clearwater, Florida, argued that gays adopting children is not a significant, dominant social problem).

196. Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POLICY 207, 223 (1995).

197. See Fla. Sen., JOURNAL OF THE FLA. SENATE, Reg. Sess. 370–371 (1977) (Sen. Chamberlin argued that “the heart of this bill is not the subject matter of adoption—adoptions—it is discrimination”).

198. *Id.*

199. Elovitz, *supra* note 223, at 223 (noting that Senator Don Chamberlain “argued that the purpose of the bill had nothing to do with adoption and everything to do with discrimination” and no one “disputed [his] assessment”).

200. According to Curtis Peterson, the purpose of the bill was to tell the gay community that “[w]e’re really tired of you,” and “[w]e wish you’d go back into the closet.” Linda Greenhouse, *Justices Refuse to Consider Law Banning Gay Adoption*, N.Y. TIMES, Jan. 11, 2005, at A14.

201. Anita Bryant was an anti-gay activist, a popular singer and Florida Citrus Commission spokeswoman who settled in the Miami area during the 1970s. Gmax, *What was the ‘Save Our Children’ Campaign?*, <http://www.gmax.co.za/think/history/2005/050322-anitabryant.html> (last visited Apr. 24, 2006). She organized the “Save Our Children” Campaign in response to the passage of gay antidiscrimination ordinances in Miami-Dade County. *Id.* She sought not only to prohibit gays from adopting children, but also to overturn the anti-discrimination ordinance and bar gays from teaching in public schools. Elovitz, *supra* note 223, at 223.

202. Elovitz, *supra* note 223, at 222.

B. The Legal Challenges to Florida's Ban on Lesbi-Gay Adoption

1. Seebol v. Farie

In 1990, *Seebol v. Farie* was the first challenge to Florida's ban on lesbi-gay adoption.²⁰³ In this case, the Department of Health and Rehabilitation Services (HRS) denied plaintiff Edward Seebol's application to adopt a special-needs child because of Seebol's sexual orientation.²⁰⁴ Seebol was a long-time Key West resident who was actively involved in community projects, such as volunteering for Florida's guardian *ad litem* program and educating the public about AIDS.²⁰⁵ The Sixteenth Judicial Circuit for Monroe County concluded that the statute banning lesbi-gay adoption violated federal and state constitutional rights to privacy, equal protection, and due process of the law.²⁰⁶ The court also noted a lack of evidence showing that homosexual orientation in parents adversely affects children.²⁰⁷

2. State v. Cox

In 1993, *State v. Cox* presented the second challenge to Florida's adoption statute.²⁰⁸ James Cox and his partner Rodney Jackman signed up for an HRS pre-adoption parenting class in anticipation of adopting a child,²⁰⁹ and both disclosed their homosexual orientation.²¹⁰ HRS refused to allow them to take the class and informed the couple that it would reject their adoption applications due to their sexual orientation.²¹¹ Cox and Jackman challenged the statute as a violation of their constitutional rights to privacy, equal protection, and substantive due process.²¹² Relying on the reasoning in *Seebol v. Farie*, the trial court found the gay adoption ban unconstitutional.²¹³ However, Florida's Second District Court of Appeal reversed, concluding that the legislature, not the courts, should

203. 16 Fla. L. Weekly C52 (Fla. 16th Jud. Cir. Ct. 1991).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. 627 So.2d 1210 (S. D. Fla. 1993).

209. *Id.* at 1212.

210. *Id.*

211. When Mr. Cox and Mr. Jackman signed up for the parenting classes, HRS discovered that the two men lived at the same address. *Id.* HRS then sent them a letter advising them of Florida's ban on gays and lesbians adopting children. *Id.*

212. *Id.*

213. *Id.*

decide whether lesbians and gays can adopt children.²¹⁴ Florida's Supreme Court affirmed the Second District Court of Appeal's decision in 1995.²¹⁵

3. *Matthews v. Weinberg*

*Matthews v. Weinberg*²¹⁶ challenged HRS's policy banning "unmarried couples" from being foster parents and the policy prohibiting lesbians and gays from becoming licensed foster parents.²¹⁷ Plaintiff Bonnie Lynn Matthews counseled emotionally disturbed children in foster care under HRS's supervision.²¹⁸ She became a licensed foster parent specifically to care for a six-year-old patient whose foster mother wanted him removed from her home.²¹⁹ The six-year-old boy lived with Matthews for over two months before HRS removed him when it learned of Matthews's homosexuality.²²⁰ The court held that the rules applied in this case were unofficial and thus invalid.²²¹ Lesbi-Gay individuals and couples are now allowed to become foster parents.²²²

4. *Lofton v. Kearney*

In *Lofton v. Kearney*,²²³ a group of plaintiffs challenged the adoption statute's ban on lesbi-gay adoption. The primary plaintiff, Steven Lofton, challenged the denial of his application to adopt his

214. *Id.* at 1220.

215. *See generally* Cox v. Florida Dept. of Health & Rehab. Serv., 656 So.2d 902 (Fla. 1995) (affirming the district court's holding that the statute did not violate the plaintiff's right to privacy or substantive due process, but remanding for consideration on equal protection grounds).

216. 645 So. 2d 487 (1994).

217. *Id.* at 488.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 488-90.

222. Florida is not the only state that allows gay and lesbian individuals to foster children. LESLIE COOPER & PAUL CATES, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 10-11 (2nd ed. 2006). California, Massachusetts, and New Jersey prohibit discrimination against gay people applying to become foster parents. *Id.* The Supreme Court of Arkansas recently struck down a state statute prohibiting people to serve as foster parents if any member of their household is gay. *See generally* Dept. of Human Serv.s & Child Welfare Agency Review Board., 367 Ark. 55 (2006) (holding that the statute violated gay and lesbian couples' right to equal protection and privacy). Conversely, Nebraska, Missouri, and Utah prohibit gay individuals and/or couples from being foster parents. LESLIE COOPER & PAUL CATES, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 11 (2nd ed. 2006).

223. 157 F. Supp. 2d 1372 (S.D. Fla.2001).

foster son, whom he cared for since infancy.²²⁴ The state argued that the ban serves two functions: to reflect the state's moral disapproval of a lesbi-gay lifestyle and to reflect the state's belief that it is in a child's best interest to reside in a two-parent marital home.²²⁵ The plaintiffs, on the other hand, argued that the law's true purpose was to discriminate against gays and lesbians.²²⁶ The U.S. District Court for the Southern District of Florida concluded that the true purpose behind the statute is immaterial.²²⁷ The court stated that, "[i]t is enough for the legislation to be supported by plausible or hypothesized reasons . . . Whether this reasoning in fact underlay the legislative decision is irrelevant."²²⁸ Accordingly, the court upheld the statute and rejected the argument that the statute violates the Equal Protection clause.²²⁹ The U.S. Court of Appeals for the Eleventh Circuit affirmed, finding that the U.S. Constitution does not forbid Florida's policy judgment that it is not in a child's best interest for lesbians or gays to adopt them.²³⁰

5. *In re Adoption of John Doe, Minor*

At least one Florida Circuit Court Judge has confronted Florida's Ban of lesbi-gay adoption. On August 29, 2008, in *In re Adoption of John Doe, Minor*,²³¹ Judge David J. Audlin held:

[t]he Court concludes that as (a) an unconstitutional special law pertaining to the adoption of persons, (b) an unconstitutional bill of attainder, and (c) an unconstitutional violation of the separation of powers, section 63.042(3), in its categorical exclusion of all gays and lesbians from demonstrating their fitness to adopt, does not furnish a legal basis for denying the relief sought by this petition.¹ Accordingly, the relief

224. *Lofton*, 157 F. Supp. 2d at 1376; see also *supra* notes 17-29 and accompanying text (discussing the facts of Lofton's claim against the state).

225. *Lofton*, 157 F. Supp. at 1382-83.

226. *Id.* at 1382-83 (noting that plaintiffs sought "to prove at trial that animus towards gays underlie the State's true purpose in preventing gays from adopting").

227. *Id.* at 1383.

228. *Id.*

229. *Id.* at 1384.

230. *Lofton v. Kearney*, 358 F.3d 804, 827 (11th Cir. 2004).

231. *In re Adoption of John Doe, Minor*, 2008 WL 4212559 (Fla. Cir. Ct. Aug. 29, 2008)

sought by this Petitioner shall be and is GRANTED.
(citations deleted).²³²

At five years old, minor male child came to petitioner's and his partner's home in 2001 as a foster child. Petitioner and his partner were Florida-licensed foster parents at that time and had completed the State-mandated MAPP training. In 2007, the court held a hearing to determine whether petitioner and his partner should be granted permanent guardianship of the minor until he reaches eighteen years of age.²³³ In providing a definition of guardianship, Judge Auldin opined that:

the Guardians, [Petitioner] and [his partner], or either of them acting individually, have all of the rights and duties of parents of the [minor], until he reaches the age of majority, including but not limited to, the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, and education, and medical, dental, psychiatric and psychological care. . . .²³⁴

At the hearing on this petition for adoption, a psychologist, "Dr. F," qualified as an expert and testified that:

[the minor] is very bonded to [Petitioner] and [his partner] and that if [the minor] is removed from the care of [Petitioner] and [his partner], removal could cause [the minor] to suffer attachment disorder and serious harm. . . . Petitioner is 52 years old, that his partner is 41 years old and that they have a very caring 15 year relationship and show obvious mutual respect for each other. [Petitioner's partner] is in agreement with [Petitioner's] decision to adopt.²³⁵

The court, in its final Judgment, expressly agreed with and accepted this expert testimony.

The homestudy for adoption was entered into evidence and its author testified. The Opinion in DOE included the following:

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

The home study's penultimate paragraph concludes by stating that "[I] would highly recommend the applicant, [Petitioner], for the adoption of one child, [the minor.] The final paragraph states: "However, this homestudy is not approvable due to [Petitioner]'s open disclosure of his sexual orientation, and therefore the adoption is disallowable by law." (*citation omitted*).

At the hearing, Ms. D. testified that it is the duty of a social worker performing adoptive home studies to determine an applicant's eligibility to adopt under Florida law, which includes routinely inquiring of individuals whose heterosexuality is uncertain whether they are homosexual. (*citation omitted*).²³⁶

The Petitioner entered into evidence abundant documentation regarding the legislative history of SB 354 (1977).

Judge Audlin heard extensive scientific-related testimony from Dr. David Brodzinski, Professor Emeritus of Developmental and Clinical Psychology at Rutgers University. The opinion states that Dr. Brodzinski has done extensive clinical work with adoptive parents who are gay or lesbian and that he was qualified as an expert to testify at the hearing. Judge Audlin found Dr. Brodzinski's testimony to be cogent, well-reasoned and persuasive.²³⁷

Based on that testimony, the court found that:

the depiction of existing research set forth in the 2004 Lofton panel opinion (358 F. 3d at 824-26) is, at minimum, not presently accurate. In view of Dr. Brodzinski's testimony that the categorical ban is irrational and scientifically inexplicable, the Court is unable to discern any coherent explanation for its enforcement in 2008, other than a willingness to passively leave intact the ban against this politically-disfavored group."

Finally, Judge Audlin determined that Florida's ban of lesbi-gay adoption was unconstitutional under the Florida State Constitution based on two rationales. First, as a "special law" rather than a "general law," the statute may not relate to certain persons as a class because such state action is limited to general laws. Second, section 63.042(3)

236. *Id.*

237. *Id.*

is a Bill of Attainder, which is expressly prohibited under Section 10, Article I of the Florida Constitution. As a circuit court opinion, *Doe* may have limited immediate application only in the 16th Circuit (Monroe County). With its breadth of justification and depth of analysis and supporting documentation, however, *Doe* signifies the onset of proper judicial activism in Florida.

6. *In re the Adoption of John Doe and James Doe*

In the final months before this Article went to press, a Florida circuit court judge in Miami-Dade, Florida delivered an opinion supporting the theories and analysis of this Article. The Authors had completed their years of research and had written numerous drafts prior to this ruling. None of the theories, analysis or research in this Article were derived from the Lederman Opinion. Indeed, the Authors applaud the acceptance and promulgation of their position by Judge Lederman.

On December 11, 2004, two half-brothers, “John”, born June 15, 2000, and “James,” born August 2, 2004, were placed together with the petitioner, Martin Gill, who was a licensed foster caregiver. The children became available for adoption in July of 2006 – after nearly two years in the petitioner’s care. At the time of 2008 hearing, the two boys had been in foster care with the petitioner for four years. Thus, the boys, who had arrived at ages four years and four months at the time of “temporary” placement, were now eight and four years old in November of 2008.

Petitioner is in a committed relationship with his life partner – “John Roe.” John Roe’s biological son, who was 12 years old in 2008, also lived in the Doe-Roe household. Although these men co-parent John and James in their home, a strategic legal decision was made to have only one party seek adoption due to the lesbi-gay adoption ban.

The State and petitioner presented extensive expert testimony at the hearing (which is detailed in the Opinion). In addition, the Opinion outlines 56 stipulated facts – including: “54. But for Section 64.042(3), Fla. Stats., DCF would have approved petitioner’s application to adopt John and James.”

As further proof of the trial court level “movement” to repeal Florida’s 30-plus year ban of lesbi-gay adoption, after careful review of the facts and in depth analysis of the arguments, Cindy Lederman, a Miami-Dade circuit court judge, ruled to allow an openly gay man in a committed homosexual relationship to adopt two minor foster children in his care. Specifically, Judge Lederman held that:

Fla. Stat. §63.042(3) violates the Petitioner's and the Children's equal protection rights guaranteed by Article I, § 2 of the Florida Constitution without satisfying a rational basis. Moreover, the statutory exclusion defeats a child's right to permanency as provided by federal and state law pursuant to [AFSA] of 1997.

The State has appealed the decision to the Third District Court of Appeal in Miami, but will allow the children to remain in the petitioner's home and care until the appeals process is complete.

IV. FLORIDA'S BAN ON LESBI-GAY ADOPTION VIOLATES ASFA

A. Lift the Ban and Increase the Number of Prospective Adoptive Parents.

As previously stated, the purpose of ASFA is to promote permanency for children.²³⁸ Lifting the ban on lesbi-gay adoption would increase the adoption rate in accordance with ASFA by increasing the number of potential adoptive parents.²³⁹ No definitive figures estimating the number of lesbian and gay individuals in the United States or in Florida exist.²⁴⁰ Moreover, no statistics document how many lesbi-gay individuals or couples are deterred from applying to adopt a child.²⁴¹ It seems axiomatic that excluding a class of people from adopting children decreases the potential of finding families for children by reducing the number of people eligible to adopt them.²⁴²

A University of Chicago study on sexuality reported that 1.3 percent to 4.1 percent of women and 2.7 percent to 4.9 percent of men are homosexual.²⁴³ In a Kaiser Family Foundation survey of self-

238. See *supra* Part II. C. for a detailed discussion of ASFA.

239. LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 15 (2nd ed. 2006)

240. *Id.* at 1.

241. *But see generally* Lofton v. Sec'y of Dept. of Children & Family Serv., 377 F.3d 1275 (2004) (Barkett, J. dissenting) (noting that Florida's statutory prohibition against gays adopting children renders "hundreds of thousands of Florida citizens unfit to serve as adoptive parents...").

242. Natl. Gay & Lesbian Task Force, *supra* note 221 (stating that the ban on gay foster and adoptive parents decreases the number of potential homes for children who need foster or adoptive homes).

243. National Opinion Research Center, *The National Health and Social Life Survey ("The Sex Survey,")*, <http://cloud9.norc.uchicago.edu/faqs/sex.htm> (last visited Jun. 5, 2006)

identified gay and bisexual individuals, forty-nine percent of the respondents who were not parents of children under the age of eighteen said they would like to adopt children in the future.²⁴⁴ About eight million adults between the ages of twenty and fifty-four reside in Florida.²⁴⁵ If, *arguendo*, about two percent of those adults are gay and even as little as five percent wished to adopt, Florida could see an increase of over 8,000 prospective adoptive parents.²⁴⁶ Therefore, allowing lesbi-gay couples and individuals to adopt children would increase the amount of eligible adoptive parents²⁴⁷ and the number of children actually adopted.²⁴⁸

B. Lesbi-Gay and Heterosexual Parents Raise Equally Safe and Healthy Children

Obtaining a larger pool of adoptive-parent applicants in Florida is an important step in achieving ASFA's basic goal, which is to find

(citing EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY IN THE UNITED STATES* (1994)).

244. Kaiser Family Foundation., *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* 4 (2000), available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf> (last visited Jun. 5, 2006).

245. Bureau Economic and Business Research Warrington College of Business, FLORIDA STATISTICAL ABSTRACT 2005 4 (39th ed., Univ. of Fla. 2005).

246. This is a similar amount to the 9-10,000 children who need foster care in Florida each year. Florida Dept. of Children & Families, *Fostercare - Am I ready?*, available at <http://www.dcf.state.fl.us/fostercare/amiready.shtml> (last visited Apr. 21, 2006) (noting that there are 4,642 children available for adoption but homes have been identified for only 2,727 of them).

247. The 2000 U.S. Census showed that a higher percentage of gay couples adopt children compared to married and unmarried heterosexual couples. Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents: A Human Rights Campaign Foundation Report* 5 (2004), available at http://www.hrc.org/Content/ContentGroup/Publications1/kids_doc_final.pdf (last visited Jan. 21, 2009). In 2000, six percent of same-sex couples were raising adopted children compared to 5.1 percent of married heterosexual couples and 2.6 percent of unmarried heterosexual couples. *Id.*

248. By lifting the ban on gay individuals and couples adopting, states would see an increase in the number of gay individuals adopting children similar to the increase in single individuals adopting when states stopped restricting adoptions to married couples. *Id.* For example, prior to the 1970s, single individuals were generally excluded from adopting children. *Id.* During the 1970s, it is estimated that between one-half percent and four percent of people adopting were single. *Id.* In the 1980s, the percentage jumped to between eight percent and thirty-four percent. *Id.* According to the U.S. Department of Health and Human Services, currently about 33% of children adopted from foster care are adopted by a single parent. *Adoption Statistics: Single Parents*, <http://statistics.adoption.com/information/adoption-statistics-single-parents.html> (last visited Jun. 5, 2006).

permanent homes for foster children. However, ASFA's overriding concern is that states protect the health and safety of children within their foster-care systems.²⁴⁹ Allowing lesbi-gay individuals to adopt would not prevent Florida from complying with this concern because research shows that lesbi-gay parents are equally competent to raise children as are heterosexual parents.²⁵⁰

The Florida legislature mandated that, in every proceeding that relates to children, the child's health and safety is the "paramount concern."²⁵¹ Before the state places a child with a prospective foster or adoptive parent, the state must determine that the child's health and safety is adequately protected.²⁵² Both prospective adoptive and foster parents must establish that they are financially,²⁵³ physically,²⁵⁴ and emotionally²⁵⁵ able to care for children.²⁵⁶ Both must establish stable and safe housing conditions.²⁵⁷ Both must establish moral fitness to care for children.²⁵⁸ The state uses this screening process to evaluate heterosexual and gay applicants.²⁵⁹ Applicants who successfully establish these criteria and complete the screening process are deemed qualified to protect a child's health and safety.²⁶⁰ Therefore, properly screened lesbi-gay applicants are as qualified to protect the health and safety of children as heterosexual applicants.

The best interest of the child standard governs the adoption and foster-care placements.²⁶¹ Therefore, foster and adoptive parents must not only establish that they can adequately protect a child's health and

249. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First Three Years of the Adoption and Safe Families Act*, 39 FAM. & CONCILIATION CTS. REV. 25, 27 (2001).

250. See *infra* note 264 and accompanying text (invalidating arguments supporting the ban on gay adoption based on the best interest of the child standard).

251. FLA. STAT. § 39.001(1)(b) (2002).

252. FLA. STAT. § 39.001(1)(a) (2002).

253. FLA. ADMIN. CODE ANN. r. 65C-16.005(g) (2005).

254. r. 65C-16.005(3)(i).

255. *Id.*

256. *Id.*

257. r. 65C-16.005(h).

258. r. 65C-16.005(3)(m).

259. r. 65C-16.005(3).

260. FLA. STAT. § 409.175 (2002) (stating that the purpose of foster home license requirements are to ensure protection of the health, safety, and well-being of foster children); FLA. ADMIN. CODE ANN. r. 65C-16.005 (2005) (stating that the evaluations of adoption applicants are aimed at "selecting families who will be able to meet the physical, emotional, social, educational, and financial needs of a child").

261. FLA. STAT. § 39.001(1)(a)(2002).

safety, but also that it is in the child's best interest for the state to place him or her in that home.

Florida's foster-care agencies and organizations have consistently placed children in foster homes with gay parents, thereby reflecting the State's determination that placement is in the best interest of those children.²⁶² However, Florida's legislature and the courts have defended the blanket ban on lesbi-gay adoption by arguing it is not in a child's best interest for a gay parent to adopt him or her.²⁶³ Since Florida has routinely determined that lesbi-gay foster parents adequately protect children's health and safety during foster care, it is illogical to conclude that gay parents cannot provide safe adoptive homes that serve the best interests of the child.

Despite the contradiction between allowing gay individuals to be foster parents but not adoptive parents, the Florida legislature and courts have advanced many rationales to support the State's prohibition on lesbi-gay adoption. The most common rationales are that it is in the best interest of children to live in homes with a mother and father because the marital family is more stable than any other household arrangement,²⁶⁴ children need socialization and education from a mother and father;²⁶⁵ and heterosexuals are better able to educate and guide children through their sexual development.²⁶⁶

The State argues, and the Courts have agreed (at least until 2008), that the ban serves a moral purpose and reflects the State's disapproval of a lesbi-gay lifestyle.²⁶⁷ The State further argues that lawmakers may legislate public morality²⁶⁸ and the law promotes public morality in the context of child-rearing and the legal recognition of families.²⁶⁹ Other concerns include the belief that gay adoptive parents are more likely to molest their children²⁷⁰ and that the

262. *Id.*

263. *Lofton v. Sec'y of Dept. of Children & Family Serv.* 358 F.3d 804, 818 (11th Cir. 2004).

264. *Lofton*, 358 F.3d at 818-21.

265. *Id.* at 818.

266. *Id.*; *Florida Dept. of Health & Rehab. Serv. v. Cox*, 627 So. 2d 1210, 1220 (Fla. 1993).

267. *Lofton v. Kearney*, 157 F. Supp. 1372, 1382 (S.D. Fla. 2001); *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 822 (11th Cir. 2004).

268. *Lofton*, 157 F. Supp. at 1382.

269. *Lofton*, 358 F.3d at 819.

270. Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POLICY 207, 211 (1995).

children's peers will ostracize and tease them.²⁷¹ Nevertheless, these beliefs are mainly based on stereotypes and prejudice rather than credible evidence.²⁷² As a result, such beliefs and rationales do not establish that a child's health and safety are at risk with gay parents.

An oft-cited reason for the Florida ban is the preference for children to live in a two-parent home.²⁷³ The State believes that the marital family is more stable than any other household arrangement, and mothers and fathers should socialize and educate their children.²⁷⁴ Due to the limited research on the stability of same-sex relationships, it is difficult to assess the validity of the belief that heterosexual married couples provide a more stable household.²⁷⁵ However, according to the 2000 Census, unmarried lesbi-gay couples raising children are two times more likely to be in long-term relationships than unmarried heterosexual couples raising children.²⁷⁶ As for heterosexual married

271. *Id.*; see also *State of Florida, Dept. of Health & Rehab. Serv. v. Cox*, 627 So. 2d 1210, 1220 (Fla. 1993) (noting that children may experience bias and prejudices due to their parent's gay orientation, but acknowledging that these "private biases" are not a legitimate rational basis to support banning gays from adopting).

272. Elovitz, *supra* note 270, at 211 (noting that "no study has shown any harm to children raised by lesbian or gay parents."); see also *infra* Part III A and accompanying notes (arguing that there is no merit in Florida's arguments in support of banning gays from adopting children); but see generally Lynn D. Wardle, *The Potential Impact of Gay Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997) (criticizing the methodological and analytic aspects of "studies purporting to show equivalence of gay parenting" and arguing that children of gay parents are negatively affected). However, Judith Stacey, a sociology professor at New York University, insists that the studies comply with the same standards as most other studies in the areas of child development and psychology and claims that "critics... are really leveling attacks on well-accepted social science methods." LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 34 (2nd ed., 2006). Stacey also insists that gay parents are as "fit, effective, and successful" as heterosexual parents and "[n]o credible social science evidence supports a claim otherwise." *Id.*; Laura A. Turbe, *Florida's Inconsistent Use of the Best Interests of the Child Standard*, 33 STETSON L. REV. 369, 385-86 (2003).

273. See *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 818 (11th Cir. 2004) (upholding the state's assertion that the marital home with a mother and father is "critical to optimal childhood development and socialization").

274. *Id.* at 818-21.

275. The *Lofton* court called the notion that the marital family structure is the most stable household arrangement one of those "unprovable assumptions." *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 820 (11th Cir. 2004). It also claimed that despite the plethora of alternative living arrangements, none have been as enduring as the marital family. *Id.* at 820-21.

276. Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents: A Human Rights Campaign Foundation Report 5* (2004), available at http://www.hrc.org/Content/ContentGroup/Publications1/kids_doc_final.pdf (noting that according to the 2000 U.S. Census "19.9 percent of unmarried heterosexual couples raising children have been together for five years or longer while 41.1 percent of same-sex couples raising children have stayed together that long")(last visited Jan. 21, 2009).

couples, more than forty percent of first marriages in the United States end in divorce.²⁷⁷ Although most divorced parents eventually remarry,²⁷⁸ these second marriages are even more likely to end in divorce²⁷⁹ and usually do not last as long as the first marriage.²⁸⁰

Although most families with children include married couples,²⁸¹ household and family composition in the United States is constantly changing.²⁸² The purported preference for a marital home for adoptive children seems like an empty justification, especially in light of the fact that Florida actively recruits single people to adopt children.²⁸³ In fact, in Florida, single people account for about twenty-five percent of adoptions from foster care.²⁸⁴ Instead of focusing on the sexual orientation and marital status of the family structure, Florida should follow ASFA's clear directive to focus on the children's needs and evaluate whether a particular family can adequately provide the love, nurture, care, and other necessities that allow children to thrive and grow.²⁸⁵

277. WALTER KIRN, *Should You Stay Together for the Kids?*, in THE REFERENCE SHELF: THE AMERICAN FAMILY 65 (Karen Duda, ed. 2003).

278. About seventy percent of divorced mothers remarry within six years. MARY ANN MASON, ARLENE SKOLNICK & STEPHEN D. SUGARMAN, INTRODUCTION TO ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 2 (Mary Ann Mason, Arlene Skolnick, Stephen D. Sugarman, eds. 1998).

279. *Id.* Sixty percent of second marriages end in divorce. Divorce Magazine, *U. S. Divorce Statistics*, available at <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Aug. 21, 2006).

280. WALTER KIRN, *Should You Stay Together for the Kids?*, in THE REFERENCE SHELF: THE AMERICAN FAMILY 65 (Karen Duda, ed. 2003) (stating that the "average duration of first marriages ending in divorce is eight years; duration of second marriage is six years").

281. Married couples head about seventy-three percent of families with children under the age of eighteen. DAVID BLANKENHORN, THE REAPPEARING NUCLEAR FAMILY IN THE REFERENCE SHELF: THE AMERICAN FAMILY 14 (Karen Duda, ed. 2003).

282. Beside the traditional nuclear family, there are single parent families, stepfamilies, blended families, adoptive families, and, increasingly, families headed by same-sex couples. Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents: A Human Rights Campaign Foundation Report 5* (2004), available at http://www.hrc.org/Content/ContentGroup/Publications1/kids_doc_final.pdf (last visited Jan. 21, 2009). Also at least one same-sex couple currently raises a child in ninety-six percent of all counties in the country. LESLIE COOPER & PAUL CATES, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 2 (2nd ed. 2006).

283. Br. of App. at 29, *Lofton v. Kearney*, 157 F. Supp. 1372 (S.D. Fla. 2001).

284. *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 377 F.3d 1275, 1291 (11th Cir. 2004).

285. See e.g. MARY ANN MASON, ARLENE SKOLNICK & STEPHEN D. SUGARMAN, INTRODUCTION TO ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 2 (Mary Ann Mason, Arlene Skolnick, Stephen D. Sugarman, eds. 1998) (arguing that conforming to a certain image of a family is unimportant compared to how well a family functions); ROBERT A. BERNSTEIN, FAMILIES OF VALUE: PERSONAL PROFILES OF PIONEERING LESBIAN AND GAY

Another rationale in Florida for banning lesbi-gay adoption is the notion that children need heterosexual role models for “optimal childhood development.”²⁸⁶ The court in *State v. Cox* repudiated the ability of gay individuals to educate and guide children in relationships with the opposite sex after puberty.²⁸⁷ The court claimed that some aspects of a child’s education “are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex.”²⁸⁸

As a result, the court concluded that, “[i]t is in the best interests of a child if his or her parents can personally relate to the child’s problems and assist the child in the difficult transition to heterosexual adulthood.”²⁸⁹ In its reasoning, the court failed to offer any proof that lesbi-gay parents are unable to advise and guide children through puberty and adolescence. It also did not consider any evidence indicating the few differences in the growth and development of children in homes with heterosexual parents versus gay parents.²⁹⁰

In fact, mental health care professionals agree that, “[c]hildren’s optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes.”²⁹¹ This clinical analysis refutes the Florida legislature’s claim that children require heterosexual role models for optimal social development.

PARENTS 255 (2005) (claiming that “the *quality* of a family’s relationship is more important than the particular *structure* of families”) (emphasis in original).

286. *Lofton v. Sec’y of Dept. of Children & Family Serv.*, 358 F.3d 804, 818, 822 (11th Cir. 2004) (finding that the gay adoption ban could be rationally related to the theory that heterosexuals are better able than gays to educate and guide adoptive children’s sexual development through puberty and adolescence); *Florida Dept. of Health & Rehab. Serv. v. Cox*, 627 So. 2d 1210, 1220 (Fla. 1993) (stating that because most children will become heterosexual adults, it is in their best interest for a heterosexual adult to assist them with the transition to adulthood); *In re Op. of the Justices*, 530 A. 2d 21, 25 (N. H. 1987) (concluding that a ban on gay adoption was reasonably related to the belief that children’s role models can influence their sexual development and identity); *but see* Child Welfare League, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, available at <http://www.cwla.org/programs/culture/glbtposition.htm> (last visited Jun. 5, 2006) (stating that the quality of children’s relationships within their families has a greater impact on their development than the specific familial composition).

287. *State of Florida, Dept. of Health & Rehab. Serv. v. Cox*, 627 So. 2d 1210, 1220 (Fla. 1993).

288. *Id.*

289. *Id.*

290. LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 21 (2nd ed. 2006).

291. *See generally* Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002).

The State's argument that children need heterosexual role-models is an attempt to disguise their baseless belief that parents shape their children's sexual orientation; in other words, that children of gay parents will become gay themselves.²⁹² However, numerous studies confirm that children of gay parents are no more likely to become gay than children of heterosexual parents.²⁹³ In fact, most sexual and gender identity studies found that a substantial majority of children with gay parents are heterosexuals.²⁹⁴

Florida has also claimed that the ban on lesbi-gay adoption is rationally related to promoting public morality.²⁹⁵ Furthermore, according to Florida, the ban reflects the state's disapproval of a lesbi-gay lifestyle and promotes public morality in the context of child-rearing and the legal recognition of families.²⁹⁶ The State has defended its position by arguing that public morality is a legitimate concern of the legislature.²⁹⁷ This reasoning is flawed because Florida is disguising its discrimination against a group of people as a moral regulation. Moral disapproval is not a legitimate purpose for discrimination²⁹⁸ and "passing a law that discriminates against a group of citizens to express dislike or disapproval of them is precisely what

292. See *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 818 (11th Cir. 2004) (defending the gay adoption ban with the argument that "dual-gender parenting plays [a vital role] in shaping sexual and gender identity"). The dissenting judges argued that the statement was simply a "cryptic" way of suggesting that "placing children with gay parents may make it more likely that children will become gay." *Id.* (Barkett, J. dissenting); see also Lynn D. Wardle, *The Potential Impact of Gay Parenting on Children*, 1997 U. ILL. L. REV. 833, 852 (1997) (claiming that "disproportionate percentages of children raised by gay parents will develop gay interests and behaviors").

293. See J. Michael Bailey & David Bobrow, *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVELOPMENTAL PSYCHOLOGY 124, 124-129 (1995) (finding that over ninety-percent of the sons of gay fathers identified themselves as heterosexuals); CHARLOTTE J. PATTERSON, *CHILDREN OF THE LESBIAN BABY BOOM: BEHAVIORAL ADJUSTMENT, SELF-CONCEPTS AND SEX ROLE IDENTITY IN LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH, AND CLINICAL APPLICATIONS* 156-75 (B. Greene & G.M. Herek eds. 1994) (finding that most children with gay parents are heterosexual); Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341-44 (2002) (finding no differences in sexual orientation of adults with a divorced gay parent compared to a divorced heterosexual parent).

294. Charlotte J. Patterson, AMERICAN PSYCHOLOGICAL ASSOCIATION, <http://www.apa.org/pi/parent.html> (last visited Jul. 5, 2006).

295. *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 819 (11th Cir. 2004).

296. *Id.*

297. *Lofton v. Kearney*, 157 F. Supp. 1372, 1382 (S.D. Fla. 2001).

298. Br. of App. at 20, *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

the equal protection clause of the Constitution does not allow.”²⁹⁹ Therefore, Florida cannot claim a rational basis for its absolute ban of lesbi-gay adoption (whether the individual is in a “sexual relationship” or not).

Another concern of supporters of laws banning gay individuals from adopting children is the belief that gays will molest their children.³⁰⁰ No evidence, however, supports that gay people pose a risk of sexual abuse to children. Research studies reveal that gay men are no more likely than heterosexual men to be sexually attracted to or sexually abuse children.³⁰¹ For example, a 1994 study of sex abuse cases in a Denver hospital found a gay offender in less than one percent of the cases.³⁰² The researcher concluded that, “a child’s risk of being molested by his or her relative’s heterosexual partner is 100 times greater than by someone who might be identified as a gay.”³⁰³ Even more telling, many pedophiles do not have a sexual attraction to adults – regardless of their gender.³⁰⁴

Finally, opponents of lesbi-gay adoption frequently justify the ban by claiming that children with gay parents will be teased and ostracized.³⁰⁵ While some children with gay parents are teased about their parent’s sexual orientation, most children are ridiculed and teased at some point during their childhoods anyway.³⁰⁶ Excluding lesbi-gay adoption will not guard against children teasing their peers.³⁰⁷ Further, no evidence supports the proposition that having gay parents hinders children from forming relationships with their peers. Children with gay parents form equally healthy peer relationships as do children with

299. *Id.* at 18. States have long attempted to use a morality rationale to justify laws passed to express disapproval of groups of people. *Id.* at 19 (noting that states laws barring women from certain professions as necessary to protect public morals when the laws really discriminated against groups to censure women working outside the homes).

300. See e.g. Jodi L. Bell, *Prohibiting Adoption by Same-Sex Couples: Is it in the “Best Interest of the Child?”*, 49 *DRAKE L. REV.* 345, 351 (2001) (noting that it was “the mistaken presumption that gays will molest their children...[that led] to the enactment of the New Hampshire prohibition statute”).

301. LESLIE COOPER & PAUL CATES, *TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING* 88 (2nd ed. 2006).

302. Carole Jenny, T. A. Roesler & K. L. Poyer, *Are Children at Risk of Sexual Abuse by Homosexuals?*, 94 *PEDIATRICS* 41, 41–44 (1994).

303. *Id.*

304. See COOPER & CATES, *infra* note 328, at 88.

305. See *Lofon v. Kearney*, 157 F. Supp. 1372, 1383 (S.D. Fla. 2001) (defending banning gays and lesbians from adopting children because it would minimize social stigmatization).

306. COOPER & CATES, *infra* note 328 at 89.

307. *Id.*

heterosexual parents, and studies show that the former are not teased more than the latter.³⁰⁸

The State's arguments in support of the prohibition against lesbi-gay adoption are simply excuses to promote prejudice and animus against gays, especially when one considers that gays are the only group prohibited from adopting children in Florida. Other groups of people who may present an identified risk of harm to children are not categorically excluded from adopting.³⁰⁹ For example, Florida has provisions that allow convicted felons or child abusers to undergo a heightened-scrutiny adoption-application process.³¹⁰ Commenting on this differential treatment, Judge Barkett of the United States Court of Appeals for the Eleventh Circuit wrote:

[t]here is no comparable bar in Florida's adoption statute that applies to any other group. Neither child molesters, drug addicts, nor domestic abusers are categorically barred by statute from serving as adoptive parents. In a very real sense, Florida's adoption statute treats gays less favorably than even those individuals with characteristics that may pose a threat to the well-being of children.³¹¹

In light of the overwhelming evidence that lesbians and gays are equally qualified to care for and raise children, they should, at a minimum, have the same protections afforded individuals with criminal or abuse records — an adoption application evaluated on a case-by-case basis in the best interest of the child.

308. *Id.*

309. *See* Br. of App. at 13, *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (claiming that parental substance abuse “plays a role in over half of the cases in which children are removed from their families in Florida,” but substance abusers are not excluded from adopting).

310. FLA. ADMIN. CODE ANN. r. 65C-16.005(9)(a) (2005) (establishing procedures for evaluating cases in which the adoption applicant has a criminal or abuse record); *see also* Cox v. Florida Dept. of Health & Rehab. Serv., 656 So.2d 902, 905 (Fla. 1995) (acknowledging that the fact that gays are excluded from adopting children while convicted felons or people listed on the Child Abuse Registry are allowed to adopt via a more intensive screening process “raises a serious substantive due process question”).

311. *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 377 F.3d 1275, 1290 (Fla. Dist. Ct. App. 1994) (Barkett, J., dissenting). Although the mere fact that an applicant is a felon or has a history of abuse does not mean the applicant cannot adequately care for and raise an adoptive child, the past behavior affirmatively demonstrates that the applicant is capable of engaging in the behavior and there is a risk that the applicant will repeat that behavior. *Id.*

C. Lift the Ban and Meet ASFA's Goal of Permanent Placement

Florida must look beyond outdated stereotypes and animus towards gays and concentrate on its problem-ridden foster-care system. As previously noted, based upon the most recent data from 2005, over 29,000 children are in foster care in Florida.³¹² According to DHHS, 7,478 of those children were in foster care and waiting for adoption.³¹³ As of January of 2001, the average length of stay in foster care was thirty-three months. Even more critically, approximately eighteen percent of the foster children had been in care for five years or longer.³¹⁴ Unfortunately, some children never find a permanent home.³¹⁵ These extensive time periods are directly inconsistent with ASFA's clear mandate to find permanent placements for children in foster care in a timely manner.³¹⁶ Allowing lesbian and gay individuals and couples to adopt children is a feasible way for the state to comply with ASFA because it means a greater quantitative pool of adoptive-parent applicants.³¹⁷

Conversely, upholding the law that bans gay individuals from adopting children simply maintains the current state of foster care in which children suffer "foster-care drift" where they move from home-to-home, and often remain in foster care long term.³¹⁸ Such a

312. The Children's Defense Fund, *Child Welfare in Florida* (2005); CWLA, Florida's Children (2008), available at <http://www.cwla.org/printable/printpage.asp> (last visited Oct. 29, 2008); USDHHS, ACF, Foster Care FY2002-FY2006: Entries, Exits, and Numbers of Children in Care on the Last Day of Each Federal Fiscal Year, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/entryexit2006.htm (last visited Dec. 15, 2008).

313. USDHHS, ACF, Children in Public Foster care Waiting to be Adopted: FY1999 thru (sic.) FY 2006, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/waiting2006 (last visited Dec. 15, 2008).

314. Florida State Foster Adoptive Parent Association, Inc., Statistics from the U.S. and Florida, available at <http://www.charityadvantage.com/fsfapa/stats1.asp> (last visited Nov. 24, 2008).

315. Jessica Berman & Kenneth Leichter, *Adoption and Foster Care*, 6 GEO. J. GENDER & L. 667, 672 (2005).

316. Jim Moye, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 382 (2002).

317. According to the 2000 U.S. Census, the State of Florida had a total adult population of 15,982,378 (the 4th largest US state population). The total number of reported same sex couples was 41,048 (approximately 0.5% of the total adult population). There is no data for the number of single or non-committed gays and lesbians, available at http://www.gaydemographics.org/USA/states/Florida/2000Census_state_fl.htm (last visited Jan. 25, 2009).

318. Florida has a high percentage of children placed in more than two foster homes during their first year in the foster care system. Lofton v. Sec'y of Dept. of Children & Family

tumultuous way of life often has an overwhelmingly negative effect on a child's development.³¹⁹ Further, according to the Pew Commission on Children in Foster Care, “[c]hildren who spend many years in multiple foster homes are substantially more likely than other children to face emotional, behavioral, and academic challenges.”³²⁰ Finally, children who have grown up in foster care are more likely to abuse drugs and encounter homelessness, unemployment, and other social and developmental problems.³²¹

D. Constitutional Implications Support Lifting the Ban on Lesbi-Gay Adoption

When legislators passed ASFA, they did not propose that states allow gay individuals to adopt children to comply with its mandates.³²² In fact, in the years immediately after ASFA's passage, Florida increased its number of adoptions in accordance with ASFA and even received economic adoption incentives provided to states by the federal government for complying with ASFA mandates.³²³ Still Florida has not reached its goal of finding permanent placements for children within one year of their entrance into foster care, or ASFA's goal to timely find stable homes for foster children.³²⁴ Banning lesbian pre-adoptive-parent applicants further reduces the state's

Serv., 377 F.3d 1275, 1299 (11th Cir. 2004). This is in direct violation of national standards on foster care placement stability. *Id.*

319. See FLA. STAT. § 409.1673 (2002) (pointing out the need for alternate care for adolescents because they are “often inappropriately and repeatedly placed in the foster care system, typically spend long periods in alternate care, lack a stable environment, and exhibit behavior problems such as truancy, delinquency, and physical or sexual abuse”).

320. Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-being for Children in Foster Care* 9–11 (Pew Charitable Trust 2004).

321. *Id.* A University of Wisconsin study on foster children who “aged-out” of the system found twenty-seven percent of the males and ten percent of the females entered the criminal justice system within twelve to eighteen months. *Id.* The study further revealed that fifty percent were unemployed, thirty-seven percent never finished high school, thirty-three percent of the former foster children received welfare, and nineteen percent of the females had children. Barbara Vobejda, *At 18, It's Sink or Swim; For Ex-Foster Children, Transition is Difficult*, WASH. POST, July 21, 1998, at A01; see also Timothy Arcaro, *Florida's Foster Care System Fails its Children*, 25 NOVA L. REV. 641, 667 (2001). The mental health implications were equally astounding: forty-seven percent of the foster children had mental health counseling and/or medication while in the foster care system; and twenty-one percent of the children still needed continual psychological assistance after exiting the foster care system. *Id.*

322. See *supra* discussion Part I.B. and accompanying notes.

323. See *supra* discussion Part I.B. and accompanying notes.

324. FLA. STAT. § 39.001(1)(h)(2002).

opportunities to find permanent homes for children.³²⁵ Although Congress did not intend for states to specifically allow gay applicants to adopt children in passing ASFA, constitutional implications against upholding the ban and ASFA's best interest of children standard support repealing the Florida law.

1. Due Process & Privacy Rights

Florida's adoption law violates the substantive due-process clause because it seeks to enforce a particular view concerning the immorality of a lesbi-gay lifestyle on the State's citizens. The Supreme Court decision in *Lawrence v. Texas*,³²⁶ which recognized a fundamental right to private sexual intimacy, demonstrates the due-process implications against upholding this ban.³²⁷ Specifically, Florida favors the ban as a reflection of the State's moral disapproval of a lesbi-gay lifestyle.³²⁸ However, a state's traditional view of a particular practice as immoral is not a sufficient reason for upholding a

325. See Christine Kim, *Case Spotlight: Lofton v. Kearney*, 157 F. Supp. 2d 1372 (2001), 7 U.C. DAVIS J. JUV. L. & POL'Y 400, 407-08 (2003) (noting that banning gay people from adopting children raises difficult policy concerns in light of ASFA because "the potential pool of good adoptive homes available for children [is] reduced if gay parents are automatically excluded").

326. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Court invalidated a Texas law criminalizing certain intimate sexual conduct between two persons of the same sex. *Id.*

327. *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 377 F.3d 1275, 1303 (11th Cir. 2004) (explaining that *Lawrence v. Texas* held that "consenting adults have a right under the *Due Process Clause* to engage in private sexual conduct, including gay conduct.") (Barkett, J., dissenting) (emphasis in original); see also *Lawrence*, 539 U.S. at 564 (declaring that the Court granted certiorari to consider "[w]hether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the *Due Process Clause* of the Fourteenth Amendment"). There is some disagreement over whether the Court classified private sexual conduct as a fundamental right. *Id.* Although the Court also cited an equal protection grounds for granting certiorari, it later expressly decided to resolve the case under the *Due Process Clause* of the Fourteenth Amendment and then went into an extensive discussion of precedent dealing with due process fundamental rights. *Id.* at 564-66. *But see id.* at 586-605 (pointing out that the decision did not expressly characterize the right as fundamental and applied rational basis review which is not used in analyzing laws burdening fundamental rights) (Scalia, J. dissenting). Some commentators point to the court's mention that there was no "legitimate state interest" justifying Texas' sodomy law to support the proposition that the Court did not characterize the issue as a fundamental right. *Id.* at 578. *But see* Cass R. Sunstein, *What Did Lawrence Hold?: Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 47 (Year) (asserting that the phrase was preceded and followed by extensive analysis of privacy rights strongly suggesting that the interest was not an "ordinary one— and that the Court is demanding something more than a rational basis").

328. *Lofton*, 358 F.3d at 819.

law that prohibits that practice.³²⁹ In *Lawrence*, the U.S. Supreme Court noted the traditional condemnation of the lesbi-gay lifestyle, but also mentioned the recognized constitutional protections for adults to make decisions in their private lives concerning sex.³³⁰ Accordingly, states should not use its power to enforce its views of the immorality of a lesbi-gay lifestyle on its residents.³³¹

Florida admits that the ban is meant to express its belief that a lesbi-gay lifestyle is immoral.³³² The State justifies the ban by pointing out that the government may legitimately regulate public morality.³³³ However, *Lawrence* establishes that private sexual intimacy is not an area into which the government may intrude.³³⁴ In this decision, the Court reiterated that any law burdening a fundamental right must have a compelling governmental interest that is narrowly tailored to further that interest.³³⁵ In this instance, Florida's ban on lesbi-gay adoption burdens a fundamental right because gay individuals who wish to adopt children must either stop engaging in "current, voluntary gay activity"³³⁶ or not adopt a child.³³⁷ As shown in *Lawrence*, Florida's belief that a lesbi-gay lifestyle is immoral is an insufficient basis for determining the eligibility of potential adoptive parents.

329. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)) (Stevens, J., dissenting). The *Lawrence* court argued that Stevens' analysis was directly applicable to its decision finding private sexual conduct a protected liberty under the Due Process Clause of the Fourteenth Amendment. *Id.* at 578.

330. *Id.* at 572.

331. *Id.* at 571. The Court wrote, "Our obligation is to define the liberty of all, not to mandate our own moral code." *Id.* (citing *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)).

332. *Lofton*, 358 F.3d at 819; *see also supra* Part III and accompanying notes (discussing the history behind the Florida adoption statute).

333. *Lofton v. Kearney*, 157 F. Supp. 1372, 1382 (S.D. Fla. 2001).

334. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (stating that consenting adults engaging in private sexual conduct are entitled to privacy). The Court argued that adults engaging in private sexual conduct have liberty rights under the Due Process Clause that "gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" *Id.*

335. *Id.* at 578.

336. *See Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 806 (11th Cir. 2004).

(noting that when evaluating claims under the adoption statute, Florida courts distinguish between gay orientation and gay activity and define a gay as a person "known to engage in current, voluntary gay conduct").

337. *Id.* at 1291 (arguing that "[t]he state's ban on gay adoption also violates the Due Process Clause by conditioning access to the statutory privilege of adoption on surrendering the right to engage in private intimate sexual conduct protected by *Lawrence v. Texas*") (Barkett, J. dissenting).

a. Compelling Governmental Interest

As discussed earlier, ASFA provides and mandates a compelling state interest to place the children currently in the child welfare system into permanent homes in a timely manner.³³⁸

b. Not Narrowly Tailored

Rationalizing its lesbi-gay adoption ban, Florida prefers a two-parent marital home because such homes are in the best interest of children.³³⁹ However, no evidence supports that placing children in a marital home with two parents is always in a child's best interest.³⁴⁰ Further, since the ban burdens gay applicants' right to private sexual intimacy, the State must show that the method by which it seeks to ensure that children are placed with a married mother and father is narrowly tailored to achieve its goals.³⁴¹

This law is not narrowly tailored because it does not further the State's goal of finding two-parent homes. Most notably, the adoption statute does not express a preference for married adoptive parents.³⁴² Instead, it expressly allows "unmarried [adults]" to adopt.³⁴³ Furthermore, DCF administrative regulations, which are tied to Florida's adoption statutes, do not prefer married candidates over single candidates for adoption.³⁴⁴ The State's willingness to actively recruit single adoptive parents contradicts the purported justification of the ban based on the State's desire to place children in two-parent marital homes.

Even if the State preferred married couples over single persons when drafting the statute, prohibiting gay people from adopting children does not make it more likely that the State will find a married

338. See generally *supra* Parts I & II.

339. *Lofton*, 358 F.3d at 818–821; see also *supra* Part III A & B and accompanying notes (addressing the argument that it is in the best interest of children to reside in a two-parent marital home).

340. See *supra* Part III A & B and accompanying notes (arguing that gay parents are equally capable of raising children). For example, the foster child in dispute in the *Lofton* case lived with his foster parents for over ten years before the litigation ensued. *Id.* It may not be in his best interest for the state to remove him from the only home he has known simply because his foster parents' sexual orientation prohibit them from adopting him. *Id.*

341. FLA. STAT. § 63.042 (2002).

342. *Id.*

343. *Id.*

344. *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 377 F.3d 1275, 1297 (11th Cir. 2004).

couple to adopt eligible children.³⁴⁵ The law is not narrowly tailored to find eligible children an adoptive home with a married mother and father. Furthermore, the law directly contradicts ASFA's goal of finding permanent homes for children.

2. Equal Protection

Even if homosexual relationships are not protected under the fundamental right to privacy, Florida's ban on lesbi-gay adoption may still be invalidated on equal protection grounds, further illuminating why repealing the ban is consistent with ASFA. The Equal Protection Clause proclaims that "no person shall be denied equal protection of the law" and mandates the same treatment of similarly situated people.³⁴⁶ A law that involves an identified class of people but "neither burdens a fundamental right nor targets a suspect class. . . [will usually be upheld] so long as it bears a rational relation to some legitimate end."³⁴⁷ This "rational basis" analysis is usually a deferential standard and courts "insist on knowing the relation between the classification adopted and the object to be attained."³⁴⁸ The means attained must have a legitimate state interest and not simply a "bare . . . desire to harm a politically unpopular group."³⁴⁹ As previously detailed, the state legislators' statements when the Florida legislation was introduced illustrated unvarnished homophobic sentiment.

In reviewing challenges to the adoption statute, courts have consistently framed the issue as whether banning lesbi-gay adoption serves the governmental purpose of finding a two-parent marital home for children.³⁵⁰ However, this characterization of the issue is flawed because the state's ultimate concern is centered on the best interests of

345. See Br. of App. at 29, *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (noting that even after recruiting couples and single parents, thousands of children remain in need of adoption placements).

346. U.S. CONST. amend. XIV, § 1.

347. *Romer v. Evans*, 517 U.S. 620, 631 (1996); see also *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 437 (1985) (applying rational basis review because the challenged ordinance burdened neither a fundamental right, nor a suspect class); *Vacco v. Quill*, 521 U.S. 793 (1997) (stating that legislative classifications that do not infringe on a fundamental right nor target a suspect class will be upheld as long as it is rationally related to a legitimate end).

348. *Romer*, 517 U.S. at 632.

349. *Id.*

350. *Lofton v. Kearney*, 157 F. Supp. 1372, 1383 (S.D. Fla. 2001) (noting the state's argument that prohibiting gays from adopting children is a rational means of furthering Florida's interest in promoting adoption by marital families).

the child.³⁵¹ Therefore, courts should frame the issue as whether banning lesbi-gay adoption serves the legitimate governmental purpose of promoting the best interest of children whom need an adoptive home. An equal-protection analysis offers a resounding negative answer.

Florida's law categorically denies a group of citizens the opportunity to adopt children based on broad assumptions about their ability to adequately rear children.³⁵² The law does not allow the State to evaluate any gay applicant's fitness for child-rearing; instead, the gay applicant is *per se* excluded from consideration based on sexual preference.³⁵³ Moreover, the law fails to address the State's true aim—to protect the best interests of children—by failing to exclude applicants who may actually pose a threat to the children's health and safety.³⁵⁴

Even if the courts have justified a lesbi-gay adoption ban by solely finding children a home with a married mother and father, two facts undermine this argument: (1) the State does not exclude unmarried persons from adopting;³⁵⁵ and (2) banning gay persons from adopting will not assist the State in finding marital homes for children.³⁵⁶ The law's purported justification of finding a two-parent marital home, without a "best interest of the child" analysis, is directly adverse to ASFA's mandate to evaluate permanency placements based on the child's best interest.³⁵⁷ In short, Florida's ban on lesbi-gay

351. See FLA. STAT. § 63.022(2) (2002) (requiring courts to make a specific finding that the adoption placement is in the best interest of the prospective adopted child before proceeding with the adoption).

352. See *supra* discussion Part III and accompanying notes (noting rationales the state has posited in support of its adoption laws including the instability of a gay household in comparison to a martial household and the necessity of a heterosexual role-model to guide children from puberty to adulthood).

353. FLA. STAT. § 63.042(3)(2008) ("No person eligible to adopt under this statute may adopt if that person is homosexual.").

354. Florida's adoption statute does not categorically exclude any other class of people who would otherwise be eligible to adopt. § 63.042. Florida has provisions for allowing convicted felons and child abusers to go through a heightened scrutiny adoption application process, thereby allowing people to adopt that may pose an identified risk of harm to children. FLA. ADMIN. CODE ANN. r 65C-16.005(9)(a) (2005); see also *supra* Part III A & B and accompanying notes discussing this issue.

355. See FLA. STAT. § 63.042(b) (2002) (allowing unmarried adults to adopt children).

356. There are disproportionately higher numbers of children awaiting adoption than there are married couples who are eligible to adopt. *Lofton v. Sec'y of Dept. of Children & Family Serv.*, 377 F.3d 1275, 1299 (11th Cir. 2004). "[T]he state's ban on gay adoption does nothing to increase the number of children being adopted, whether by married couples or anyone else." *Id.*

357. See *supra* discussion Part I and accompanying notes.

adoption is an example of legislation that reflects the desire to harm a politically unpopular group.

E. Repealing the Ban is the Only Appropriate Remedy

The Florida legislature should repeal the law banning lesbi-gay adoption because of the lack of stable and legally-protected alternatives to adoption for gay parents seeking to obtain custody of the children they care for.³⁵⁸ Alternative means for gay parents include guardianship, protective supervision, long-term custody, long-term licensed custody, lesbi-gay adoption of established foster children only, or denying their sexual orientation on the adoption application.

1. Guardianship

Florida has allowed some gay parents to become guardians of children in their care.³⁵⁹ The flaw in the guardianship option is that it does not ensure a permanent relationship between the guardian and the ward because the guardianship relationship can terminate at any time.³⁶⁰

2. Protective Supervision

When a child is under protective supervision, there is an assumption that the child will remain in this placement until he or she reaches the age of majority.³⁶¹ However, the custody arrangement remains subject to judicial supervision and the state can decide that the child should not continue to live with the caregiver.³⁶² Further, an adult protective supervisor must expressly agree to the child's reunification with his or her biological parents if ordered.³⁶³ Protective Supervision is an inadequate arrangement because it does

358. See *supra* discussion Part II.D. and accompanying notes. (discussing custody procedures that may allow gay and lesbian individuals to permanently care for children and other options to bypass the ban on lesbi-gay adoption). Supporters of the law often point to the availability of alternative ways for gay parents to get permanent (or semi-permanent) custody of the children they care for. *Id.*

359. Guardianship is a judicial process in which the state gives an adult the right to care for and make decisions for a ward of the state. In the case of foster children, when the court appoints a guardian, the child leaves the foster care system and state supervision terminates.

360. Termination may occur if the guardian resigns, when the court, the ward, or any other interested person begins proceedings to remove the guardian, or when the ward reaches eighteen years of age.

361. FLA. STAT. § 39.521(1)(b)(3) (2006). Both judicial and state oversight continue throughout the placement. *Id.*

362. *Id.*

363. *Id.*

not provide stability or the legal guarantees of adoption, where a parent would have recognized constitutional rights to the care, custody, and control of their children.³⁶⁴

3. *Planned Permanent Living Arrangement*

Planned permanent living arrangement is an alternative to other court-mandated custody determinations.³⁶⁵ It is akin to the now-abolished long-term custody arrangement.³⁶⁶ Planned permanent arrangements must be in the best interests of the child,³⁶⁷ stable and more secure than ordinary foster care,³⁶⁸ based upon compelling reasons,³⁶⁹ and subject to continued state supervision and court review every six months.³⁷⁰

4. *Lesbi-Gay Adoption of Established Foster Children Only*

Advocates of lifting the lesbi-gay adoption ban have proposed legislation that attempts to balance the bright-line rule prohibiting gay individuals from adopting children with the need for adoptive homes for Florida's foster children. In February 2006, the Florida legislature considered a bill that would have allowed lesbi-gay adoption of foster children within their care.³⁷¹ The bill had five requirements: (1) the child must be in foster care for at least two years; (2) the child must reside with the applicant; (3) the child must recognize the applicant as his or her parent; (4) permanency in the home must be more important to the child's development and psychological needs than temporary placement in foster care; and (5) the placement must be in the child's best interest.³⁷² However, this law never made it passed the Florida House of Representatives or the Senate committees and thus failed to command a floor vote.³⁷³

364. *Olf v. East Side Union High Sch. Dist.*, 404 U.S. 1042, 1042-43 (1972) (noting the high degree of protection given to family privacy). The *Olf* court wrote, "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. ... And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

365. See generally FLA. STAT. § 39.6241 (2006)

366. See generally FLA. STAT. § 39.622 (2004).

367. FLA. STAT. § 39.6241(1)(a)(2006).

368. § 39.6241(1)(b).

369. § 39.6241(1)(d).

370. § 39.6241(3).

371. Fla. Sen. Bill 172, 2006 Reg. Sess. (Sept. 8, 2005).

372. *Id.*

373. *Id.*

At a minimum, this proposed law would have allowed for some lesbi-gay adoptions. Although this proposed law may have increased the likelihood of finding a permanent home for needy foster children, the proposal was not specific or detailed enough. Gay individuals wishing to adopt would have to undergo the application process to become foster parents and then wait for their foster child to become eligible for adoption.³⁷⁴ The foster parent would have no guarantee that the child placed in their home would ever become eligible for adoption. Once the child became eligible for adoption, the foster parent would have to go through an additional screening and evaluation process to adopt. The proposed law also required lesbi-gay pre-adoptive parents to establish the eligibility criteria by clear and convincing evidence.³⁷⁵ Therefore, even after an extended application process, lesbi-gay foster parents still risk denial due to the higher evidentiary standards.

5. Deny Sexual Orientation on Adoption Application

Adoption applicants may choose not to reveal their sexual orientation on their applications for adoptions. However, this alternative is a poor choice because of the serious consequences that may result, such as the vacation of annulment of a prior adoption if the state discovers an applicant's untruthfulness.³⁷⁶ While in some circumstances it may be legal to omit information, it is illegal to intentionally give false information when asked explicit questions.³⁷⁷ Adoption applicants who knowingly fail to disclose their sexual orientation may be guilty of fraud and may have their adoption proceedings terminated or prior adoptions overturned.³⁷⁸

On balance, the shortcomings of the various custody arrangements available to lesbi-gay individuals seeking to care for Florida's foster children shows that the ban on lesbi-gay adoption significantly disadvantages gay "parents" and their children. For their benefit, the best option is to repeal the ban on lesbi-gay adoption.

374. *Id.*

375. *Id.*

376. FLA. STAT. § 63.2325 (2002).

377. *Id.*

378. *Id.* (stating that the state can revoke consent for an adoption if the applicant obtained consent to the adoption through fraud).

V. CONCLUSION

ASFA attempts to give foster children a permanent home, which is what all children deserve. Banning gay and lesbian individuals from adopting children needlessly denies children potential homes and parents. With growing numbers of children awaiting adoption, Florida must reach out to a broader pool of applicants. Gay individuals are a likely source, especially given that Florida has long relied on them as temporary caregivers to its foster children. Research affirmatively establishes that gay parents are as capable of caring for children as heterosexual parents.

Moreover, lifting the ban on lesbi-gay adoption is consistent with ASFA's mandate to find permanent homes for children in a timely manner and to ensure the adequate protection of the health and safety of foster children. Therefore, Florida should repeal its ban on lesbi-gay adoption and evaluate all adoption applicants on a case-by-case basis under "the best interest of the child" standard. The current process not only harms Florida's foster children who are in need of permanent homes, but also perpetuates discrimination against gay and lesbian Florida residents. Certainly, every child in Florida deserves a permanent home.