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**PARENS PATRI[ARCHY]:
ADOPTION, EUGENICS, AND SAME-SEX COUPLES**

Kari E. Hong

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KARI E. HONG*

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INTRODUCTION

On March 14, 2000, Utah Governor Mike Leavitt signed into law House Bill 103, a measure that prevents unmarried couples from adopting children.¹ The law places children with two married heterosexual adults and expressly denies others from becoming adoptive parents. The exclusion applies to same-sex couples, unmarried heterosexual couples, and single parents who live with a partner or significant other.²

Utah's law is not an anomaly. In 1977, Florida was the first state to prohibit gay individuals and unmarried couples from adopting.³ In 1999, Arkan-

1. Katherine Kapos & Heather May, *Adoption Law Faces Legal Tests*, SALT LAKE TRIB., Mar. 17, 2000, at C6.

2. UTAH CODE ANN. § 78-30-1(3) (2003) (“(a) A child may be adopted by: (i) adults who are legally married to each other in accordance with the law of this state, including adoption by a stepparent; or (ii) any single adult, except as provided in Subsection (3)(b).; (b) A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3)(b), ‘cohabiting’ means residing with another person and being involved in a sexual relationship with that person.”). A gay man, lesbian woman, and single mother who are celibate may adopt children in Utah. However, if any such person enters into a serious relationship outside of marriage, she loses her ability to parent children. See Kapos & May, *supra* note 1, at C6 (“The state law . . . more clearly targets gay and lesbian partners and requires DCFS [Division of Child and Family Services] case workers to determine if applicants have a sexual relationship outside of marriage.”).

3. See FLA. STAT. § 63.042 (2003); 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. & POL'Y 207, 222-23 (1995) (observing that in the height of Anita Bryant's anti-gay campaign, which was entitled Save Our Children, “the first state-wide statutory ban on adoptions by lesbians and gay men was passed with almost no analysis or debate”) (citing Tom Mathews et al., *Battle Over Gay Rights*, NEWSWEEK, June 6, 1977, at 16).

sas promulgated a similar administrative regulation, and in 2000, Mississippi enacted a statutory ban reaching the same end.⁴ Between 1996 and 2000, legislators in seven more states—Alabama, Indiana, Michigan, Missouri, Oklahoma, South Carolina, and Texas—have introduced similar measures with the purpose of restricting gay individuals, same-sex couples, or unmarried heterosexual couples from becoming adoptive or foster care parents.⁵ In seven short years, just over 20% of the states have revised or are attempting to revise their child welfare policies in this manner.

The basis of state authority to regulate selection of adoptive and foster parents derives from a general power of the state that is known as *parens patriae*, which empowers the state to confer “protection for those unable to care for themselves.”⁶ A state has the power to ensure that children are placed with good—indeed ideal—parents.⁷

4. See MISS. CODE ANN. § 93-17-3(2) (2002) (“Adoption by couples of the same gender is prohibited.”); Minimum Licensing Standards for Child Welfare Agencies, Ark. Reg. § 200.3.2 (2002) (“No person may serve as a foster parent if any adult member of that person’s household is a homosexual.”).

5. See H.J.R. Res. 35, Reg. Sess. (Ala. 1998) (“we hereby express our intent to prohibit child adoption by homosexual couples”); H.B. 1055, 111th Gen. Assem., 1st Reg. Sess. (Ind. 1999) (“The division may not grant a license to operate a foster family home to a homosexual.”; “A person who is a homosexual is not entitled to adopt an individual”); H.R. 6236, 89th Leg., Reg. Sess. (Mich. 1998) (“A child shall not be placed with a prospective adoptive parent and the court shall not issue an adoption order if a person authorized to place the child or the court authorized to issue the order has reliable information that the prospective adoptive parent is homosexual.”); H.B. 29, 89th Gen. Assem., 1st Reg. Sess. (Mo. 1997) (providing that a petition for adoption and foster care shall be denied “if the [statutorily required] investigation . . . contains credible evidence that the petitioner has been involved in a homosexual relationship at any time within the three years preceding the filing of the petition.”); H.B. 1455, 88th Gen. Assem., 2d Reg. Sess. (Mo. 1996) (same); H.R. 1280, 47th Leg., 1st Sess. (Okla. 1999) (providing that a child welfare committee draft legislation “prohibiting homosexuals from adoption children”); S.B. 387, 2003 Gen. Assem., 115th Sess. (S.C. 2003) (as relating to foster care, prohibiting a child to be placed “with a person who is engaged in a sexual relationship with another person residing in the proposed foster home other than their lawful spouse”); S.B. 904, 2001 Gen. Assem., 114th Sess. (S.C. 2002) (as to foster care and adoption, prohibiting placement “with a person who has been convicted of buggery or who is a homosexual or bisexual”); H.R. 3179, 1997 Gen. Assem., 112th Sess. (S.C. 1997); H.R. 382, 76th Leg., Reg. Sess. (Tex. 1999) (prohibiting placement of children in foster care or adoptive homes where homosexual activity occurs or is likely to occur). In addition, in 1997 and in 1998, Congressman Steve Largent (R-OK) introduced his bill entitled the “Largent Amendment” that would have prohibited same-sex couples from adopting children in the District of Columbia. Log Cabin Republicans of Washington, *Log Cabin News*, available at www.logcabinwa.com/archive/199907291800.shtml (last updated July 29, 1999) (reporting that the Largent Amendment was defeated by a vote of 213-215 after it had passed in 1997 on a vote of 227 to 192).

6. BLACK’S LAW DICTIONARY 1114 (6th ed. 1990); see also Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1346-47 (1999) (explaining that *parens patriae* is “the ancient English doctrine that the King, as the father of the nation, has the power to act in protection of the nation’s weak and powerless, namely infants, idiots, and lunatics. Today, in both the United States and England, *parens patriae* is used in a variety of contexts, from protection of the mentally ill to the law of juvenile courts, in order to justify the state’s power to intervene.”); JOAN HEIFETZ HOLLINGER, 1 ADOPTION LAW & PRACTICE ¶ 1.01, at 1-4 (1st ed.

Since the first adoption bill was enacted in the mid-1800s, states have used a variety of selection criteria to ascertain who will be an ideal parent. The notion of "ideal" has been defined differently at various times in American history. In the past fifty years alone, the preferred adoptive parent changed from one who matched society's standards of the suburban family, defined by siblings and a home with specific square footage, to one who is able to respond to the demands of each child's individual characteristics—whether it be care for a particular medical condition, education with respect to his or her ethnic heritage, or even contact with his or her birth parent.⁸ Thus, over time, adoption law has shown a greater understanding and flexibility regarding what properly is counted as a desirable parental trait. Adop-

2000) ("For the most part, adoption is the product of and subject to state laws and regulations, not federal ones. Pursuant to the Ninth and Tenth Amendments to the U.S. Constitution, state governments are considered the proper domain for the enactment of family, property, and succession laws. Nonetheless, there is a growing body of federal statutory and constitutional law pertaining to adoptions.").

7. Curiously, all fifty states exercise their power to select adoptive parents but none make any attempt to determine who may become a biological parent. Any biological parent can have as many children as he desires and may maintain custody as long as he does not neglect or abuse his child, a low legal threshold. An adoptive parent, by contrast, must demonstrate a number of criteria purportedly showing her fitness as an ideal parent before a child is placed in her care. As explained in detail in part I of this Article, the contemporary standards that determine who may raise an adopted or biological child have not been constant throughout history. For example, until the 1930s, child welfare agencies freely and easily removed, and most often permanently, children from their biological families if the parents were considered unfit, which included the now considered capricious reasons that the parent possessed wine in the home during the Temperance Movement or practiced the Catholic religion. See LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 11-12 (1999) [hereinafter GORDON, ORPHAN]. In addition, until the 1950s, children in many states were placed in the homes of adoptive and foster parents with minimal, and often, no screening of the adoptive parents' capacities, follow-up of the child's well-being, or regulation of the process. See E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 13 (1998). I mention these differences not in an effort to return to the abuses of the past, but rather, to understand that the contemporary bifurcated treatment of prospective parents, which subject adoptive parents to heavy scrutiny and practically never interfere with the biological relationship, are quite unique to the modern era.

8. See Elizabeth S. Cole & Kathryn S. Donley, *History, Values, and Placement Policy Issues in Adoption*, in *THE PSYCHOLOGY OF ADOPTION* 289 ("In former times the preparation [of adoptive parents] tended to be investigative in nature, concentrating more exclusively on the qualifications of the candidates. Preparation now tends to be more educative in nature, familiarizing adopters with common behaviors among children needing adoption, the intricacies of the child welfare system, the techniques used by experienced parents, and the resources they will need to make adoption work. This focus is largely due to the emergence of special needs adoption, the reality that adoptive candidates are in short supply for older and handicapped children, and the experience that veteran parents are the best sources of information and help.") (David M. Brodzinsky & Marshall D. Schechter, eds., 1990) (emphasis in original); *id.* at 277 (critiquing the "restrictive eligibility requirements" formerly used to screen out adoptive parents for being "strictly applied and [of] dubious psychological and social criteria"). See, e.g., ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 143-63 (1999) (describing the conditions and ideologies that combined to create the ideal of the "typical" suburban home in 1950s America).

tive parents no longer need be sterile, religious, non-working, or have one bedroom per child.⁹

9. State laws and private agencies have screened out prospective parents on a number of factors that are now considered arbitrary, irrelevant, needlessly rigid, and of “dubious psychological and social criteria.” Cole & Donley, *supra* note 8, at 277. Despite its questioned relevance to parenting, even today, “infertility is a prerequisite to apply to most adoption agencies placing babies [who are white infants], and the applicant may be required to provide medical proof of infertility.” CHRISTINE ADAMEC & WILLIAM L. PIERCE, *THE ENCYCLOPEDIA OF ADOPTION* 24 (Facts on File 1991); *Eligibility Guidelines for Adoption*, Family Service Centers of Holston United Methodist Home for Children (licensed by the Tennessee Department of Children Services), available at <http://www.holstonhome.org/adoptions/eligible.html> (requiring from prospective adoptive parents a “statement of infertility or a medical statement not recommending pregnancy by an appropriate specialty physician”). Such a requirement, however, is waived for parents who are adopting a child from another country or one who is classified as a “special needs” child. *Id.* at 25. A “special needs” child is one whose “[c]onditions or characteristics make a child difficult to place.” *Id.* at 266. Such characteristics include “black or biracial” children, handicaps, those with siblings who must be adopted together, teenagers, and those with behavioral problems. *Id.* at 266-69.

With respect to religion, as reported in a child welfare manual written in 1919, “some [child placement] organizations formerly demanded that foster parents should be church members.” W.H. SLINGERLAND, *CHILD-PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS* 121 (Russell Sage Foundation 1919). Although the requirement providing that adoptive and foster parents must demonstrate actual church membership began to relax in some states by the 1920’s, (the fact that an adoptive or foster parent would participate in non-Christian religion apparently had not been anticipated), states required a child to be placed in an adoptive home that matched the religion of its biological parents, where such information was known. This rule in turn barred through the 1950’s parents who had different religious faiths from adopting a child. See RUTH CARSON, *SO YOU WANT TO ADOPT A BABY*, PUBLIC AFFAIRS PAMPHLET NO. 173, at 17 (May 1951) (“Many fine couples of mixed religion feel that this requirement works an unfair hardship on them, and some of them even resort to the amateur, or so-called grey market, because of it. What they don’t realize is that the agency ruling has to be consistent with the state laws as interpreted by the courts, since court action is needed to make an adoption legal—whether it is arranged by an agency or an amateur.”). Despite the fact that the requirement of church attendance was relaxed, some agencies and states continued to rely upon church membership as a marker of good parenting and thus screened out non-church goers. See, e.g., EDITH M.H. BAYLOR & ELIO D. MONACHESI, *THE REHABILITATION OF CHILDREN: THE THEORY AND PRACTICE OF CHILD PLACEMENT* 334 (Harper & Bros. 1939) (the authors, an instructor and assistant professor of sociology, state: “The manner in which people observe and practice the mandates of their professed religion may to some extent be indicative of their stability and dependability. It may . . . serve as a means of ascertaining the consistency or inconsistency in a person’s profession and action.”).

With respect to complexion and personality, a 1919 manual directed at social workers, however, stated that “[i]t is also desirable in fitting children to applications, to select such as resemble one or both of the foster parents, or at least are not specially different from them in appearance. A strong contrast between parents and children causes endless remarks and calls for continued explanations, which are often irritating and sometimes embarrassing to the foster parents . . . The laws of most states properly require that so far as is practicable placements of children be made in families of the same religious faith. . . . It is also worth while to avoid mixing too diverse types or nationalities, as, for instance, the very swarthy with the decidedly blond.” SLINGERLAND, *supra*, at 125. By 1941, the Child Welfare League of America, in its recommendations to child placement agencies, provided that: “It should be required that a bed of his own be provided for each child. It is preferable that infants should not sleep in the same room as foster parents, and never after the age of two or three.” CHILD WELFARE LEAGUE OF AMERICA, *STANDARDS FOR CHILDREN’S ORGANIZATIONS PROVIDING FOSTER FAMILY CARE* 40 (1941) [hereinafter *STANDARDS FOR CHILDREN’S ORGANIZATIONS*]. As late as 1978, many

What then explains the apparent trend toward excluding a subset of otherwise qualified parents on the grounds of their sexual orientation and marital status? Certainly this question becomes more intriguing in light of the following social facts: There are more parentless children than available homes;¹⁰ 542,000 children are in foster homes and of these, 119,000 are eligible for adoption;¹¹ there are many prospective parents who are not in heterosexual marriages;¹² and every mainstream child advocacy organization is against this type of policy.¹³

child-placement agencies continued to recommend that a child not be placed with any family in which the *mother* worked outside of the home, a recommendation that was later revised to require that there is one stay-at-home parent (of either gender) for a particular set of time. *See, e.g., CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE 71 (Rev. 1978)* (“A woman who works should not for that reason alone be excluded from consideration as an adoptive parent, if she is able to remain at home with the child for as long as necessary after placement.”).

10. *See Number of Foster Parents Drops, Report Finds*, N.Y. TIMES, May 27, 2002, at A17 (according to the Department of Health and Human Services Inspector General there is a shortage of families willing to provide foster care).

11. In addition, of the estimated children in foster care, 38% are black/Non-Hispanic, 37% are white/Non-Hispanic, 17% are Hispanic, and 8% are identified as being another race/ethnicity. These statistics are the most current federal estimates, which were released in June 2003 by the American Public Human Services Association (APHSA)—formerly known as the American Public Welfare Association (APWA). Although the federal government stopped collecting national data on adoptions in 1975, APHSA is a federally-mandated data collection program, which collects data based on information voluntarily submitted semi-annually by the participating States. Not all of the States submitted information used in the 2001 estimate. *See National Clearinghouse on Child Abuse and Neglect Information*, U.S. Dep’t of Health & Human Services, available at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm>. (last updated Oct. 8, 2003).

12. For instance, when a county commissioner proposed introducing a prohibition against gay individuals and single parents from serving as foster parents in El Paso County, Colorado, the local Department of Human Services estimated that of the 700 children in foster families, approximately 10% to 15% were parented by single parents. The DHS did not keep statistics on how many of its foster parents were gay or lesbian because “it’s not something that’s a function of the decision about the placement of a kid.” Pam Zubeck, *Beedy Takes on Foster Care*, THE GAZETTE (Colorado Springs), Dec 4., 1999, at Metro 1 (quoting DHS spokesperson Lloyd Malone).

13. Before the Utah State Board promulgated Administrative Rule R512-41, which reserves adoption for married individuals, it invited comments from professional child welfare organizations including the Child Welfare League of America, the American Family Therapy Academy, the Utah Chapter of the National Association of Social Workers, and the Children’s Service Society of Utah; official advisory bodies including the Family Violence Advisory Committee, Youth Services Advisory Committee, and the Out-of-Home Care Advisory Council; and child welfare and family law scholars including Professor Thorana Nelson of Utah State University, Professor Pepper Schwartz of the University of Washington, Ann Hartman, Dean of the Smith College School for Social Work, Professor Judith Stacey of University of Southern California, Professor Joan Hollinger, Reporter for the Uniform Adoption Act, and Michael Wald of Stanford Law School and former Reporter for the American Bar Association’s Model Standards for Child Abuse and Neglect. Utah Plaintiffs’ Brief at 18-20, *Utah Children v. Utah State Bd. of Child & Family Servs.*, Civ. No. 990910881 (3d Dist. Ct., Salt Lake County, Utah 1999) [hereinafter Utah Plaintiffs’ Brief]. All of these organizations, boards, and experts recommended against the rule. *Id. See also David Crary, Gays Gaining Ground in Adoptions*, S.F. CHRONICLE, Oct. 29, 2003, at A5 (reporting that a recent survey

A starting point to find an answer is with David Blankenhorn who wrote the 1995 book, *Fatherless America: Confronting Our Most Urgent Social Problem*.¹⁴ Advocates of the contemporary adoption bans justify their policies by relying heavily on the theories and concerns set forth by Blankenhorn, describing what he dubs the problem of "Fatherlessness."¹⁵ Blankenhorn presents a contemporary justification for the belief that two parents of the opposite sex is the proper familial arrangement in which to raise children and that any other familial combination harms children.¹⁶ When introducing a similar exclusionary regulation in El Paso County, Colorado, County Commissioner Betty Beedy relied upon this concept, explaining to a reporter that single parents and same-sex couples are unable to provide an "ideal" family environment:¹⁷ "It's a role model [issue]. A normal biological unit of a family is a mother and father. The father and mother bring different parental skills to a family."¹⁸ Commissioner Beedy supported her views by claiming that national statistics show "most kids that commit crimes come from one-parent families."¹⁹

Within a six-month period after the foster care regulations were proposed, Beedy made a string of telling remarks. In March 1998, she publicly opposed renaming a highway in honor of Dr. Martin Luther King, Jr. be-

concludes that "[a]bout 60 percent of the nation's adoption agencies now accept applications from gays and lesbians" who are seeking to adopt children).

14. DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (1995).

15. See Zubeck, *supra* note 12. The problem of a child being raised outside of a traditional one mother, one father family is not about "motherlessness" because Blankenhorn's concern is over traditional masculinity either disappearing by becoming emasculated by feminists and modern marriages or exploding into violent rages in the form of violence towards women and children. BLANKENHORN, *supra* note 14, at 102-03 (Blankenhorn critiques the "New Father" defined as the "diaper changing men" who have a "more nurturing, hands-on paternal role," *id.* at 98, because "[t]he New Father is the missing father. For a cultural model—a set for cultural cues for paternal behavior—the New Father reflects the puerile desire for human omnipotentially [sic] in the form of genderless parenthood, a direct repudiation of fatherhood as a gendered social role for men"); *id.* at 37 ("For many men, suddenly losing their identity as married fathers, especially when the loss is involuntary, shatters their world and triggers violence.").

16. BLANKENHORN, *supra* note 14, *passim*. Blankenhorn explains that whereas women are naturally able to be mothers, men are inherently aggressive and violent and that only when these impulses are channeled toward caring for a child or wife can the violent nature be tamed. See *id.* at 107 ("Maternal tenderness is assumed, not recommended"); *id.* at 35 ("[M]arried fatherhood emerges as the primary inhibitor of male domestic violence. By reducing the likelihood of sexual jealousy and paternal uncertainty, and by directing the male's aggression toward the support of his child and the mother of his child, married fatherhood dramatically reduces the tendency among men toward violent behavior.").

17. Zubeck, *supra* note 12. Commissioner Beedy publicly advocated for such legislation and introduced it to the commission. The commission, however, declined to adopt the policy. E-mail from Pam Zubeck, THE GAZETTE (Colorado Springs) to Kari Hong (Aug. 20, 2003, 04:56:46 CST) (on file with author).

18. Zubeck, *supra* note 12.

19. *Id.* In the same article, Colorado Springs Police Lieutenant Skip Arms "said he knew of no data showing one-parent families produce more criminals." *Id.*

cause "he had extramarital affairs."²⁰ In June 1998, she called single mothers who date men, "sluts," a remark she later clarified to extend only to promiscuous women.²¹ In July 1998, when appearing on the "The View," a nationally syndicated talk show, Beedy asserted that the struggle for gay rights is not comparable to the civil rights movement.²² Attempting to demonstrate her point, she explained that the African-American co-host was clearly a minority because "she's different than the white, normal American."²³

Commissioner Beedy's remarks serve as an important backdrop to the rest of this article. In her words, an "ideal" family is a "normal biological unit" of a mother and a father, and any variation from this norm is inferior. According to Beedy, single mothers are "sluts" and gays are not like "normal" Americans. Indeed, her televised comments conflate bad character with cultural inferiority by claiming that (undeserving) gays are not like the (deserving) civil right fighters, while still clarifying that despite any gains, people of color are still in Beedy's worldview, not like "white, normal Americans."

The legislative history of Utah's statute mirrors Beedy's moral opprobrium against unmarried couples and gay people. Utah's adoption statute began as an administrative rule that categorically denied a foster care or adoption application if the prospective parent is shown to have (1) a violent criminal history; (2) had molested a child; or (3) lived in a home with another adult to whom he or she was not married.²⁴ Although the administrative rule's constitutionality was immediately challenged, the lawsuit became moot when the state legislature enacted the statute at issue.²⁵ In an astonishing turn of events, the state law dropped the categorical presumption against placing children with individuals with histories of criminal violence or child molestation, but codified the principle that Utah children shall never be raised in foster or adoptive homes by couples who are not married. The sponsors of Utah's statute adamantly defend their policies as protecting chil-

20. Zubeck, *supra* note 12.

21. *Id.*

22. *Id.*

23. *Id.*

24. In June 1999, the Utah Board of Child and Family Services, which is the agency responsible for administering foster care, issued Rule R512-41, mandating that before a child will be placed with adoptive parents, a home study must be done to verify the specific information about each adult, including non-adoptive parents, who is living in the prospective home. The information sought included *inter alia* (1) criminal background check; (2) child abuse screening; and (3) "verification that adults present in the home are legally related to parent(s) by blood or adoption or legal marriage." Utah Admin. Code R512-41-4 (3), (7), & (8) (1999) *reprinted in* 99 Utah State Bulletin, No. 11, at 39-42 (June 1, 1999) [hereinafter Utah Rule R512-41].

25. See *Utah Children v. Utah State Bd. of Child & Family Servs.*, Civ. No. 990910881 (3d Dist. Ct., Salt Lake County, Utah 1999); Kapos & May, *supra* note 1. The plaintiffs in the administrative action did not renew their complaint as applied against the statute. As of August 2003, no advocacy organization has brought a challenge against the statute.

dren from the harm that arises when they are raised outside of a nuclear family with parents who exhibit traditional gender roles.²⁶

What is notable about Utah's statute is that it revives a form of family policy that denied parenthood based on a prospective parent's moral standing in the community. The Utah statute is a radical break from contemporary adoption placement practices by eschewing reliance on individualized findings with respect to whether a person can provide emotionally and financially for a child and instead deems a parent presumptively unfit based on with whom he or she does—or does not—reside. Despite attempts to cushion contemporary adoption bans²⁷ by claiming—often sincerely—that the preferred family formation is in the best interest of children, these latter-day statutes and regulations are a revival of family policies that seek to regulate undesirable individuals. The contemporary adoption bans reveal connections between the contemporary “Fatherlessness” movement, which is increasingly influential in national politics, and its prior incarnations. As poignantly illustrated by the 1999 *Lofton v. Kearny* case,²⁸ the purpose of these new adoption bans is not to place children in good homes, but rather, to remove children from the care of families who are deemed morally inferior. The exercise of *parens patriae* again is infused with an intolerance intent on regu-

26. See Lucinda Dillon, *Critics Jab Leavitt on Adoption Bill*, DESERT NEWS, Feb. 16, 2000, at B1 (“A child in crisis is best served in a traditional family setting,” [Utah Governor Mike] Leavitt repeated. “Why?” the reporter followed. “Because the traditional family setting serves the child best.”); Lynn Wardle, *Utah Legislation Barring Nonmarital Cohabitants from Adopting* (July 11, 2003) (unpublished manuscript, on file with author) [hereinafter Wardle Manuscript], at accompanying text & nn.29-30 (“There is abundant evidence that nonmarital cohabitation is an environment of elevated risk to children of child abuse, child sexual abuse, relational instability, exposure to adult domestic violence, economic deprivation, and immoral and dangerous behavior modeling. Most of the studies focus on heterosexual nonmarital cohabitation, but the advocates and defenders of adoption by same-sex couples failed to provide any credible evidence that gay/lesbian cohabitation is less-risky nonmarital cohabitation.”).

27. My selection of the term “adoption bans” is shorthand to refer to the laws and administrative regulations passed by Arkansas, Florida, Mississippi, and Utah, the statute repealed by New Hampshire, N.H. REV. STAT. § 170-B:4 (repealed 1999), and the bills recently considered by Alabama, Indiana, Michigan, Missouri, Oklahoma, South Carolina, and Texas. The various statutes and administrative regulations vary on whether their prohibition extends to applications for adoption, foster care, or both. In addition, the states deploy various means by which they define an undesirable parent. Some states expressly limit or prohibit a “gay man” or lesbian” or “homosexual” from being a prospective parent. Some states prohibit only same-sex couples. Some states limit or prohibit unmarried couples from being prospective parents—either through statutory language or accompanying regulations. Some states limit or prohibit unmarried individuals who live with another adult in the home, which extends to individuals who are straight and gay. And most states elect to mix and match the various categories. See *supra* note 5 for citations and description of the states’ statutes and regulations.

28. 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (upholding federal challenge against Florida’s prohibition against gay men or lesbians from becoming adoptive parents); see *infra* notes 302-317 and accompanying text. Lofton appealed the district court opinion to the Eleventh Circuit Court of Appeals. At the time this article was sent to the printer, no decision had been issued. See *Lofton v. Kearny*, No. 01-16723-DD.

lating or destroying differing conceptions of morality, gender identity, and personhood.²⁹ These contemporary adoption bans, once stripped from their feel-good rhetoric, are nothing more than revived attempts at improper social engineering, and as such, they should not continue.

Part I of this article presents a historical overview of child placement practices in the United States. In the past 150 years since its inception, two separate trends have shaped adoption policy. As social science has acquired more knowledge regarding what influences child development, such findings have been incorporated into adoption policy, shaping it into a respected institution. Such progress has not been seamless, however. At different times in history, social reformers, government officials, and private vigilantes have misused the institution of adoption, removing children from their biological families if the parents were imputed to be inferior morally. The contemporary adoption laws thus trace their lineage to such failed social experiments as the Orphan Trains, the Tennessee Baby Snatching Scandal, and the conditions that resulted in the passage of the Indian Child Welfare Act.

Part II examines why the contemporary adoption bans have been enacted and the reasons behind the declared state interest in reserving parenthood for married heterosexual couples. In court filings, Arkansas, Florida, and Utah contend that married couples are the optimal families in which to raise children because single mothers produce violent boys and promiscuous girls and gay and lesbian parents produce gay children. What is remarkable is that the states' contentions regarding the nature of alternative families (1) are contrary to mainstream science and child welfare expertise; and (2) supported only by Fatherlessness ideology. Set against the possibility of same-sex marriage, the contemporary Fatherlessness movement is gaining influence and using the adoption bans as part of an ideological campaign that is reviving eugenic undertones of saving children from their parents' moral pollution.

Part III begins by analyzing *Lofton v. Kearny*,³⁰ the recent case challenging Florida's adoption ban. In that case, the State of Florida removed a ten-year-old boy from his two fathers and four siblings on the basis that the parents are presumptively unfit because they are gay and unmarried. (Curiously, the state previously had recognized the men's superlative parenting by presenting them with an Outstanding Foster Parent Award, which it subsequently renamed in their honor.) The district court upheld the statute facially

29. First exercised by the King of England to take children away from their biological parents who were poor, the action was justified not because the children were in harm's way, but because the removed children were placed in apprenticeships and thus were believed less likely to burden tax-payers. See CARP, *supra* note 7, at 6 (stating that "[i]t was not unusual for English Overseers of the Poor to remove children from impoverished families and place them with those more fortunate"); Lucy McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 20 & n.25 (1999) (observing that the English involuntary apprenticeships did not require the consent of the biological parent).

30. 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

and as applied to Lofton, relying on its finding that there is no fundamental right to adoption.³¹ In 1987, the New Hampshire state supreme court similarly issued an advisory opinion upholding New Hampshire's adoption ban.³² Both of these courts erred by failing to recognize the substantive due process to family formation that *Carey v. International Population Services*³³ affords an unmarried person and that *Lawrence v. Texas*³⁴ recently conferred to gay and lesbian individuals. Just as a state's regulation of contraception, limiting the choice of whether to create a child, impermissibly interfered with an individual's right to bear and raise a child, so the adoption bans impermissibly control a person's ability to form a family. Furthermore, the adoption bans as applied to foster parents operate similarly to the ways that illegitimacy statutes once removed a child from her unmarried biological father. Both types of statutes create irrebuttable presumptions of parental unfitness, and both fail to comport with procedural due process by denying a gay or unmarried individual the individualized determination of fitness that is provided to every other prospective parent. The contemporary adoption bans, like the prohibition on family planning in *Griswold v. Connecticut*,³⁵ and the illegitimacy statute in *Stanley v. Illinois*,³⁶ are impermissible exercises of state power and therefore must fall.

I. HISTORICAL OVERVIEW OF ADOPTION PLACEMENT PRACTICES IN THE UNITED STATES

In modern times, adoption is understood as the respectable, legal process by which a child is placed into a loving, stable home.³⁷ Social workers scrutinize the prospective family through extensive interviews and home studies; state legislatures protect the biological mother by providing her a grace period to reconsider her decision, which allows from anywhere between seventy-two hours and three months from the time she surrenders her child until an adoption is finalized; and judges supervise the situation, ensuring that the final arrangement is in keeping with the best interests of the child.³⁸ A recent and growing trend in the area is "open adoption," an arrangement in which the biological mother surrenders her legal rights to the

31. *Id.* at 1380.

32. Opinion of the Justices, 530 A.2d 21 (N.H. 1987).

33. 431 U.S. 678 (1977).

34. 123 S. Ct. 2472 (2003).

35. 381 U.S. 479 (1965).

36. 405 U.S. 645 (1972).

37. See BLACK'S LAW DICTIONARY 49 (6th ed. 1990) (defining adoption as process by which a parent takes "into one's family the child of another and give him or her the rights, privileges, and duties of a child and heir."); HOLLINGER, *supra* note 6, at 1-6.1 ("Considerable evidence exists that in at least the past fifty years, adoption has attained the status of a fully socially acceptable practice.").

38. See HOLLINGER, *supra* note 6, at 1-12 (child welfare professionals); *id.* at 1-9 (birth mother rights); *id.* at 1-12 (best interest of the child).

adoptive parent(s), but retains contact with her child and the adoptive family.³⁹

The history of adoption, however, uncovers an institution plagued with undercurrents of eugenic purposes and racist ends. In particular, the removal of children from their biological homes exemplifies state power at its worst. The drastic, and at times, sudden changes in the desirability of adoption mirrors shifting societal meanings of the nature of family, child welfare, citizenship, and morality.

A. Early History of Adoption in the United States: From Private Bills to Orphan Trains

The modern conception of adoption, defined as an adult adopting a child (as opposed to another adult), is "doubtless as old as humanity itself."⁴⁰ For centuries, the Christian Church had helped coordinate placing orphaned children with relatives and church parishioners. If homes could not be found, the "Church began boarding children with worthy widows, paying for the service by collections taken in the various congregations."⁴¹ However, by the sixteenth century, adoption in Europe was not common, but when it did occur, was made through informal arrangements that were primarily motivated out of humanitarian or charitable impulses.⁴² The Christian Church opposed these arrangements, however, citing concerns that men were abusing adoption as a means to fold their illegitimate children into a legitimate family structure.⁴³ The Christian Church initiated a campaign to stigmatize adoption by advocating that sex and procreation should be reserved for marriage. By the 1600s, the campaign had achieved its goal, and most Europeans stopped

39. See CARP, *supra* note 7, at 196. "Open adoption" is the result of advocacy efforts by adopted children and birth mothers who were frustrated, and claimed to be harmed emotionally, by the lifelong forced separation that a closed, secretive adoption created. *Id.* One of the primary reasons that adoptive parents are willing to enter into these arrangements is that there are fewer desired children than ever before due to the legalization of abortion, availability of contraception, and the increase in numbers of unmarried mothers raising their children. *Id.* For instance, over forty years, the percentage of babies unmarried white women gave up for adoption decreased from approximately 80% to less than 4%, and the percentage of children black and Latino mothers gave up for adoption remained at its constant rate respectively of 2% and 1% of out-of-wedlock children. See *id.* at 200-01; HOLLINGER, *supra* note 6, at 1-58 (citing these statistics from a study performed by the Alan Guttmacher Institute); RICKIE SOLINGER, WAKE UP LITTLE SUSIE 33 (2d ed. 2000). For a humorous and moving account of one couple's experience with open adoption, see DAN SAVAGE, THE KID (1999).

40. CARP, *supra* note 7, at 3 (observing that adoption "appears in the Code of Hammurabi, drafted . . . around 2285 B.C." and "was practiced in ancient Egypt, Greece, Rome, the Middle East, Asia, and the tribal societies of Africa and Oceania.").

41. SLINGERLAND, *supra* note 9, at 29.

42. CARP, *supra* note 7, at 4.

43. *Id.* Historians speculate that the Church also discouraged adoption to protect its interest in land and money that would otherwise be inherited by the adopted children.

adopting children out of belief that it was “unchristian” or an “unnatural” act to do.⁴⁴

At the founding of the United States, adoption was not a widespread practice among white, “native-born” families.⁴⁵ When they occurred, adoptions were arranged informally and usually involved shifting the care of a child to an extended family member.⁴⁶ In response to the arising logistical complications, people turned to the state legislatures for assistance. Between 1781 and 1851, state legislatures passed hundreds of private bills requesting name changes, and in some states, even conferring partial inheritance rights upon the child.⁴⁷ Among poor and immigrant families, however, orphaned or abandoned children were placed in orphan asylums or almshouses, which were usually run by private, religious organizations.⁴⁸

In 1851, Massachusetts became the first state to pass a general statute establishing a system by which legal adoption could occur. The Massachusetts statute was unique because it established adoption as a means to serve the best interests of the child. The law conferred full inheritance rights to the child, imposed duties on the adoptive parent, required biological parents (or legal guardians) to provide written consent, terminated the rights of biological parents, established an evaluation of the prospective adoptive homes, and provided judicial supervision over the child’s placement.⁴⁹

44. *Id.* (“Fears of adoption were spread by stories of accidental incestuous unions between unsuspecting blood relatives. As a result, people hesitated to adopt: childless couples who adopted invited public scrutiny of their infertility; other presumptive adoptive families worried that neighbors might perceive them as challenging the natural order.”).

45. It appears that absent interference by a slave owner, informal “adoption” of orphans among slaves operated in a similar, informal manner. See Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1364-65 & nn.107-09 (1994). The fate of the children who were born to slave women and “fathered” by slave masters also varied widely. Some slave owners made arrangements for these children to be educated, freed and receive inheritance (usually upon the master’s death), or be owned forever by the “family.” With respect to the last arrangement, one slave owner considered it “cruelty” for the children of his slave “mistresses” to be owned by strangers. Specifically, he said that “any but my own blood should own as slaves my own blood.” RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 45-48 (2003).

46. See CARP, *supra* note 7, at 6-7. With respect to orphaned, neglected, or children who were born out of wedlock, the institution of adoption differed. The American Colonialists replicated the English poor law system of removing poor children from their biological families and placing the child with wealthier families or in involuntary apprenticeships.

47. *Id.* at 7.

48. *Id.* at 6-7.

49. *Id.* at 11-12. Known as “An Act to Provide for the Adoption of Children,” Massachusetts enacted the first modern adoption law, which was characterized by granting rights to the child and by evaluating the parents. In 1846, Mississippi and in 1850, Texas enacted general adoption statutes that recorded private adoption agreements in the same manner that land deeds were recorded. The laws of Mississippi and Texas, which had been under the control of France and Spain, reflected the legal principles of the Napoleonic Code. The modern conception of adoption, which marshaled its resources to focus on the best interest of the child, was a radical break from the traditional legal scheme of adoption that “was intended to benefit the adopting male parent by providing the necessary heirs to mourn, inherit, or carry on the family line.” Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 441 (1996).

The legalization of adoption was controversial but spread widely in a short period of time. One of the ripples from adoption was a sudden interest in children's issues by the elite, Protestant social reformers. In urban centers, particularly New York City and Boston, social reform movements boomed during the mid- to late-1800s, and private charities and organizations rallied around the cause to save the children from urban degeneracy.⁵⁰ For instance, as "an offshoot" of the Society for Prevention of Cruelty to Animals ("SPCA"), Eldridge Gerry founded the Society for Prevention of Cruelty to Children ("SPCC") in the 1870s, which for the first time identified the problems of "child abuse" and "neglect."⁵¹ The reformers were protestant, white, and wealthy; the objects of their reforms were newly-arrived immigrants who were mostly poor, Catholic, and considered to be not "white."⁵² In the Progressive Era, a person's "race," as used in the Northeastern cities, was not based on her skin color; rather race was used to demarcate a perceived culturally inferior individual from the white, native born elite. By 1911, the U.S. Immigration Commission's *Dictionary of Races of Peoples* identified forty-five different races, including "Hebrew," "Irish," "Italians," "Poles," "Great Russians," "White Russians," and "Little Russians."⁵³

In 1853, the Reverend Charles Loring Brace, a prominent social reformer, established the Children Affairs Society ("CAS"), which was an orphanage for poor (and mainly Catholic and immigrant) children.⁵⁴ Reverend

50. SLINGERLAND, *supra* note 9, at 36-37 (listing the "most noteworthy" organizations, as understood in 1919, to be: the Henry Watson Children Aid Society of Baltimore, founded in 1860; the Boston Children's Aid Society, founded in 1864; the New York Society for the Prevention of Cruelty to Children, founded in 1874; the Massachusetts Society for the Prevention of Cruelty to Children, founded in 1878; the Children's Aid Society of Pennsylvania, founded in 1882; and the association known by 1919 as the Illinois Children's Home and Aid Society, which began in 1883 as the American Educational Aid Association. By 1917, 34 states had active societies dedicated to child-placement concerns.) See LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 32-37, 82-83 (1988) [hereinafter GORDON, *HEROES*] (listing various organizations and social influences that led to their founding); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 138-41 (1994) (listing various private anti-vice and social purity societies formed in this era).

51. See CHAUNCEY, *supra* note 50, at 138.

52. See GORDON, *HEROES*, *supra* note 50, at 32-37 (discussing class interests in reforming the poor and deprived immigrants); GORDON, *ORPHAN*, *supra* note 7, at 11-12 (noting that most of the orphans were Irish, Italian, Polish who were considered to be racially inferior to the protestant white elite).

53. See GORDON, *ORPHAN*, *supra* note 7, at 12 (observing that race was used to connote status. "These were not physical or cultural descriptions of innocuous 'difference,' but social and economic markings of rank. For example, elites typically labeled upscale German Jews as Germans and Russian Jews as Hebrews.").

54. See CARP, *supra* note 7, at 9. When African-American children were truly orphans—abandoned or homeless on the streets—they were not placed on the orphan trains because of the mores concerning interracial adoptions. (Known technically as "transracial adoption," the first documented adoption of a black child by white parents occurred in Minnesota in 1948. See HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 3 (2002)). "Even when the orphan train movement was at its height, most wound up in poorhouses or segregated 'colored orphanages.'" See ANNETTE R. FRY, *THE ORPHAN TRAINS* 50-51 (1994). Indeed,

Brace also is credited with devising the concept of the orphan trains, which he used for the purpose of dispersing the children to rural areas of the United States.⁵⁵ Reverend Brace reasoned that now with the advent of legalized adoption, children would benefit by being adopted into homes away from urban vices.⁵⁶ The rural farmers were eager for more help, children would thrive once away from the “peculiar temptations” found in a city, and the end result would be fewer children who remained in the urban environment, rife with corrupt influences.⁵⁷ Reverend Brace, and soon other child welfare organizations, loaded children onto west-bound trains. When an orphan train arrived in a station, eager farmers met the trains and picked out the hardest looking children to work on the farms. The remaining children re-boarded and continued west until all were claimed. By 1910, over 110,000 children had been shipped out of New York City to the West on such trains.⁵⁸

Reverend Brace’s romantic vision of children romping in bucolic paradise was shattered by the harsh and exploitative reality. The orphan trains drew sharp criticism for three main reasons. First, the orphans were placed in random families without any supervision or follow-up. Although there were families who welcomed the orphans into their home, critics pointed to the farmers who treated the children as a source of cheap labor, subjecting them to exploitative working conditions, physical abuse, at times sexual abuse, and even death.⁵⁹ For example, in 1919, child welfare expert W.H. Slinger-

Reverend Brace observed that: “It is a noticeable thing that during this age of poverty, not a single colored boy has come under the operations of this Society, and only two during the two years of our labors.” *Id.* at 50-51. Jewish children also were rarely placed on the orphan trains. (Although they would be if they were baptized as Catholic first). The Federation of Jewish Charities formed during this time and looked after the welfare of Jewish children. Most of the homeless Jewish children were placed in segregated asylums for Jewish orphans. *Id.* at 51. *See also* SLINGERLAND, *supra* note 9, at 51 (listing that as of 1919, 1,200 Jewish children were “in residence” at the Hebrew Orphan Asylum in New York City and 600 Jewish children were in residence at the Hebrew Sheltering Guardian Society in Pleasantville, New York. In addition, the organizations had “boarded-out” approximately 800 orphans to “selected Jewish families.”).

55. CARP, *supra* note 7, at 9; GORDON, ORPHAN, *supra* note 7, at 8.

56. GORDON, ORPHAN, *supra* note 7, at 9.

57. *Id.* (listing Brace’s description of the advantages of his program and commenting “[t]hen as now some of the wealthy preferred to deal with poor and homeless by expelling them”); *see also* CARP, *supra* note 7, at 9-10. The Reverend Brace believed that he was “rescuing” children by removing them from their biological families who lived amidst urban vices and by placing them in the homes of the rural Christian families. Reverend Brace believed that this process would transform the children, whom he referred to as “street Arabs,” “little vagabonds” and “homeless creatures,” into “decent, orderly industrious children.” *Id.*

58. GORDON, ORPHAN, *supra* note 7, at 10.

59. CARP, *supra* note 7, at 13. In 1882, contemporary criticism of the orphan trains included charges that the CAS “distribut[ed] large number of children to farmers ‘without asking any questions or obtaining any information regarding them or any security for their proper care or protection.’” Critics said that the farmers treated the children “like slaves.” In 1884, Hastings H. Hart, a “respected child reformer” conducted an independent study documenting “many abused and exploited children.” Significantly, one-fourth of the 340 children placed in Minnesota never were located. In addition, farmers took the children with the understanding that they could return them if unsatisfied for any reason. According to the Home for Destitute

land criticized the previous child-placement practices because "supposedly rescued boys and girls have frequently been cast into an environment that injured body and spirit, and sometimes destroyed even life itself."⁶⁰ Other critics in the western states also fought the Orphan Trains because they perceived the children to be miscreants, and they accused the CAS of dumping the "offspring of New York's criminal population" into their pristine lands.⁶¹ Both sets of reformers combined their efforts, and individuals in various western states stepped in as early as 1874 to begin attempts either to block the trains from arriving in their state or to establish judicial supervision over the adoptive families.⁶²

Second, in New York City and Boston, Catholic Church leaders were outraged at what they called the kidnapping of children from Catholic, immigrant homes and their subsequent placement into Protestant families.⁶³ In a well-publicized case, a Catholic father became temporarily debilitated from illness and placed his children in the care of a private agency until he became well.⁶⁴ When he recovered, he requested the return of his children only to discover that the agency instructed the foster family to hide the children away as long as possible because "we dread Catholic influence more than the bite of the rattle-snake."⁶⁵ By the 1860s, the Catholic church leaders re-

Catholic Children, "foster children were fairly often sent back to them." FRY, *supra* note 54, at 50.

60. SLINGERLAND, *supra* note 9, at 43.

61. FRY, *supra* note 54, at 57; *id.* at 55 (quoting a Catholic leader who said: "The system which is flooding our western country with undisciplined, vicious children is much to be deprecated"); CARP, *supra* 7, at 12 (reporting that residents in the Midwestern and western states also criticized the orphan trains for dumping "car loads of criminal juveniles, . . . vagabonds, and guttersnipes," which had the claimed effect of increasing the population of the homeless and prisoners).

62. See CARP, *supra* 7, at 12. For instance, the Reverend Martin Van Buren Van Arsdale represented a movement of reformers who responded to practices of the CAS by establishing a more humane method of removing and placing children. Reverend Van Arsdale, for instance, founded the National Children's Home Society ("NCHS") in 1883, which was an agency that required a thorough investigation of the child's background to ensure that she was not being separated from her biological parents. A child was not accepted into the custody of the NCHS until either a legal guardian provided written consent or a court ordered a legal commitment. In addition, the NCHS screened prospective families, kept records where children were placed, and followed up with inspection visits to ensure the child was cared for properly. CARP, *supra* note 7, at 14.

63. The majority of children "stolen or rescued, depending on one's point of view" were Catholic whereas most of the child-saving organizations and foster homes were Protestant. GORDON, ORPHAN, *supra* note 7, at 11. In New York, 40 to 50% of the population was Catholic, a percentage that increased among the poor. *Id.* Jewish leaders also responded by starting their own welfare organizations to take care of Jewish children. See *supra* note 54.

64. CARP, *supra* note 7, at 103.

65. *Id.* The father had placed his children with the American Female Guardian Society and Home for the Friendless. The entire quote from the agency official to the foster parents was: "As we dread Catholic influence more than the bite of the rattle-snake, for that only destroys the body while the other destroys the immortal soul . . . ; if you have become attached to the dear boy, save him from the power of the fell-destroyer, and the conscious approving smile of your Heavenly father will be your award." The agency official forwarded the letter to

sponded to the perceived religious annihilation by starting their own orphanages and placement services for the purpose of placing the “orphaned” children into Catholic families.⁶⁶ These organizations worked more closely with adoptive families to oversee adoptions, albeit mainly motivated by the desire to ensure that the children were not being raised outside the faith.⁶⁷

Third, and most chilling, Reverend Brace’s plan ultimately failed because most of the children sent west were not really orphans. By his own estimate, 47% of the “orphans” had one or both parents who were still alive⁶⁸ and historians estimate the figure to be closer to 75 or 80%.⁶⁹ Reverend Brace defended his practices by explaining that “the great majority [of the children sent west] were the children of poor and degraded people, who were leaving them to grow up neglected in the streets.”⁷⁰

Reverend Brace and agents from other private agencies swept the streets, picking up immigrant children and taking them to orphanages or private agencies.⁷¹ The private agencies also would make *sua sponte* house calls and remove children from immigrant parents on the grounds of poverty, immorality, or cultural inferiority.⁷² A diagnosis of “immorality” often was made if the mother did not have a husband, if the family was poor, or if the parents were Catholic.⁷³ “Cultural inferiority” was charged whenever families failed to resemble the “American” values of temperance, wealth, and

a CAS officer who “tacitly approved hiding the child to prevent him from falling into the hands of the Catholic father.”

66. See FRY, *supra* note 54, at 50 (observing that in 1865, 48 children from Catholic birth mothers were sent on the first orphan train directed toward Catholic families in the west); CARP, *supra* note 7, at 13-15.

67. See CARP, *supra* note 7, at 13-15.

68. *Id.* at 10.

69. See HOLLINGER, *supra* note 6, at 1-27 (observing that the estimates were based on data provided by the U.S. Census data and many state and private agencies).

70. CARP, *supra* note 7, at 10. Historians estimate that approximately half of all children taken from their homes during this period were “removed from parents only because of poverty.” GORDON, ORPHAN, *supra* note 7, at 11.

71. See HOLLINGER, *supra* note 6, at 1-28 (“The Children Aid Society agents thought that proper children should stay clean, remain in school, speak modestly, and never—at least not in the cities—play outside unattended.”); GORDON, ORPHAN, *supra* note 7, at 11. See also GORDON, HEROES, *supra* note 50, at 37-38 (remarking that 45.2% of new cases of child abuse and neglect that the Massachusetts SPCC investigated in a three month span were initiated by the SPCC agents. In addition, complaints also were received by elite individuals who called to allege that their servants were “mistreating” their own children. In 1880, 56% of the complaints made in Boston were dismissed for lack of evidence.).

72. See HOLLINGER, *supra* note 6, at 1-28.

73. Although approximately 10 to 15% of households in New York City were headed by single mothers, approximately 55% of child neglect cases arose from single mother families. “The child neglect of which [single mothers] were accused was often difficult to distinguish from, simply, poverty: the children were malnourished, poorly clad, without medical care, or living in unheated flats; they were left unsupervised or with slightly older siblings while mothers worked.” GORDON, ORPHAN, *supra* note 7, at 8; see also CARP, *supra* note 7, at 103-04 (anti-Catholic bias); GORDON, HEROES, *supra* note 50, at 34 (observing that the New York chapter of SPCC was noted for its prosecution of parents).

whiteness.⁷⁴ Relying exclusively on the representations made by the private anti-vice agencies, courts typically committed these children to the custody of a private or public institution.⁷⁵ Indeed, under state law, a court could enter an order severing the biological ties of the child to her parents without providing the biological parents notice or an opportunity to contest the charges.⁷⁶ In the few circumstances in which parental consent was required, some states allowed a judicial finding of the parents' "moral depravation" sufficient to waive it.⁷⁷

Once a private agency took custody of an "orphan," a biological parent had limited, if any, legal recourse to secure the return of his child.⁷⁸ Many of the biological families targeted by the anti-vice societies were ignorant of any rights they may have had, often because they were illiterate and non-citizens.⁷⁹ When legal remedies in fact existed, the courts usually did not side with the biological parents who sued for the return of their child.⁸⁰

The "social reformers" who removed children from their homes relied upon the Fatherlessness ideology of the day to identify a bad mother as one who was unmarried or poor and a bad parent as one who is morally depraved (defined as not Protestant) and poor. A number of factors lead to the demise of the Orphan Trains during the 1910s, including a heightened criticism of child labor and abuse, continued discontent by the western states who received the children, burgeoning consciousness that poverty was not a basis

74. See GORDON, HEROES, *supra* note 50, at 46-48. In addition, the protestant elite "traced child mistreatment to vices inherent among inferior nationalities and cultures" of the newly arrived immigrant families. *Id.* at 47. See also *supra* note 53 and accompanying text for discussion of "whiteness" during this time period.

75. HOLLINGER, *supra* note 6, at 1-28 ("SPCC agents would round up children from city streets . . . and on the basis of little more than the agent's allegation of parental immorality or unfitness, obtain a court order committing the children to a state or private institution."); *id.* at 1-26 (noting that when prospective adoptive parents went to court to legalize custody of their child, the courts "accepted the adopters' statement that the biological parents had abandoned the child or [had] died" without taking any efforts to locate the biological parents to determine whether those representations were true). In addition, the New York SPCC agents were deputized, providing them with legal authority to remove children. GORDON, HEROES, *supra* note 50, at 52.

76. See HOLLINGER, *supra* note 6, at 1-26; GORDON, HEROES, *supra* note 50, at 43.

77. HOLLINGER, *supra* note 6, at 1-26 (observing that "[j]udges had broad discretion to determine whether these grounds existed"). In addition, in 1882, the Massachusetts legislature enacted a law providing that a probate judge could appoint the SPCC guardian for any "neglected, ill-treated, or abandoned child under fourteen" and that any judge could give the SPCC immediate 30 day custody of an "abandoned or deserted child[]" who was under age five. GORDON, HEROES, *supra* note 50, at 50-51.

78. Poor immigrant families feared the CAS and SPCC, criticizing the agencies for being "child stealers." GORDON, HEROES, *supra* note 50, at 33.

79. *Id.* at 47-48.

80. CARP, *supra* note 7, at 10. In one case, a man lost his case against the CAS for sending his son west without his permission or knowledge. In another, a father left his daughter in the care of the Salvation Army Brooklyn Nursery and Infants Hospital. When he returned to bring her home, the hospital informed him that she had been "put out on a farm in Kansas" by the CAS." Neither the Salvation Army nor the CAS provided the father with any more information and the father and daughter never saw each other again.

to remove a child from a home, and the railroads' discontinuing its practice of offering eastern charities reduced or free fares.⁸¹ The trains, however, did not stop running until the Fatherlessness ideology of the day, which declared a parent unfit based exclusively on his or her marital status, income, or religion, permanently severed at least 110,000 children from their biological families.⁸²

B. *The Fall and Rise of Adoption: Eugenics to the Cold War*

During the Progressive Era, a woman who gave birth out-of-wedlock engaged in highly immoral behavior. Like the prostitute, the bachelor who frequented bars, and immigrant children who spent much time on the urban streets, the vice of a single mother was that she was not a part of a traditional family.⁸³ Progressive Era Social Reformers in New York founded organizations to repress such social corruption and "[t]he societies' efforts to control the streets and tenements and eliminate the saloon and brothel were predicated on a vision of an ideal social order centered in the family."⁸⁴ In the 1880s, the social reformers, particularly the white middle-class evangelical Protestant women, ran rescue homes for the purpose of saving prostitutes through proper moral instruction.⁸⁵ By 1909, approximately seventy-eight rescue homes existed around the country, and the social reformers abandoned their efforts directed towards the prostitutes and focused on saving

81. President Teddy Roosevelt took many efforts to encourage poor families to keep their children. For instance, he said, "Parents of good character, suffering from temporary misfortune, and above all deserving mothers . . . deprived of the support of the normal breadwinner, should be given such aid as may be necessary to enable them to maintain suitable homes for the rearing of their children." FRY, *supra* note 54, at 73; *see also id.* at 72 (observing that the Orphan Trains stopped running when anti-monopolization contributed to the railroads' decision to stop giving reduced or free fares to eastern charities).

82. *See* FRY, *supra* note 54, at 72; CARP, *supra* note 7, at 12-13.

83. *See* CHAUNCEY, *supra* note 50, at 139.

84. *Id.* The self-appointed anti-vice societies hired agents to attend the social functions in question to report back on the activities. Over time, some societies attempted to regulate the corrupt individuals either through assuming quasi-police powers from the state or using their connections with the business community to use economic pressure against the tenement landlords and small business owners of the particular neighborhoods. The social reformers apparently targeted groups of individuals who posed a "threat to the social order" and "conventional gender and sexual arrangements." *Id.* at 140. The anti-vice squads' conflation of gender transgression with foreignness culminated in the Prohibition movement, designed to stop the "un-American culture of German brewers and immigrant saloons." *Id.* at 143.

85. *See* REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK 1890-1945*, at 10-11 (1993). Many of the evangelical women believed that they uniquely were equipped to provide moral instruction. Beginning in the late eighteenth century, society attributed "piety, virtue, and morality" as feminine traits and characteristics. *Id.* Despite such rhetoric, it was a man, Charles Nelson Crittenton, who built a larger number of maternity homes in response to hearing a divine call after his youngest daughter Florence died. *Id.* at 14. Crittenton inspired women across the nation to open up Florence Crittenton homes by "criss-crossing" the country in his personal railroad car to hold religious services for "outcast girls." *Id.*

unwed mothers.⁸⁶ The immigrant unwed mothers were believed to suffer from a moral vulnerability, which resulted from their poor training in religious and domestic affairs, and from a heightened risk of degeneracy, which derived from their status as lower-class immigrants.⁸⁷ The renamed maternity homes attempted to educate them by imparting employment skills that would market the women as domestic servants for the upper classes.⁸⁸

During this time, however, the belief that every single mother was presumptively unfit was not universal. By 1910, widespread social pressure, including the outspoken support by President Teddy Roosevelt, led Congress to enact legislation that created pensions for widows.⁸⁹ Considered *deserving* single mothers, the pensions allowed widows the means to raise their own children in their own home.⁹⁰ Notably, as the widow pensions provided that not all single mothers were treated the same, racism ensured that not all widows were treated the same. The pensions were given only to white women and, in a shift in defining whiteness, the Progressive Era's delineation of multiple races was replaced ultimately with an understanding that immigrant women from Europe were white, and thus worthy of raising their own children.⁹¹ Indeed, the maternity homes that served (white) immigrant woman

86. See KUNZEL, *supra* note 85, at 14, 16-17. In 1896, Kate Waller Barrett was hired as the superintendent of the Florence Crittenton Mission. *Id.* at 17. Crittenton remained the president of the Mission but left Barrett to supervise the various maternity homes. *Id.* When Crittenton died in 1909, Barrett was the sole person in charge and over the next fifteen years, "shifted the emphasis of the homes from the rescue and redemption of prostitutes to residential and maternity care for single mothers." *Id.* Barrett also told audiences that her first encounter with an unwed mother was a religious experience for her. *Id.* at 9-10.

87. See KUNZEL, *supra* note 85, at 13, 30-31. In addition, "[t]raining in the womanly arts supplemented training in religion and industrial habits to complete the evangelical strategy of redemption, and lessons in cooking, sewing, laundering, ironing, and child care were offered in every home." *Id.* at 28. The maternity homes attempted to alter the dress, language, and habits of the unmarried women because "a working-class style . . . [was] associated with moral and sexual laxity." *Id.* at 30-31. For this reason, maternity homes only accepted "first offenders." Kate Barrett explained that a woman with a second illegitimate child may exert a "bad influence" over "girls who are in the institution for the first time." *Id.*

88. KUNZEL, *supra* note 85, at 34 ("Evangelicals valued domestic work for precisely the reasons that working women disliked it; it effectively removed women from the temptations of city life and limited their independence in ways that young women found constraining and reformers found reassuring." Kunzel observes that despite the fact that Evangelical women believed that proper training in female domesticity could cure a morally depraved girl or woman, "many studies indicated that domestic servants were disproportionately represented among populations of unmarried mothers, prostitutes, and delinquent girls.").

89. See CARP, *supra* note 7, at 16. In 1909, President Theodore Roosevelt urged states to assist a widowed mother "keep her own home and keep the child in it." In 1911, Illinois became the first state to enact a pension for widowed mothers, and by 1920, 40 states had enacted similar statutes. *Id.*

90. For an excellent historical overview of the social and political factors that resulted in the creation of pensions for widows, see THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 434-75 (1992).

91. See LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935* at 24-35 (1994) [hereinafter GORDON, *PITIED*]; see also KUNZEL, *supra* note 85, at 29 (observing that by early 1900s, social reformers considered immigrant women to be "white").

excluded black women from their care.⁹² With the allowance that some single mothers were capable of raising children, the private agencies became less aggressive in taking away children who would have otherwise been the targets of removal a decade earlier.⁹³

With the dawning of the Eugenics movement, which was most influential from approximately 1910 to 1930, the popularity of adoption declined. Eugenics was a widely-accepted belief that humanity could combine the theories of Darwinism and animal husbandry to produce a superior race, or at least prevent an inferior one from forming.⁹⁴ As explained in a 1914 high school textbook, “the demand has become more urgent that we do something to prevent the race from handing down diseases and other defects, and that we apply to man some of the methods we employ in breeding plants and animals. . . . A tendency to cancer, or tuberculosis, or chorea, or feeble-mindedness is a handicap which it is not merely unfair, but criminal, to hand down to posterity.”⁹⁵ Accordingly, in an effort to purify the race by reserving parenthood for the most fit, “tens of thousands of American citizens were locked up or sterilized as a precaution against crime, disease and other social ills.”⁹⁶

92. See KUNZEL, *supra* note 85, at 29-30. In response, African-American women “founded benevolent institutions for ‘unprotected women’ in their own communities.” *Id.* at 13.

93. *Id.* at 33 (observing that “evangelicals insisted that every effort be made to keep mother and child together.” As explained in 1913 by Lilian Clarke, a social reformer of the day, “It is a dangerous thing to take an infant away from a mother of this type. . . . If deprived of [the baby, which was a] powerful motive and influence toward an upright life, . . . [the unmarried mother will be] ready for evil spirits to come in and take possession.” (citing LILIAN FREEMAN CLARKE, *THE STORY OF AN INVISIBLE INSTITUTION: FORTY YEARS WORK FOR MOTHERS AND INFANTS* 12 (1913)).

94. Christopher Reardon, *American Gothic: A New Curriculum Explores a Disturbing Side of the Progressive Era*, *TEACHING TOLERANCE*, Spring 2003, at 20. Francis Galton, an English mathematician who was also Charles Darwin’s cousin, is attributed to have developed the theory of Eugenics in 1883, a term whose etiology is the Greek word for “good in birth.” Galton intended to promote the good of humanity by using the principles of Social Darwinism to encourage “breeding the best with the best.” In his words, “Eugenics cooperates with the workings of nature by ensuring that humanity shall be represented by the fittest races. What nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly.” *Id.*

95. *Id.* at 21 (quoting GEORGE WILLIAM HUNTER, *THE NEW CIVIC BIOLOGY* (1914)).

96. *Id.* at 19. States regularly passed laws to sterilize individuals who were diagnosed as insane, feeble-minded, or had a propensity for criminal behavior. In *Buck v. Bell*, 274 U.S. 200, 207 (1927), the Supreme Court famously upheld such a regulation (in an 8-1 decision) with the chilling explanation: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” The Supreme Court did not strike down forced sterilizations until 1942 when it decided *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating an Oklahoma statute that provided for the sterilization of felons). Historians estimate that 65,000 individuals were sterilized during this time period. See Reardon, *supra* note 94, at 22. In addition, the immigration policies of this era reflected eugenic principles. In 1923, Congress limited citizenship to “white persons.” See *United States v. Thind*, 261 U.S. 204 (1923) (upholding ban). From the 1870s until the 1940s, Congress had categorical bans against nationals of various Asian countries, preventing them from receiving immigration benefits including even entry into the

With respect to child-placement practices, the "science" of Eugenics dominated the entire process. In 1919, as described by W.H. Slingerland, a "Special Agent of the Department of Child-Helping," "[o]ne of the greatest social problems in America is the large and constant increase in feeble-mindedness. Less than a decade ago the world woke up to this fact—for the problem is not confined to America but is world-wide—and realized something of its portent. We now know that almost every orphanage contains some feeble-minded children; . . . [and] that from 15 to 50 percent of the delinquents in the reform and industrial schools are of subnormal mentality."⁹⁷ "Feeble-mindedness," (a now-discredited medical condition) was defined in 1911 by Dr. Walter S. Cornell of the Department of Public Health and Charities as the "original lack of normal mental capacity. By 'original' is meant before the end of the child period or about the twelfth year, although actually 95 per cent of the feeble-minded are born so because of hereditary influences, or injury to the head during labor. . . . Probably over one-half of all the feeble-minded, and certainly three-fourths of all of those found as state charges in our public institutions, are degenerates. They represent the running down of the human stock."⁹⁸

The child welfare experts in the Eugenic Era did not presume that a child would benefit from being raised by his or her biological parent. As explained in 1919, "it is not right to leave children with parents regardless of the parents' character and fitness to raise them. Those who are immoral, positively criminal, afflicted with contagious or infectious diseases, or decidedly deficient mentally, are unfit to bear or raise children. The state and philanthropic organizations must sometimes step in to save the progeny already in existence, and take measures to prevent further reproduction by these classes."⁹⁹

In response to the fear of the "running down of the human stock," the child welfare experts in the Eugenic Era classified the feeble-minded children into categories such as "Idiots," "Idio-imbeciles," "Imbeciles," "Morons," and "Dullards" to identify which children could be treated or rehabilitated.¹⁰⁰ The child welfare experts relied upon these categories to identify

country. *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (upholding Chinese Exclusion Act).

97. SLINGERLAND, *supra* note 9, at 69. Accordingly, Special Agent Slingerland recommended an education for all "teachers, social workers, and others interested in community problems" to include instruction on how to administer the Binet-Simon exam and course preparation in "vital statistics, the family, marriage and divorce, eugenics, educational standards for normal children, and other subjects . . . [in] clinical psychology." *Id.* at 70.

98. *Id.* at 74 (quoting Walter S. Cornell, M.D., Department of Health and Charities, Philadelphia, BULLETIN, at 1-2 (1911)).

99. *Id.* at 83.

100. *Id.* at 74-75 (listing comprehensive definitions of each category and identifying the five-tiered classification scheme as devised from the "systems of Martin W. Barr, of Elwyn, Pennsylvania, and Henry H. Goddard, of Vineland, New Jersey" and previously published in a book entitled, "Child Welfare Work in Pennsylvania."); *See also id.* at 67 (explaining that there were four categories of "Defective Children," which include the "(1) feeble-minded or

which children needed to be removed from their biological homes, the attributed source of the feeble-mindedness problem. For instance, as admonished by Special Agent Slingerland in his "Manual for Students and Social Workers," "[c]hildren of very incompetent, really feeble-minded, viciously cruel, or positively criminal parents, [] should be wholly separated from them and provided for permanently in selected private homes or appropriate institutions."¹⁰¹

Social agencies and child-welfare workers removed children from their biological families if one of the five situations existed: (1) serious neglect;¹⁰² (2) physical or moral endangerment "by their surroundings;" (3) desertion or abandonment; (4) "badly diseased or distressed by deep poverty;" and (5) "poor and unprotected orphans and half-orphans."¹⁰³ (The term "half-orphan" was a term of art that was defined in 1919 as "[w]hen only one parent is deceased, the children are called half-orphans."¹⁰⁴ In continuing with the abuses of the Orphan Train era, the vast majority of children deemed orphans had in fact one living parent. Special Agent Slingerland, for instance, states that "[i]t is estimated that only a little more than 10 percent of the children in orphan asylums are full orphans."¹⁰⁵). Equally important, the same agencies

insane; (2) epileptic; (3) physically crippled or deformed; (4) seriously diseased").

101. *Id.* at 65.

102. What is particularly notable about the Eugenic Era's grounds for removal is that the term "neglect" was defined differently in each state. The State of Indiana, for example, defined neglect as "A child who has not proper parental care or guardianship, who begs or receives alms, is employed in a saloon, or lives in [an] unfit environment." *Id.* at 61 (quoting Indiana statute). The State of Tennessee provided that "neglected children" include those whose parents "allow them to have vicious associates, or visit vicious places." *Id.* at 234 (reprinting Public Act of 1917 (Tennessee)). The reformers targeted neglect because it was believed that neglect caused a child to become "wayward, truant, lawless, and ultimately incorrigible." *Id.* at 61-62. In demonstrating the logic of Eugenics, Special Agent Slingerland continued to explain that "By reason of neglect, prenatal and postnatal, many children are afflicted with blood diseases, or are deformed, crippled, anemic, neurotic, or tuberculous. . . . [which] generally causes its victims to become dependent, delinquent, or defective." *Id.* at 62. States also relied on the perceived basis of neglect as a ground to waive the requirement that a biological parent consent to having his or her child removed from its home and adopted to another family. For instance, the state of Idaho provided in its Abused Child Law that a biological parent's consent to have his or her child removed and adopted "is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery or cruelty and for either cause divorced, or adjudged to be a habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty or neglect." *Id.* at 136 (quoting from Idaho statute, § 2703).

103. SLINGERLAND, *supra* note 9, at 65. In addition, a child would be deemed deserted if only the father left the family. *Id.* at 63 ("In probably nine-tenths of all desertion cases the father alone deserts his family."). Thus, under the reasoning of the day, a child could be removed from the care of an otherwise competent and devoted single mother on the basis that her husband deserted the family. Indeed, Slingerland explains that "[m]any half-orphans, because of the poverty, illness, bad character, or other incapacity of the surviving parent, also need the temporary or permanent care which can be given in boarding or free homes." *Id.* at 65.

104. *Id.* at 74-75.

105. *Id.* at 65.

took great care to place a child with the family perceived to be best situated for its care, which was understood to mean that the least defective child was placed with the family with the highest social standing.¹⁰⁶

Not surprisingly, the popularity of adoption declined in part due to the rhetoric deployed by the child welfare agencies and experts who justified the mass removals of children from morally and mentally unfit parents. As explained in 1955 by Justice Wise Polier, a justice in the New York City's Children Court, during this era, "Adoption was a rare and unusual thing, risked only with a brand new, beautiful and perfect baby known to have an excellent family history."¹⁰⁷ Indeed, popular wisdom no longer attributed the moral failings of a single mother to her voluntary participation in vice or inherent vulnerability arising from her lower caste; rather immorality was the result of the given individual's biological inferiority.¹⁰⁸ Under this logic, unwed single mothers were considered "feeble-minded" and "near-morons," and had a biological flaw such as mental deficiency, which, in turn, created a propensity to moral weakness.¹⁰⁹ In this era, children of immoral parents could no longer be saved from the influences of urban degeneracy, and adopted children were believed more likely to grow up to be "poor, criminal, and feeble-minded[]." ¹¹⁰ Following the advice of popular magazines that warned prospective parents of the "bad heredity" embedded in single moth-

106. As explained by Slingerland, a failure for the social worker to appreciate from which defect a child suffered was an unforgivable mishap. "To put a low grade mental defective in a family home where a normal child was expected is a social crime, once to be condoned because of ignorance, but now inexcusable in a well-ordered and progressive child-placing agency." *Id.* at 69. In addition, Slingerland admonishes the reader of his manual that "You must bear in mind that there are first-class, second-class, and third-class children, and there are first-class, second-class, and third-class homes. If a child is dull, stupid, untrained, or a bed-wetter, you cannot expect to secure as good a home as you could secure for a bright, attractive, well-trained child, and it is true many humble homes of uncultivated people are permeated by a loving and faithful spirit, and will give conscientious care even to an undesirable child." *Id.* at 118-19.

107. SOLINGER, *supra* note 39, at 149; see also LINDA TOLLETT AUSTIN, *BABIES FOR SALE: THE TENNESSEE CHILDREN'S HOME ADOPTION SCANDAL I* (1993) ("Around the turn of the century, few adoptions were initiated because people felt ambivalent about adoption. Those persons felt that poor, immigrant, and unwed mothers were likely to give birth to children of low intelligence."). Cole & Donley, *supra* note 8, at 276 (reporting that "In one request to the Chicago Child Care Society, adoptive parents requested that the agency assure them that the child did not have 'one drop of Irish Blood.'").

108. See SOLINGER, *supra* note 39, at 149-52.

109. KUNZEL, *supra* note 85, at 52-56 (describing how "criminologists, social workers, and psychiatrists" used the now discredited Binet-Simon test, which could measure mental capacity, to correlated feeble-mindedness in men with criminal activity and poverty and feeble-mindedness in women with sexual deviance that was understood as prostitution and out-of-wed lock pregnancy. In addition, social workers diagnosed women too intelligent to be feeble-minded as "sexual delinquents" if they were lesbian, victims of rape, or pregnant outside of marriage).

110. CARP, *supra* note 7, at 18. ("Studies like Henry H. Goddard's *The Kallikak Family* (1912) claimed to demonstrate the tendency of generations of children to inherit the social pathology of their parents, particularly criminality and feeble-mindedness.").

ers' offspring, white families became less inclined to adopt such a child into their family.¹¹¹

In a marked shift from the Orphan Train era, social reformers strongly encouraged white women to keep their children. Single women were admonished that they would be bad mothers if they abandoned their biological child, and the maternity homes took great efforts to discourage adoption through literature, counseling tactics, and even signed contracts in which a woman's admission into the home was predicated on her keeping the child.¹¹² In addition, a "handful of states" passed legislation mandating that a woman breast feed her infant for the first six months in an attempt to ensure that illegitimate children remained with their birth mothers.¹¹³

By the 1950s, however, adoption returned to a desirable means by which to create or expand a family. The rise in the popularity for white families to adopt white babies boomed overnight, alongside the post-World War baby boom, and can be attributed primarily to three factors.¹¹⁴ First, by the 1940s, the eugenic theory of biological inferiority faded from its prominence

111. *Id.*

112. See KUNZEL, *supra* note 85, at 33; Sanger, *supra* note 49, at 445-46 (observing that the counseling tactics included "regularly requir[ing] pregnant women to touch, nurse, and room with their infants as a condition of admission. Such intimacies were intended to create a bond too wrenching for the mother to break. Tactics were blunt. Throughout the 1930s and 1940s, the Florence Crittenton Homes gave their residents a letter signed by 'The Baby You Didn't Want' which asked, 'Whose arms will pick me up from my coop tomorrow? Into what home shall I be consigned . . .?').

113. SOLINGER, *supra* note 39, at 21; MAY, *supra* note 8, at 120-42 (describing the myriad forces that led to the baby boom, a belief in a large family, and an emphasis on conformity).

114. See JEAN CHARNLEY, *THE ART OF CHILD PLACEMENT* 149 (Univ. of Minnesota Press 1955) (reporting that "the shortage of foster homes was most acute" during World War II). According to estimates made by the Children's Bureau, in 1937, approximately 16,000 adoptions occurred each year. *Id.* By 1945, this rate tripled to approximately 50,000 adoptions annually. In the 1950s, the adoption rate doubled to approximately 93,000 adoptions per year. By 1965, the adoptions per year grew to 142,000. *Id.* As a historical note, white families disregarded the stigma of childlessness and mores of white supremacy and began to adopt children of color relatively late in time—first Japanese children after World War II and then orphaned children from the Korean and Vietnam wars. See CARP, *supra* note 7, at 33. In modern times, international adoptions are skyrocketing in popularity. In 2001, international adoptions accounted for 20,000 placements in the United States. Jane E. Brody, *Adoptions from Afar: Rewards and Challenges*, N.Y. TIMES, July 22, 2003, at F7. The international adoptions are criticized for promotion or reliance on baby selling. See, e.g., Raymond Bonner, *A Challenge in India Snarls Foreign Adoptions*, N.Y. TIMES, June 23, 2003, at A3. See also FRANCES M. KOH, *ORIENTAL CHILDREN IN AMERICAN HOMES* iv-xv, 102-07 (1981) (discussing challenges and suggesting resolutions to difficulties occurring in adoptions of Asian children by white American parents). In modern times, there also is a controversy over interracial adoptions arising between white parents adopting non-white children, focusing on the adoptions of African-American children. For an overview of this controversy, see KENNEDY, *supra* note 45, at 447-79; FOGG-DAVIS, *supra* note 54, at 3-4, 34-51 (critiquing the concept of "colorblindness" as used in the adoption context); see also Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 916-18 (1994) (commenting on assumptions behind the placement of children with parents of same race and of different races than the child).

as psychology and child-rearing theories scientifically proved that children were influenced by their environment. Once again adoption offered the opportunity to save the children of deprived single mothers as long as the children were raised by the good (and usually Christian) parents of the day.¹¹⁵ For the first time, adoptive parents preferred adopting infants to older children because an infant hid the child's illegitimacy, the mark of its own moral failing, and it was believed that the earlier in time a good couple could raise the child, the earlier a child would be free from the influence of her biological mother's corrupted environment.¹¹⁶

Second, the demand for white babies was enforced by changing psychological explanations for single motherhood. By the 1940s, the discipline of psychiatry proffered that white women and girls who became pregnant merely suffered from a mental illness, which caused them to act out by engaging in illicit behavior such as pre-marital sex and out-of-wedlock childbirth.¹¹⁷ During the baby boom, the penance for a single mother's moral fail-

115. See CARP, *supra* note 7, at 18.

116. See HOLLINGER, *supra* note 6, at 1-50. According to a 1951 survey of 25 states, approximately 70% of the children who were adopted were under the age of one. *Id.* See also Cole & Donley, *supra* note 8, at 276 (listing the reasons why infants were not adopted in earlier periods including the fact that until the 1920s, there was an infant mortality rate as high as 95% when an infant was separated from her birth mother). By contrast, in contemporary times, approximately 81% of children who are adopted are under age one. See ADAMEC & PIERCE, *supra* note 9, at 24.

117. SOLINGER, *supra* note 39, at 90. Whereas the "scientific" explanation for single motherhood previously had been the result of a woman's moral weakness (Progressive Era) or biological inferiority (Eugenics), in the 1940s, the etiology of out-of-wedlock pregnancy among white women became understood as the result of mental illness. The psychiatrists, psychologists, and social workers discovered that these women suffered from "masochism, sadomasochism, severe immaturity, psychopathic tendencies, homosexual tendencies, schizophrenia, delinquency, and chaotic personality structure." *Id.* Despite the more seemingly forgiving explanation, the psychological genesis of single motherhood in fact was predicated on the assumption that women who chose pregnancy were doing so to defy society's order. For a white woman to choose out-of-wedlock pregnancy despite the societal opprobrium against it indicated that she was "a truly sick person [who] den[ie]d reality so radically." *Id.* at 88. Although contraception and abortion were legally unavailable (or if legal, extremely limited) the researchers focused on how a white teenager willed herself pregnant, including one 1957 report by a respected researcher, that showed pregnant teenagers were able to consciously control their ovulation process to ensure pregnancy. *Id.* at 90. Notably absent were studies on the male fathers who impregnated the girls. One reason for this omission was that the underlying anxiety about an unwed mother's pregnancy was that she was having sex, an activity reserved for men. Researchers identified an unwed pregnancy as pathological because the young woman was acting "aggressively like [her] father," she had "a lot of latent homosexuality . . . coupled with contempt for men," and she was conflicted about her "masculine and feminine drives." *Id.* at 90-91. The discourse about gender role transgression entered greater society. In 1951, a social worker described a particular unwed pregnant teenager as "boyish," "aggressive," and attributed her interest in "work, recreation, and sports" to the possibility that "she denied her femininity by redirecting her sexual energy. . . ." *Id.* at 91. By contrast, the larger white society continued to attribute unwed black women's pregnancies to their biological inferiority that was exhibited by their "hypersexuality." *Id.* at 43. Because unmarried black women's pregnancy remained a "fact" of biological inferiority, black single motherhood was associated with an inferior morality leading to the breakdown in

ing, having sex outside of marriage, was to surrender her child to a loving home inhabited by a upwardly mobile, infertile married couple. During this era, the single mother still was considered unfit to parent her child. Indeed, courts could, and did, terminate her parental ties based on her out-of-wedlock status.¹¹⁸ More commonly though, the private maternity homes that had once counseled women to keep their children during the Eugenic Era, almost overnight, again changed tactics to convince women to give up their children at birth.¹¹⁹

society. *Id.* at 43-44. In the 1950s and 1960s, segregationists and de-segregationists alike defended their cause based on the effect the end of segregation would have on out-of-wedlock pregnancies among black women and girls. In the state legislature, laws were passed and proposed to penalize, and at times, criminalize black women who had out-of-wedlock births. *Id.* at 46-51. For example, in 1960 Louisiana made it a crime for a woman to have more than one child out of wedlock. *Id.* at 47. And in 1958, the following bill was introduced to the Mississippi legislature: "An Act to Discourage Immorality of Unmarried Females by Providing for Sterilization of the Unwed Mother Under Conditions of the Act; and for Related Purposes." *Id.* at 41. Although the bill did not pass, the sentiment captures the enormous amount of animus unwed black mothers faced. For instance, states across the country considered similar sterilization bills, conditioned public benefits on limiting family size to one child, and required hospitals and doctors to involuntarily sterilize unmarried and even married black women during these decades. *Id.* at 48-58. (Notably absent were the states' regulation of men's involvement in out-of-wedlock pregnancies. In North Carolina, when the legislature was debating the merits of an unwed mother sterilization bill, a member proposed sterilizing the unwed fathers. Although the amendment was added to the bill, the bill was tabled, never to be discussed again. *Id.* at 56-57).

118. See SOLINGER, *supra* note 39, at 165 (recording comments of Judge Harry D. Fisher, Circuit Court, Cook County, Illinois, who "believed it was [his] right and duty to intercede and terminate the parental rights of mothers whose wrongdoing consisted of bearing a child while unwed."). In extreme examples, upon the birth of their child, unwed mothers in Augusta, Georgia were brought into juvenile court, charged with neglect, the children were taken away permanently, and usually placed with adoptive couples who lived in California or New York. *Id.* at 175.

119. See Sanger, *supra* note 49, at 446-47 & n.334 (observing that maternity homes admonished unwed pregnant women who desired to keep their children for being selfish and immature. For instance, the unwed mother who decided to keep her child did so "not out of an ability to care for the child, but out of the wish for pleasure for herself"). Unlike earlier eras, maternity homes conditioned care on a signed agreement that the unwed mother would surrender her child upon its birth. See SOLINGER, *supra* note 39, at 161-64 (describing the "relinquishment culture" in maternity homes that led to birth mothers surrendering their children at birth). When a white pregnant teenager learned she was pregnant, she was aggressively counseled by family, friends, and maternity homes to surrender her child and admonished not to tell anyone of her secret. The larger white community was complicit in this lie. When a young white girl became pregnant, her parents, shamed and tremendously embarrassed by her actions, usually pressured their daughter to give up her child by sending her away to a maternity home before she showed. If the young woman had wanted to keep the baby before entering the maternity home, she rarely did afterwards due to the social workers' aggressive and constant guilt campaign. While she was away, the family explained to others she was visiting relatives, and upon her return, she continued her schooling and social life as if nothing had happened. *Id.* at 108-13.

The sin for which unwed pregnant white women were punished was not that they were pregnant per se, but that the pregnancy was proof that they were violating their gender role. A proper woman only had interests in domestic hobbies, was uninterested in sex, and stayed at home until she married. *Id.* at 90-93, 100-02. A pregnant unmarried woman carried around

Social pressures to have large families, combined with restrictive criteria for adoptive parents, resulted in a sizable number of couples who desired to adopt children at any cost. A black market (for white babies) responded to this demand, which thrived in the 1940s and 1950s.¹²⁰ During that time, it was commonly believed among lawyers, doctors, judges, and social workers that the "ideal" family consisted of two parents and at least two children, and that an unmarried mother should not raise children under any circumstances.¹²¹ Accordingly, motivated by moral conviction (and at times the generous compensation for their services), these professionals participated in or facilitated baby selling on the black market. For instance, some lawyers recruited pregnant women on the streets to sell their baby; some hospitals refused to return the newborn baby to the mother if she did not have sufficient funds to pay for her hospital bills; and some judges worked with agencies to terminate the rights of birth parents and approve adoptions without requiring any investigation of the situation beyond whether the adoptive parents had sufficient funds to cash the check for the services rendered.¹²² Other agencies aggressively manipulated and coerced a young poor pregnant teenager to surrender her child for sale on the black market.¹²³ The most flagrant

the proof that she had been outside the home, and even worse, participating in the male behavior of sex. Pregnancy in a married woman ironically made her chaste; pregnancy in an unwed woman made her manly. Motherhood was an icon reserved for the pure women who could live up to proper ideals of femininity. *Id.* at 90.

Black families responded differently to a teenage pregnancy. Although they never encouraged teenage pregnancies as claimed by white policy makers, black parents usually saw abandoning one's own child to strangers as the greater harm than extramarital sex posed. Families usually accommodated the pregnancies by having other relatives or the grandmother help the unwed mother raise her child. *Id.* at 82. White society treated black pregnant teenagers substantially different than it treated white pregnant teenagers. Although there were some maternity homes opened by the black community, most maternity homes were segregated and closed to black girls. Schools would expel a black pregnant teenager, ending her educational career; and the welfare agency scolded, admonished, and made it extremely difficult for young girls to receive the benefits to which they were entitled under law. *Id.* at 50-51, 57-59, 61-63, 78-85. In the late 1950s, the maternity homes became integrated and accepted a number of black women. *Id.* at 66-76.

Whereas a white unwed mother threatened the gender hierarchy, she was controlled by familial pressures, maternity homes, and social workers who pressured her to abandon her child to restore her femininity. An unwed black mother was perceived to burden society by draining the tax rolls or infecting others with her immorality. *Id.* at 42-45, 56. A black unwed mother's desire to raise her own child, however, had the subsequent perceived effect to threaten to bring down the entire social order, which is a sentiment that contributed to the ending of the Aid to Families With Dependent Children program in 1996.

120. SOLINGER, *supra* note 39, at 168, 177-86; AUSTIN, *supra* note 107, at 102-05 (recounting reasons why one couple turned to the black market).

121. See SOLINGER, *supra* note 39, at 165-66 (listing comments by various judges); *id.* at 175-76 (listing practices by courts and social workers to secure adoptions of children born to unwed mothers without consent).

122. *Id.* at 168-86 (listing abuses by various lawyers, judges, doctors, maternity homes, and social workers).

123. *Id.* at 168-77 (describing the exploitative practices, moral condemnation, and manipulation used to secure the "consent" of birth mothers).

examples of coercion included informing the birth mother that her child was still-born while in fact, the agency flew the child to a waiting couple, usually in New York or California, who was thrilled to receive an addition to their family.¹²⁴

The "Tennessee Baby Snatching Scandal" is the most widely known example of these abuses. In addition to employing the various coercive tactics already mentioned, the Tennessee Children's Home Society, run by Georgia Tann, colluded with a local judge, Camille Kelley, for the immediate termination of the parental rights of poor white women and families.¹²⁵ For instance, when Tann learned that a father with underage children was about to lose his job, Judge Kelley declared the children neglected and, without a hearing or even notice, removed the children and ordered them adopted by a waiting family (who paid Tann and allegedly Kelley handsomely for their time).¹²⁶

The private individuals who ran the black market were motivated in part by the sincere belief that babies would be corrupted if they were raised by the poor, immoral women who birthed them.¹²⁷ The ideology of Fatherlessness thus justified the removal of babies from their mothers and placing them in the homes of desired, good, normal families: well-off, white heterosexual couples or on occasion, single mothers if they happened to be movie stars.¹²⁸ Once the black market practices were exposed, the homes were shut down, and the various states responded with measures to curtail private abuses through more state involvement in the adoption process.¹²⁹

124. *Id.* at 176. One single mother told the Congressional Committee that Elizabeth B. Hamilton, the chief probation officer in the Richmond County Juvenile Court, informed her that her baby was born dead. Hamilton assured the mother that if she signed a paper authorizing the burial of the child, "no one . . . would know of the situation [unwed pregnancy], and that everything would be cleared up easily." *Id.* The mother signed the paper "without really looking at it" and "[t]wo years later [] was shocked to receive in the mail adoption papers from the Welfare Department in California." *Id.*

125. AUSTIN, *supra* note 107, at 122-23; *see also* SOLINGER, *supra* note 39, at 176-77 (reporting a similar arrangement between Elizabeth Hamilton and Judge Harry A. Woodward in Augusta, Georgia).

126. AUSTIN, *supra* note 107, at 122-23; *id.* at 65-71 (listing details of 4 cases between 1940 and 1943 in which the court denied a habeas corpus petition by a single mother or poor family seeking the return of their children from the custody of the Tennessee Children's Home Society). In addition, in one instance, Judge Kelley took custody away from foster parents and informed the couple that the child would be placed for adoption. Without investigating the merits of the allegations against the foster parents, Judge Kelley stated in open court that "she was the law, the whole and sole law and that President Truman could not tell her to do otherwise with this child." *Id.* at 70. Judge Kelley threatened to charge and jail the parents for contempt if they appealed her decision. *Id.*

127. *See* SOLINGER, *supra* note 39, at 177-86.

128. AUSTIN, *supra* note 107, at 80. Joan Crawford adopted children from the Tennessee Children's Home Society. *Id.*

129. *Id.* at 124-25. Senator Estes Kefauver brought the abuses to light by holding well-publicized committee hearings on the baby selling practices. Although Senator Kefauver introduced a bill to prompt federal reform of the abuses, the legislation was killed repeatedly in the 1950s and 1960s by various interests that opposed the increased regulation. Nonetheless,

The third factor leading to the increase in adoption, one of the notable social influences of the Cold War, is that the post-World War II notion of citizenship included raising better and more children than the Communists.¹³⁰ In a sharp turnabout from the Eugenic Era, *childlessness* became stigmatized, because it reflected a couple's selfish shunting of an obligation that they were expected to contribute in the efforts to overcome the Soviet threat.¹³¹ Infants were favored because they could be brought into the home and successfully hide a couple's infertility, which was perceived to be a badge of shame and a failure of good citizenship.¹³²

In keeping with efforts to hide the fact of adoption, during the post World War II era, the government and private agencies maintained records that restricted, if not prevented, a birth mother or her child from identifying or locating one another in the future.¹³³ Adoptive families took great efforts to hide the fact that they adopted a child. After receiving a child, they often would move to new neighborhoods to appear like a "normal" family, would rarely inform others of their secret, and at times, did not disclose the adoptive status to their child until adulthood, if at all.¹³⁴

Placement agencies reinforced the shame of childlessness by undertaking various efforts to make the addition of a child in a home appear the result of a biological birth rather than an adoption placement. The criteria for prospective parents developed, and the specifications of desirability in a parent were modeled after, and thus molded them into, the ideal nuclear family: The mothers needed to be within child-bearing age, the couple had to be infertile, the parents had to be of the same religion and race, the marriage had to be at least two years in duration, the homes required minimum square

states responded by introducing reforms such as keeping adoptions within various states, stricter birth parent consent laws, and follow up investigations of the adoptive parents. *Id.*

130. See MAY, *supra* note 8, at 137 (reporting J. Edgar Hoover's remarks to "homemakers and mothers" in which he lauded them for their ability to fight "the twin enemies of freedom—crime and communism"); CARP, *supra* note 7, at 28 ("Parenthood during the Cold War became a patriotic necessity.").

131. See MAY, *supra* note 8, at 137 ("A major study conducted in 1957 found that most Americans believed that parenthood was the route to happiness. Childlessness was considered deviant, selfish, and pitiable.").

132. See *supra* notes 114 and 116 (recording statistics showing that in 1945, adoption rates tripled to approximately 50,000 adoptions annually and in the 1950s, the adoption rate doubled to approximately 93,000 adoptions per year. According to a 1951 survey of 25 states, approximately 70% of the children who were adopted were under the age of one).

133. CARP, *supra* note 7, at 35. Indeed, at the time that an adoption becomes final in the United States, an amended birth certificate is issued listing the adoptive parents as the parents of the child. See Sanger, *supra* note 49, at 444. By the 1960s, a hallmark of modern adoption included the sealing of adoption records. Access was denied to everyone (including the birth mother, adopted child, and adoptive family) unless a court ordered them opened upon a finding of "good cause." CARP, *supra* note 7, at 34-35.

134. For an excellent history of the adoption rights movement's response to the secrecy and success in unsealing records, see CARP, *supra* note 7, at 36-70 (origin of adoption records); *id.* at 103-37 (history of keeping biological parents away from children, 1900-1970s); *id.* at 167-95 (beginnings of adoption rights movement); *id.* at 196-222 (documenting trends of open records and open adoption).

footage, and great efforts were made to match children with their adoptive parents' complexion, personality, and needless to say, the same race.¹³⁵

C. Historical Examination of Contemporary Justifications for Adoption Bans

In the contemporary defense of the adoption bans, Arkansas, Florida, and Utah have provided a number of reasons why their adoption bans should survive rational review. Although Part II and III will examine the legal viability of these arguments, this section examines the primary justifications through a historical lens of prior adoption policies.

1. Indian Child Welfare Act: Superiority of Nuclear Family and Proper Gender Role Socialization

In briefs filed with the courts, state attorneys from Arkansas, Florida, and Utah each defended the rationality of their adoption bans by claiming a state interest in heterosexual modeling and proper gender socialization. For instance, Florida asserts that it is in the best interest of children to be raised by married mothers and fathers, because "[i]n such homes, children have the best chance to develop optimally, due to the vital role dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."¹³⁶ Florida also provides that "[t]he adoption law is rationally related to a legitimate governmental interest in expressing community disapproval of homosexuality in the context of child rearing . . . The fact of the matter is that it is not unconstitutional—and it is in fact not uncommon—to discourage promoting homosexuality to children."¹³⁷

The one father, one mother nuclear family ideal is set forth as an unquestioned talisman of good parenting and happy families. However, the state interests in preventing improper gender socialization and discouraging a child from learning about, and later embracing, a different cultural lifestyle have been asserted once before.¹³⁸ The most tragic example of a family policy designed to achieve cultural assimilation took the form of removing Native American children from the homes of their biological families and placing them into permanent foster care or adoptive homes of non-Indian fami-

135. See HOLLINGER, *supra* note 6, at 1-64; CARP, *supra* note 7, at 30 (age limitations, religious uniformity, marriage length, personality, complexion). Most agencies were segregated until the 1950s and 1960s, and the ones that placed black children applied the same standards to prospective black couples. See SOLINGER, *supra* note 39, at 72-75.

136. Brief of Appellee at 16, *Lofton v. Kearney*, (No. 01-16723-DD) (11th Cir. 2003) [hereinafter *State of Florida Brief*].

137. *Id.* at 44.

138. Gay men and lesbian women constitute a culture, defined as one with separate history and heroes and shared commonalities such as the "coming out" experience, humor (marked by drag and camp), and political commitments. Opponents of rights for gay men and lesbian women appear to agree with this demarcation, denigrating them for leading an immoral "lifestyle."

lies.¹³⁹ At its height in the 1970s, approximately 25 to 35% of all Native American children were removed from their families, and 85% of those children were placed in homes with white parents.¹⁴⁰

Like the earlier Progressive Era social reformers, the state agencies removed children after diagnosing the parents as neglectful and abusive.¹⁴¹ According to a 1978 House of Representatives Report, 1% of the removals were in response to child abuse and the remaining 99% of the removals were on the grounds of "neglect" or "social deprivation," which were the charges social workers made in response to the perceived emotional damage that a child was receiving by being "subjected to [] living with their parents."¹⁴² The vague grounds were confirmed to be a pretext in light of the fact that after reviewing evidence of these removals, "the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character."¹⁴³ Moreover, the vast majority of the children were removed by non-Indian social workers and government agents who were "unfamiliar with and often disdainful of Indian culture and society."¹⁴⁴

Ironically, the children usually were removed from their homes because "neglect" was in fact the result of too many adults taking care of them. In many Native American homes, extended family members actively were involved in the care of children. "[T]he whole concept of family in Indian life is different from that in non-Indian life. There are not just one mother and father, but mothers and fathers. When you deal with a situation like that, . . . [the] child is just as closely related to his or her mother's sister as he or she is to the mother."¹⁴⁵ The white policy makers were blinded by their preference for a family consisting of one man and one woman such that they failed

139. See *THEY ARE YOUNG ONCE BUT INDIAN FOREVER: A SUMMARY AND ANALYSIS OF INVESTIGATIVE HEARINGS ON INDIAN CHILD WELFARE* 15, 79, 87 (Joseph A. Myers ed., 1981) [hereinafter *YOUNG ONCE*]. This family policy was not an isolated effort to prevent Native American individuals from perpetuating their culture. Since the founding of the United States, social workers, state governments, and the federal government's Bureau of Indian Affairs have been trying to separate Native American children from their parents, families, and culture. Instead of investing in adequate schools on reservations, the government created boarding schools for Indian children. *Id.* at 96. Located far away from the reservation, the schools served the purpose of stripping away the children's tribal, and at times, ethnic identity. *Id.* at 35. The children were separated from their families for nine months of the year and the schools' purpose was to "persuade Indian children to abandon the customs, traditions and values of their tribes in order to achieve a place in American society." *Id.*; see also Associated Press, *Lawsuit Alleges Abuse at Indian Boarding Schools*, *BILLINGS GAZETTE*, July 12, 2003 (reporting \$25 billion class action filed on behalf of Indian students who allegedly were abused at Indian boarding schools across the country. The lawsuit alleges specific instances of physical and sexual abuse but also alleges "that the government set up the boarding school system in the late 1800s to try to wipe out Indian culture, tradition, and language.").

140. See *KENNEDY*, *supra* note 45, at 485-86; *YOUNG ONCE*, *supra* note 139, at 87.

141. See *YOUNG ONCE*, *supra* note 139, at 91.

142. *KENNEDY*, *supra* note 45, at 489 (quoting findings from House report).

143. See *YOUNG ONCE*, *supra* note 139, at 88.

144. *Id.*

145. *Id.* at 91.

to see how the extended familial bonds were providing an enormous amount of love, care, and attention for the child. As explained in Congressional testimony by Evelyn Blanchard, the removals were the result of “recognized ignorance or a conscious decision to provide different and discriminatory services where Indian families are concerned. The strengths of Indian families are not explored and presented, only the weaknesses.”¹⁴⁶

The absence of a nuclear two-parent family—even when replaced by a larger familial support system—functioned as *per se* neglect in the eyes of the white policymakers. The policymakers’ anxiety over having children raised outside the nuclear family was so great that an alternative familial structure constituted harm to the child, which was cured only by permanently resettling the child in the homes of white, two parent families. Finally, after much publicity, charges of racist regulation, and a failure to demonstrate countervailing benefits that such removals had on the children involved, Congress passed the Indian Child Welfare Act of 1978 (“ICWA”), which sought to rectify the situation by granting tribal courts exclusive jurisdiction over child custody and adoption placements of Native American children.¹⁴⁷

The similarities to the contemporary adoption statutes are uncanny. First, in both situations, the ideal family is comprised of one mother and one father. Alternative familial relationships are presumed to be *per se* neglect and the strengths of alternative familial relationships are left unexamined. Second, neglect of and harm to a child are defined by the parents’ presumed inability to pass on proper gender role socialization. The white policy makers believed that the presence of the aunts, uncles, and grandparents in the home would cause Indian children to be confused about their own gender roles and create unhealthy role-modeling that would prevent the children from entering into nuclear families as adults. Third, although the white policy makers must genuinely have believed that they were reordering families in ways that were in the best interest of the children, history has shown that the policies in question were in fact driven by the desire to ensure that Native Americans were unable to continue their values and way of life. Similarly, in court filings, the states justify the contemporary adoption bans as preventing children from being exposed or influenced by gay men and lesbians in the belief that exposure to gay parents will result in the production of gay children. The policies against Native Americans, though couched as child welfare concerns, were in fact nothing short of an attempt at cultural annihilation. Likewise, the contemporary adoption statutes’ stated goal of preventing gay children from growing into gay adults suffers from the same ignominious purpose.

146. *Id.* at 88.

147. *See id.* at 57-58 (discussing operation of the ICWA); KENNEDY, *supra* note 45, at 486-89 (same); *see also id.* at 499-518 (offering criticisms and proposing reforms to contemporary operation of the ICWA).

2. *Great Arizona Orphan Abduction: Reserving Adoption for Morally Fit Parents*

Arkansas, Florida, and Utah justify their bans in part on the moral inferiority of gay men, lesbian women, and single mothers. A historical examination of adoption practices supports the idea that implicit mores influence notions of who can be an acceptable parent. As much as white families are no longer influenced by the ideology of white supremacy that prevented many from adopting children from other ethnic groups,¹⁴⁸ the institution is still filled with racist overtones controlling who may adopt whom. For instance, the interracial adoption debate is always about whether a white couple should adopt a black, Latino, Asian, or Native American child; never whether a black, Asian, Latino, or Native American family should adopt a white child.¹⁴⁹

In unearthing an incident where this taboo was transgressed, historian Linda Gordon has recently documented the Great Arizona Orphan Abduction.¹⁵⁰ In 1904, a group of 40 Irish orphans de-boarded a train in the West and were adopted by Catholic homes in Clifton, Arizona. Arranged by New York nuns and the local Catholic priest, the Irish children were placed in the homes of Mexican-American families who attended the local parish.¹⁵¹

Within days of the placement, the white townspeople organized an armed vigilante that raided each home and took the white children away from their adoptive families. The white townspeople were so insulted by the idea that their dark skinned neighbors and co-workers could raise "white" children, the townspeople started a race riot that nearly killed the local Catholic priest and the New York nuns who had traveled with the children.¹⁵²

In *New York Foundling Hospital v. Gatti*,¹⁵³ the Mexican-American parents and New York nuns filed a habeas petition for the return of the children.¹⁵⁴ The Supreme Court of the Territory of Arizona denied the habeas petition, concluding that the best interest of the child is the dispositive question in the matter.¹⁵⁵ Chief Justice Kent, who was sitting on the territory court, issued the decision, which noted that: "The evidence establishes, without contradiction, that the persons to whom the children were given, as assigned, both in Clifton and Morenci, were wholly unfit to be [e]ntrusted with them; that they were, with possibly one or two exceptions, of the lowest

148. See *supra* note 114 for a discussion of international and interracial adoptions.

149. GORDON, ORPHAN, *supra* note 7, at 309 (observing that "adoptions of white children by parents of color are so rare they are not even debated.").

150. For an excellent review and analysis of this historical event, see GORDON, ORPHAN, *supra* note 7, *passim*.

151. *Id.* at 16-18.

152. *Id.* at 109-17.

153. 79 P. 231 (Ariz. 1905).

154. *Id.* at 234.

155. *Id.* at 235.

class of half-breed Mexican Indians."¹⁵⁶ The court described the armed vigilantes taking the children by force and intimidation as "a committee of 25 persons . . . named to collect the children from the people to whom they had been consigned,"¹⁵⁷ and the Catholic nuns and priest's deliberate placement of children into their homes was "a great blunder [that] was committed in the consignment and delivery of the children to these degraded half-breed Indians."¹⁵⁸ In light of the fact that the "orphans" had lived with the white families since the beginning of the court case, the court further held that the best interest of the children not to be returned to the "degraded half-breed Indians"¹⁵⁹ but to the "good women of the place"¹⁶⁰ who had rescued the children from the "evil they had fallen."¹⁶¹ Although the appeal to the United States Supreme Court was dismissed for lack of jurisdiction,¹⁶² the Supreme Court gratuitously announced its approval of the result below, observing that "the children were distributed among persons wholly unfit to be intrusted with them, being, with one or two exceptions, half-breed Mexican Indians of bad character."¹⁶³

As the Progressive Era practices demonstrate how children were saved from the corrupt influences of an inferior culture, the Orphan Abduction confirms the flip-side: That racism also determines in which homes prized or undamaged, in this case white, children may be placed. A tragic footnote to this case is the allegation that one of the white parents was later charged with raping his foster daughter.¹⁶⁴ The ultimate irony of the situation, however, was that the New York social reformers originally removed Irish children from their families because the reformers regarded the poor Irish immigrants as being racially inferior to the white elite society. A train-ride away, how-

156. *Id.* at 233. The entire quote is as follows: "The evidence establishes, without contradiction, that the persons to whom the children were given, as assigned, both in Clifton and Morenci, were wholly unfit to be intrusted with them; that they were, with possibly one or two exceptions, of the lowest class of half-breed Mexican Indians; that they were impecunious, illiterate, unacquainted with the English language, vicious, and, in several instances, prostitutes and persons of notoriously bad character; that their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs; that many of them had children of their own, whom they were unable properly to support." *Id.*

157. *Id.* at 234.

158. *Id.* at 237.

159. *Id.*

160. *Id.* at 234.

161. *Id.* at 238.

162. 203 U.S. 429, 439 (1906) (holding that "[i]t was in the exercise of this jurisdiction as *parens patriae* that the present case was heard and determined. It is the settled doctrine that in such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements.").

163. *Id.* at 436.

164. GORDON, ORPHAN, *supra* note 7, at 306. Gordon emphasizes that the records are ambiguous and cautions that historical documents do not establish whether the victim was in fact one of the orphan train children. Gordon also observes that several contemporary Cliftonians believe that the vigilantes failed in removing all of the orphans in light of the fact that there are "some light-skinned and even red-haired members of their families." *Id.* at 304.

ever, the Supreme Court and townspeople recast the same children as "white." Away from the New York's hegemonic ordering, the children were innocent and young enough to overcome their formerly imputed culturally inferior status. Race was not determined by skin color, but by imputed innate behaviors. The process of marking both the townspeople and children as white additionally served the purpose of undermining the legitimacy of the claims made by the Mexican-families, the "degraded half-breed Indians," to care for the children. On the frontier, the racial ordering was bifurcated into white and savage, and where a white child would be placed was clear. As is often observed by social commentators, here is a situation illustrating that race is not about difference, but hierarchy.¹⁶⁵

At different times in history, imputed moral deficiency has separated out the Irish and Catholic immigrants, dark skinned Mexican-Americans, and Native Americans from the morally pure white-acting and self-appointed elite—a motley grouping whose ethnic and racial differences were elided by their imputed whiteness, which reified the belief that difference was found outside of one's racial group. Because behavior and marriage marked citizenship, people in alternative familial arrangements were identified as racially inferior beings. Whereas whiteness, and literally citizenship through 1865, once was defined through behaviors such as marriage, income above poverty, and associating with acceptable white people, the contemporary adoption statutes define parental ability through markers of morality: heterosexuality, gendered parenting skills, and a state-issued marriage license.¹⁶⁶

165. See, e.g., IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, at xiii (1996).

166. After Reconstruction, most states defined a person as African-American by the infamous "one drop of blood" rule, a legacy of which was the propagation of the ideology of racial purity that gained momentum in segregationists' attempts to keep the white race free from the "tainted" black race in public and private settings. Notably, such a rigid definition of race was the product of a specific historical moment. For many years, American society, and in turn the law, had a much more fluid understanding of race. Although states were heavily invested in defining who was black and Native American, and implicitly who remained white, there was no consensus between the states over such definitions. Legal definitions substantially varied, but in the early 1800s, most states determined that a person was white or Native American as long as she could prove that less than one-fourth of her ancestry was black. In a fascinating phenomenon arising during this period, no doubt influenced by the tensions between free and slave states and the reality that, be it by the choice or coercion of their parents, interracial individuals existed, a person could be placed on trial to determine his or her racial status. Typically, the racial ambiguity of a person arose when a slave catcher captured a dark-skinned individual in a free state and the person alleged she was wrongfully enslaved. If she proved before a jury that she was white or Indian, she was declared a free person. If he was proven to be black, he was kept or returned to slavery. See Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 *YALE L.J.* 109, 120-23 (1998).

As much as judges, juries, and testifying experts prided themselves in being able to "spot" black blood in the physical features of an individual, a review of the trial transcripts reveal that the means of proving racial identity in the courtroom typically was made through evidence of character. For a man, his whiteness was demonstrated through evidence of good

The contemporary adoption bans revive the creation of social castes based on perceptions of a parent's moral behavior. As part and parcel with the creation of social castes, implicit mores that once governed child placement practices are back in vogue. As illustrated by the Great Arizona Orphan Abduction, a parent can adopt a child within or below her caste, but never above it. As adoption was once the selected vehicle by which children were removed from immoral immigrant and Native American homes—the families who were considered deviant because they failed to conform to the social reformers' ideal nuclear family—the contemporary adoption bans are used to prevent today's "morally deficient" families from ever receiving children, reserving the young, and the right to form families, as a privilege for the morally righteous. The adoption bans thus are not providing for child welfare; rather, they are engaged in a much larger, and questionable, project.

II. ORIGINS OF AND JUSTIFICATIONS FOR CONTEMPORARY ADOPTION AND FOSTER CARE BANS

Despite the history of misguided and racist policies, adoption has become a respected institution over the past fifty years.¹⁶⁷ The modern respectability has resulted from the introduction of legal measures that ensure that children are not taken away from biological families without their consent and that determine parental fitness based on an individualized assessment.¹⁶⁸ The contemporary adoption bans eschew both principles by forcibly removing children from existing homes with gay or unmarried parents and by determining fitness based on gross generalizations rather than specific findings relating to a prospective parent. This next section explains why the contemporary adoption bans¹⁶⁹ have been enacted and reveals the proffered justifica-

citizenship activities such as voting, helping one's neighbor, marriage to a white woman, and associating with white people. *Id.* at 158-66. For a woman, her citizenship was proven by evidence of her sexual chastity, beauty, or examples of her moral purity. *Id.* at 166-76. *Character* and compliance with moral codes thus defined a person's race and subsequent social ordering. *Id.*

167. See HOLLINGER, *supra* note 6, at 1-6.1 ("Considerable evidence exists that in at least the past fifty years, adoption has attained the status of a fully socially acceptable practice.").

168. See Sanger, *supra* note 49, at 443 & nn.317-19 (discussing some provisions of modern consent laws); STANDARDS FOR CHILDREN'S ORGANIZATIONS, *supra* note 9, at 28, 35. By 1941, the Child Welfare League of America ("CWLA") recognized the importance of individualized determinations. In its policy paper, the CWLA recognized that "[s]pecial needs in regard to health care, education, and vocational training should determine the selection of homes where resources are available." STANDARDS FOR CHILDREN'S ORGANIZATIONS, *supra* note 9, at 28. In addition, by 1941, the CWLA was advocating that the relevance of a parent's personality no longer required a "match" between the child and parent; rather, "[t]he personalities and relationship of the adoptive parents, and their family life, should be such that they are capable of giving love, care, education, and support to the child. Financial security but not necessarily wealth is desirable." *Id.* at 35. See also *supra* note 9.

169. As a reminder, I use the term "adoption ban" as shorthand to describe the various legal challenges in each of the states. Arkansas has a regulation that prohibits same-sex couples from being foster parents, but it neither prohibits gay or lesbian individuals from being

tions, which claim to be concerned about child welfare, to be nothing more than pretextual forms of discrimination against a class of parents.

A. Origin in State Legislatures: Preemptive Strike Against Gay Marriage and Moral Opprobrium

In 1977, Florida became the first state to reserve parenthood for heterosexual individuals.¹⁷⁰ For the next twenty-two years, only two other states enacted and then subsequently repealed similar provisions. In 1987, New Hampshire enacted a statute prohibiting gay men and lesbian women from serving as adoptive and foster parents, which it repealed in 1999.¹⁷¹ In 1986, the Massachusetts Department of Social Services promulgated regulations banning gay men and lesbian women from being foster parents, which it eliminated during a lawsuit settlement.¹⁷²

What is significant is that no other state followed Florida or New Hampshire's lead until 1996. Suddenly, a flurry of bills were introduced in seven state legislatures between 1996 and 1999, and the contemporary adoption bans passed in Arkansas in 1999 and in Utah and Mississippi in 2000.¹⁷³ These dates are significant because in 1996, the Hawaii state appellate court issued *Baehr v. Miike*,¹⁷⁴ a comprehensive order determining that there was no compelling state interest in denying marriage to same-sex couples,¹⁷⁵ and in 1999, the Vermont state court decided *Baker v. Vermont*,¹⁷⁶ which held that the State of Vermont "is constitutionally required to extend to same-sex

foster parents nor extends the prohibition in the adoption context. Florida's statute prohibits gay men and lesbians from adopting children, but places no limitations on foster parents. Florida also has a presumption against placing an adoptive child with a single parent. Utah has a facial prohibition against unmarried individuals who cohabitate together. As explained in their filing with the court, the application of the statute is defended when it denies same-sex couples and single mothers from adopting children. See *supra* notes 3-5 for the citations and descriptions of the state laws, regulations, and bills.

170. See FLA. STAT. ch. 77-140, § 1, Fla. Laws, 466 (1977).

171. N.H. REV. STAT. § 170-B:4 (repealed 1999).

172. See MASS. REGS. CODE tit. 110 § 7.100 et seq. (1986); HOWARD J. ALPERIN & LAWRENCE D. SHUBOW, MASS. PRAC. SERIES, SUMMARY OF BASIC LAW § 5.13, at n.6 (3d ed. 1996) (observing that the challenge brought against the policy, *Babets v. Sec'y of Human Servs.*, 526 N.E.2d 1261 (1988), "eventually settled when the department revised its policy.").

173. See *supra* notes 3-4 (state law and regulations); *supra* note 5 (state bills).

174. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

175. *Id.* In 1993, the Hawaii Supreme Court determined that the marriage laws impermissibly discriminated on the basis of sex and remanded the matter for the state to overcome the presumption that the ban against same-sex couples from marrying furthered compelling state interests. *Baehr v. Lewin*, 852 P.2d 44, 67-69 (Haw. 1993). On remand, the appellate court considered extensive testimony regarding the well-being of children who are raised by gay individuals or same-sex couples. *Baehr v. Miike*, 1996 WL 694235, at *4-16.

176. 744 A.2d 864 (Vt. 1999).

couples the common benefits and protections that flow from marriage under Vermont law."¹⁷⁷

In reaching these legal conclusions, the Hawaii court made an express finding that children who are raised by gay parents do not suffer any disadvantage,¹⁷⁸ and the Vermont court observed that providing same-sex couples with the benefits of marriage was logical in light of the fact that the legislature already had provided legal protections for same-sex couples to "legally adopt and rear the[ir] children."¹⁷⁹

The state legislatures that considered and enacted the contemporary adoption bans did so in response to these decisions. Utah Senator Howard Nielson explained to a reporter that he supported Utah's statute because "he found convincing a legal argument that homosexuals would use the provisions to argue for the right to marry, as happened in Vermont. 'We want to make it clear that we do not approve of homosexual marriage in this state.'"¹⁸⁰ The supporters of Mississippi's ban "said the move was fueled by the recognition of gay unions in Vermont."¹⁸¹ Indeed, on June 8, 1977, Florida followed the same logic by enacting a law that expressly restricted marriage to opposite sex couples on the exact same day it enacted its statute prohibiting gay people from adopting children.¹⁸² The state legislatures thus enacted the adoption bans, not in response to any child welfare concerns, but as legal mechanisms designed to be preemptive strikes against same-sex marriage. The legislators believed that if they denied same-sex couples the right to adopt and raise children, they could prevent their state courts from finding a basis under which marriage benefits would be conferred to such families.

177. *Id.* at 867.

178. *Baehr v. Miike*, 1996 WL 694235, at *17 (finding that "the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child;" "[t]he sexual orientation of parents is not in and of itself an indicator of parental fitness," "[g]ay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted").

179. *Baker*, 744 A.2d at 882 ("The Vermont Legislature has not only recognized this reality [that gay couples are raising children], but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the[ir] children.").

180. Hillary Groutage, *Amendments to Adoption Bills Axed; Without Them, Unmarried Couples Not Allowed to Adopt*, SALT LAKE TRIB., Feb. 19, 2000, at A1; see also Utah Families Coalition, *History and Facts About Utah's Anti-Children Adoption Ban*, at <http://www.utahfamilies.org/history.html> (last visited Oct. 14, 2003) (listing remarks made by Senator Nielson, the bill's co-sponsor, Representative Nora Stephens, and BYU Law Professor Lynn Wardle in support of the bill. Wardle "testified to the legislature that gay couples were secretly taking advantage of Utah's adoption law with the ultimate goal being legalizing same-sex marriage.").

181. Gina Holland, *Mississippi Legislature Passes Ban on Adoptions by Gay Couples*, BATON ROUGE ADVOCATE, Apr. 21, 2000, at 7B; Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. Rev. 883, 896 & nn.125-27 (2000).

182. FLA. STAT. ch. 77-139, § 1, Fla. Laws, 465 (1977) (restricting marriage to heterosexual couples); FLA. STAT. ch. 77-140, § 1, Fla. Laws, 466 (1977) (restricting adoption to heterosexual parents).

When Florida and New Hampshire first enacted their adoption bans, they failed to rely on any evidence of harm that children raised by gay people experienced. Rather, the legislatures employed rhetorical devices once used in the Eugenic era to guard against a class of perceived morally inferior individuals from infecting their children. For instance, when Florida's bill was being debated, a state senator accused the proponents of advancing discrimination in light of the fact that there was "no demonstrable evidence that any problem existed in Florida with regard to adoptions by homosexuals."¹⁸³ The proponents of the bill countered by defending the prohibition as a measure that would prevent children from being placed with families that are not "wholesome."¹⁸⁴ Likewise, state legislators in New Hampshire enacted their statute by relying on the hate-driven stereotypes that all gay people have AIDS and gay parents will molest their children.¹⁸⁵

Various state legislators have publicly recognized the error of the eugenic impulses behind these statutes. When New Hampshire repealed its statute, one state senator claimed that "[b]ecause of the ignorance, discrimination, and prejudice of that Legislature [that passed the initial statute], the foster children of New Hampshire have suffered."¹⁸⁶ In addition, a group of former legislators who voted for Florida's statute have mobilized in an attempt to repeal the measure. Citing a desire to "express[] our shame at having been part of the people who voted in 1977," the group is advocating for gay parents to receive the same individualized assessment that all other prospective adoptive parents receive in Florida.¹⁸⁷ Representative Randy Ball, who is a current Florida state legislator, nonetheless defends the statute by explaining that "homosexuals lead unstable lives, as a rule," and that they "are 'an abomination' in God's eyes."¹⁸⁸ Representative Ball's comments are significant as they capture the fact that moral opprobrium is the driving force behind the contemporary adoption bans.

Some legislators in New Hampshire and Florida express regret for enacting the measures out of moral condemnation. Nonetheless their contemporary state officials are enacting their bans for the same reason. The Mississippi legislature passed its statute "without debate and without opposition."¹⁸⁹

183. Elovitz, *supra* note 3, at 222-23 (observing that in the height of Anita Bryant's anti-gay campaign "the first state-wide statutory ban on adoptions by lesbians and gay men was passed with almost no analysis or debate") (citing Tom Mathews et al., *Battle Over Gay Rights*, NEWSWEEK, June 6, 1977, at 16).

184. *Id.* at 223.

185. See Jodi L. Bell, *Prohibiting Adoption by Same-Sex Couples: Is It In the "Best Interest of the Child?"*, 49 DRAKE L. REV. 345, 351 & n.46 (2001) (citing *N.H. Set to Repeal Ban on Gay Adoptions*, RECORD (Concord), Apr. 23, 1999, at 8 [hereinafter *Set to Repeal*]).

186. *Id.* (quoting *Set to Repeal*, *supra* note 185, at 8).

187. ABC News, *Update: Rosie, the Loftons and the Law: Legislators: 'We Were Wrong,'* (Apr. 18, 2002), available at http://abcnews.go.com/sections/primetime/DailyNews/primetime_02418_adoptonupdate_feature.htm (last visited Sept. 24, 2003).

188. *Id.*

189. HOLLAND, *supra* note 181, at 7B.

Senator David Jordan explained that “Morally, we did the right thing.”¹⁹⁰ Senator Ron Farris explained that the statute was proper in light of the state’s sodomy law: “A homosexual relationship implies the exercise of illegal activities, and no child should be permitted to enter that type of setting.”¹⁹¹ Likewise, the Arkansas policy was introduced by Robin Woodruff, member of the Child Welfare Agency Review Board, by stating: “[P]ersonally, as far as I am concerned, I don’t think in any way should we ever promote homosexuality in any form or fashion, ever. I just don’t think it’s morally right and I don’t think it’s something I, as a person on the board, would ever condone or agree with.”¹⁹² Before the Arkansas Board promulgated its gay exclusion policy, legal counsel twice warned the Arkansas Board that no Board member had presented evidence or provided a statement establishing a nexus between the prohibitions against gay foster parents and the best interest of the child.¹⁹³ In its court papers, Florida asserts that its adoption ban permissibly “reflect[s] the State’s moral disapproval of homosexuality,”¹⁹⁴ and Utah justifies its measure to be consistent with “community values that view extramarital relations to be detrimental to children and the community.”¹⁹⁵

A state may punish offensive or harmful conduct with criminal or regulatory sanction pursuant to its general police powers, which involve matters of “[p]ublic safety, public health, morality, peace and quiet, law and order.”¹⁹⁶ Accordingly, laws expressing community morals, such as those prohibiting nudity, prostitution, polygamy and murder, are permissible and constitutional. However, the federal constitution prohibits any government entity from punishing a person based on her *status* as a member in a particular social group.¹⁹⁷ This distinction is highly significant in this context. When

190. *Id.*

191. *Id.*

192. Brief for Plaintiffs at 7, *Howard et al. v. Child Welfare Agency Review Bd.*, No. CV 99-988 (Cir. Ct. Pulaski County, Ark. 1999) [hereinafter *Arkansas Plaintiffs’ Brief*] (citing stipulated facts ¶ 13 and Minutes of Board’s June 23, 1998 meeting).

193. *Id.* at 7-8 (quoting DHS attorneys Joel Landrenau and Karen Wallace who advised that the statute presented constitutional defects).

194. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001) (summarizing argument asserted by State of Florida).

195. Brief for Defendants at 28, *Utah Children v. Utah State Bd. of Child & Family Servs.*, Civ. No. 990910881 (3d Dist. Ct., Salt Lake County, Utah 1999) [hereinafter *State of Utah Brief*].

196. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

197. *Meinhold v. United States Dep’t of Defense*, 34 F.3d 1469, 1478 (9th Cir. 1994). “Equating status or propensity with conduct or acts that are prohibited is problematic as well. The Supreme Court has long recognized the constitutional infirmity of penalizing status alone.” *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (holding that ethnicity is insufficient basis to believe persons are illegal aliens); *Robinson v. California*, 370 U.S. 660, 665-67 (1962) (holding that it is unconstitutional to criminalize narcotics addiction in absence of proof of use); *cf. Powell v. Texas*, 392 U.S. 514, 532-34 (1968) (recognizing *Robinson* rule that criminal penalties may be inflicted only if accused has committed act by contrast with status)).

*Bowers v. Hardwick*¹⁹⁸ was the law of the land, government entities could claim that their laws singling-out gay men and lesbian women for disadvantage targeted the criminal conduct of sodomy and not their status as gay people.¹⁹⁹ *Lawrence v. Texas*²⁰⁰ has rejected this distinction, declaring that the sodomy laws in question are unconstitutional because "the State cannot demean the[] existence of [gay individuals] or control their destiny by making their private sexual conduct a crime."²⁰¹

The legislative records establish that the state officials justified the adoption bans exclusively on moral opprobrium towards gay men, lesbian women, and unmarried couples based on their status alone. The states at issue thus confused the purpose of the "morality" clause by passing legislation based on "[m]oral disapproval of . . . [a] group, like a bare desire to harm the group."²⁰² Passing legislation of the latter purpose is impermissible. The Supreme Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale . . . to justify a law that discriminates among groups of persons."²⁰³

It is clear that child welfare concerns were not the basis of the passage of these laws. The legislatures passed the measures either as a means to express moral disapproval against gay men and lesbian women or out of the belief that adoption bans would immunize themselves against "Vermont-like actions" by the judiciary that pave the way for same-sex couples to marry. (The judiciary's actions at issue are those that ensure a state comports with the constitutional guarantees of equal protection and due process.)²⁰⁴ Indeed, immediately after *Lawrence*, conservative organizations responded by announcing their intent to introduce state legislation in a revived campaign to deny gay people the rights of the hearth.²⁰⁵

198. 478 U.S. 186 (1986).

199. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (dismissing claim of employment discrimination of FBI agent based on her sexual orientation because "[i]f the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious"); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (dismissing equal protection challenge to military's Don't Ask, Don't Tell policy based on *Bowers*); see also *Shahar v. Bowers*, 114 F.3d 1097, 1104-05 & n.17 (11th Cir. 1997) (rejecting claim made by prospective employee that the state attorney general discriminated against her based on her sexual orientation because "some reasonable persons may suspect that having a Staff Attorney who is part of a same-sex 'marriage' is the same thing as having a Staff Attorney who violates the State's law against homosexual sodomy.").

200. 123 S. Ct. 2472 (2003).

201. *Id.* at 2484.

202. *Id.* at 2486 (O'Connor, J., concurring) (citing *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996)); *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001) (rejecting the states proffered interest in regulating morality because "[m]orality is not a legitimate state interest").

203. *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

204. *Baker v. Vermont*, 774 A.2d 864, 867 (Vt. 1999).

205. Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, § 1, at 8.

B. State Interest in Preventing Gay and Single Parents from Parenting

Arkansas, Florida, and Utah each argued in court filings that under *parens patriae*, their discretion to select such criteria for the ideal parents for a foster or adoptive child essentially is unassailable.²⁰⁶ They claim that because states restrict adoptive or foster placements based on a parent's age, education, intelligence, minimum income, and duration of their marriage, they also have complete discretion to reserve adoption for the "ideal" family, which they set forth as being a nuclear family with one man, one woman, and one marriage license between them.²⁰⁷ History, however, challenges these assertions. Criteria that define the optimal parent are not above examination, and indeed many of the criteria that once were used to identify an ideal family have been abandoned as misguided or irrelevant over the past fifty years.²⁰⁸

Florida nonetheless contends that it is better for a child to have *no* parent than a gay or lesbian parent, because it is perfectly reasonable and rational for the state to prevent a child from being placed with a sub-optimal parent, which is understood as not heterosexual.²⁰⁹ In other child placement

206. See, e.g., State of Utah Brief, *supra* note 195, at 28-29 ("The state in its role as *parens patriae* of children owes a high duty to them in approving whoever shall adopt them. That duty would not be met in granting the privilege to adopt to the petitioners, who live on a daily basis outside of the law.") (quoting *Matter of Adoption of W.A.T.*, 808 P.2d 1083, 1089 (Utah 1991) (denying adoption petition filed by polygamists)); State of Florida Brief, *supra* note 136, at 28 (defending its adoption ban against charges of eliminating eligible prospective parents on the basis that "[t]here are any number of restrictions—statutory, regulatory, practical, categorical, and non-categorical—on who may adopt. . . . Each of these restrictions restricts the pool of prospective adoptive parents available to adopt children out of foster care; that is what restrictions do."); Brief for Defendants at 11, *Howard et al. v. Child Welfare Agency Review Bd.*, No. CV 99-988 (Cir. Ct. Pulaski County, Ark. 1999) [hereinafter *State of Arkansas Brief*] ("Defendants have a duty to pass rules that they rationally believe protect and promote the safety and welfare of foster children.").

207. See State of Utah Brief, *supra* note 195, at 9 ("the 'best practice' for adoptive placements is reflected in a traditional family consisting of a man and a woman who are legally married"); State of Florida Brief, *supra* note 136, at 19 ("As the district court found, Plaintiffs did not dispute that it is in the best interest of children to be raised by mothers and fathers who are married."); State of Arkansas Brief, *supra* note 206, at 3 ("Due to the stigmatization that gays may face, it may not be as easy to get the [biological] parents, the foster parents and the child together.").

208. For instance, adoptive parents are no longer required to be sterile or the same race or religion as each other, and children no longer must reflect the same race, complexion, or personality traits as their adoptive parents. Furthermore, the criteria of an ideal home has evolved from now considered arbitrary requirements such as a mandated square footage of a prospective house, to a concrete finding of a parent's ability to provide a nurturing and loving home as substantiated by an individualized home study by a professional who is trained in assessing the parenting capability of the prospective parent. See *supra* notes 7-9.

209. See State of Florida Brief, *supra* note 136, at 29 ("The flaw in Plaintiffs' first complaint is in its assumption that the best interest of a child always requires that she be adopted by any person or placed in a permanent home at any cost. The reality, however, is that just as the best interest of a child sometimes requires removing her even from her natural parents, it also requires that ineligible adoptive parents be screened such that the pool of adoptive parents is reduced."). The issue for the children in foster care is not what are the optimal circum-

contexts, however, Florida—and every other state in the Union—recognizes that parents are not perfect; and following the wisdom of contemporary social science, all fifty states endorse the principle that absent proven, concrete abuse, a child is better off with one, and even two imperfect parents than none at all.²¹⁰ Why then is heterosexuality and a marriage license the talisman of ideal parenting? In the following section, the asserted state interests are examined and are revealed to be without scientific support. The states make assertions of parental fitness based on stereotypes and junk science, and their claims are pretextual means to assert moral judgments against single parents and gay individuals.

1. Stability and Assertions of Illness and Premature Death

Arkansas, Florida, and Utah each defends its presumption for married couples as rationally related to the legitimate end of providing “permanent, stable and safe homes for adopted and foster children,” but none provide statistical support for this claim.²¹¹ In *Department of Agriculture v. Moreno*,²¹² the State of Texas passed a statute providing income assistance only to individuals who lived in a home in which all of the adults were related to one another. Texas, like the states today, asserted that these homes were more stable than other households.²¹³ The Supreme Court, however, soundly rejected Texas’s assertion as an “unsubstantiated assumption” and held that the “household” provision was a form of pretextual discrimination.²¹⁴ In light of the fact that approximately fifty percent of all contemporary heterosexual

stances in which a child will thrive. Taken to its logical end, states could provide that only millionaires could adopt because it is beyond dispute that children with trust funds will not suffer from material wants. Indeed, it was this impulse that led England and the United States to remove children from the homes of poor families. After such atrocious abuses of these practices, *see infra* notes 125-129 and accompanying text (discussing the Tennessee Baby Snatching Scandal), the states no longer consider incorporating such restrictions in their adoption policies. The issue facing the child in foster care is whether she will have a permanent home with loving, qualified parents or a life of instability between short term placements.

210. *See, e.g.*, SANDRA MORGAN LITTLE, CHILD CUSTODY AND VISITATION LAW AND PRACTICE ¶ 1.03, at 1-96 (2002) (“Natural parents are the preferred custodians of their children ‘absent grievous cause or necessity.’” (quoting *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75, 77 (1987))); *see also* *Matter of Marriage of Hruby*, 748 P.2d 58 (Or. 1987) (holding that under principles of common law and equity, biological parents have the right to maintain custody over their children absent compelling reasons to place children in custody of nonparents); *Chancey v. Dep’t of Human Res.*, 274 S.E.2d 729 (Ga. 1980) (holding improper a termination of parental rights proceeding based solely on the “welfare” of the child).

211. *State of Utah Brief, supra* note 195, at 7; *State of Arkansas Brief, supra* note 206, at 6 (“The state felt that it would . . . provide children with stability, nurturing, and adequate medical care; and provide protection against violence and sexual abuse, disease, neglect or stigmatization.”); *State of Florida Brief, supra* note 136, at 23 (“it is in the best interest of the child to enjoy the stability . . . which is best provided by mothers and fathers”).

212. 413 U.S. 528 (1973).

213. *Id.* at 535-37. Texas apparently was attempting to bar “hippies” from receiving income assistance.

214. *Id.* at 535.

marriages end in divorce, the states' present day assertion of the stability of marriage appears at best a false irrebuttable assumption, and at worst, a criteria devoid of factual support, which, like *Moreno*, raises the inference of an impermissible pretext.²¹⁵

Why then, in light of America's divorce culture, are states asserting that heterosexual marriages are presumptively stable, yet alone even more stable, than alternative familial relations? The State of Utah answers this question by asserting that same-sex couples are unable to provide permanent homes because gay men and lesbian women have a "[d]ecreased life expectancy."²¹⁶ The State of Arkansas concurs, contending that "the Board believed that there was a higher degree of disease . . . among homosexuals."²¹⁷ In support of its argument, Utah quotes the findings of two studies in its 1999 brief filed with the court. One report claims that "[g]ay sex can be deadly behavior,"²¹⁸ that 40% of gay men "still *never* use condoms during anal intercourse,"²¹⁹ and that "30% of all twenty-year-old homosexuals will be HIV positive or dead by the time they reach thirty."²²⁰ Relying on a second study, the State of Utah contends that "[e]ven without HIV infection, homosexual behavior shortens life expectancy. In a 1993 study, a group of researchers examined 7,000 obituaries . . . [and] found the following: On average, married women died at 79; married men died at 75; homosexual women died at 45; homosexual men without AIDS and no long-term partner died at 41; homosexual men with AIDS (with and without a long-term partner) died at 39."²²¹ The State of Utah uses this data to argue that it has a state interest in preventing adopted children from being placed with a gay or lesbian parent because that parent would die young and the loss of yet another parent would prove traumatic to the child.²²²

The latter study was conducted by Paul Cameron, a researcher who "resigned from the American Psychological Association to avoid an investigation into charges of his unethical conduct as psychologist."²²³ In 1985, a

215. *Id.* at 536-37 ("The existence of these provisions [that are directed at fraud] necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses.").

216. State of Utah Brief, *supra* note 195, at 26.

217. Surreply of Defendants at 1, *Howard et al. v. Child Welfare Agency Review Bd.*, No. CV 99-988 (Cir. Ct. Pulaski County, Ark. 1999) [hereinafter State of Arkansas Surreply].

218. State of Utah Brief, *supra* note 195, at 25.

219. *Id.*

220. *Id.* at 25-26.

221. *Id.* at 26.

222. *Id.*

223. *Baker v. Wade*, 106 F.R.D. 526, 537 n.31 (N.D. Tex. 1985) (the court states that the "charges of unethical conduct against Dr. Cameron included his continuing misrepresentation of Kinsey data and other research sources on homosexuality; inflammatory and inaccurate public statements about homosexuals; and his fabrications to a Nebraska newspaper about the supposed sexual mutilation of a four year old boy by a homosexual" (citing Dr. James K. Cole; *Psychology, Homosexuality, and Human Rights in Lincoln, Nebraska*, at <http://www.qrd.org/qrd/religion/anti/cameron/memorandum> (last visited Oct. 4, 2003))).

Texas federal court found in *Baker v. Wade*,²²⁴ that Mr. Cameron's testimony with respect to the behavior of gay men "distorted data" sufficient to support a finding of misrepresentation to the court.²²⁵ In 1984, the United States Court of Appeals of the Fifth Circuit in *Gay Student Servs. v. Texas A & M Univ.*,²²⁶ dismissed evidence by the then-Dr. Cameron as "speculative evidence . . . for which no historical or empirical basis is disclosed."²²⁷ In 1984, the American Psychological Association terminated Cameron's membership, the Nebraska Psychological Association adopted a resolution "formally dissociat[ing] itself from the representations and interpretations of scientific literature offered by Dr. Paul Cameron in his writings and public statements on sexuality," and in 1985, the American Sociological Association adopted a similar resolution.²²⁸

The other study cited by the State of Utah was performed by Dr. Satinover who is on the scientific advisory board of the National Association for Research and Therapy of Homosexuality ("NARTH"), an organization whose "members consider homosexuality to represent a developmental disorder" and whose self-defined "function is to provide psychological understanding of the cause, treatment and behavior patterns associated with homosexuality."²²⁹ This medical position is one that the rest of the medical profession abandoned in 1973 when the American Psychological Association declassified "homosexuality" as a mental illness.²³⁰ In the same report from

224. 106 F.R.D. 526 (N.D. Tex. 1985).

225. *Id.* at 536.

226. 737 F.2d 1317 (5th Cir. 1984).

227. *Id.* at 1330. Indeed, the Fifth Circuit explained that reliance on Dr. Cameron's assertions regarding gay individuals and the HIV virus "is precisely the kind of 'undifferentiated fear or apprehension' that the Supreme Court has repeatedly held 'is not enough to overcome the right to freedom of expression.'" *Id.*

228. See Mark E. Pietrzyk, *Queer Science*, NEW REPUBLIC, Oct. 3, 1994, at 10 (reporting Cameron's expulsion from the APA for misrepresenting the findings of others and engaging in dubious research techniques); see also Utah Plaintiffs' Brief, *supra* note 13, at 14-15 (citing sources for assertions that were submitted in administrative record). In addition, the study cited by the State of Utah "has never been published or cited in a peer-reviewed scientific or medical journal and does not conform to any reliable statistical methodology." Pietrzyk, *supra* at 9; see also *id.* at 14 n.3 (citing Andrew Sullivan, *False Bennett: Gay Bashing by the Numbers*, NEW REPUBLIC, Jan. 5, 1998, at 15 (describing flaws in Cameron's obituary study that is cited to in Utah's brief); William Bennett, *Letter to Editor*, NEW REPUBLIC, Feb. 23, 1998, at 4 (retracting prior endorsement of Cameron's statistics)).

229. NARTH, *Our Purpose*, at <http://www.narth.com/menus/statement.html> (last updated Nov. 24, 2002).

230. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981) (discussing political battles involved surrounding the APA's decision). As acknowledged by NARTH, "Professionals who belong to NARTH comprise a wide variety of men and women who *defend the right to pursue change of sexual orientation*. This right-to-change is currently under threat by all of the leading mental-health professional organizations. Students writing doctoral dissertations on sexual reorientation are being discouraged from pursuing their projects; researchers are silenced and cannot find funding; and clinicians are concerned about harrassment [sic] from their professional associations." NARTH, *supra* note 229.

which the Utah attorney general office submitted evidence to the court, Dr. Satinover also claimed that "Gays are prone to 'Gay Bowel Syndrome,' a cluster of diseases typically associated with contaminated water in Third World nations."²³¹ There is no other documentation of Gay Bowel Syndrome in the mainstream medical community.²³²

The state interest in stability thus relies upon conclusory assertions and research that was performed by psychiatrists who have been disbarred or denounced by the American Psychology Association. What is most notable is that the "studies" and "facts" advanced by the states employ rhetorical devices that claim disease is a marker of moral deviancy, differentiating "normal" Americans from gay men and lesbian women who mysteriously die in their 40s, purportedly from "gay sex." The medical studies indisputably lack scientific rigor, but they serve to "prove" the abnormality of intimacy between same-sex couples. For instance, the fabricated "Gay Bowel Syndrome" associates undeveloped, uncivilized disease with gay men, which clearly plays on racism and xenophobia to mark gay men and lesbian women as strangers to America and dangers to children. Such claims of immorality and disease recall the Eugenic Era in which American society attributed disease with moral deficiencies, most notably the mistreatment of Chinese immigrants and citizens of Chinese descent who were quarantined in neighborhoods based on the imputed, and unscientifically shown, belief that Chinese immigrants carry syphilis.²³³ Although similar claims of immorality were rejected by state courts at the turn of the century,²³⁴ the states assert these arguments in the contemporary defense of their adoption bans. The Utah Department of Human Services and legislature relied upon Dr. Satinover's and Paul Cameron's findings when enacting its statewide regulation and statute prohibiting gay parents from adopting children.²³⁵ Florida, Mississippi, and Arkansas infuse moral opprobrium in their proffered state interests, which they demand to be left unquestioned.

231. See Ex. R00064, Submission of Scientific Evidence by Joseph Nicolosi, Administrative Record, Ex. R00061-68, Utah Children v. Utah State Bd. of Child & Family Servs., Civ. No. 990910881 (3d Dist. Ct., Salt Lake County, Utah 1999).

232. There is no mention of "gay bowel disease" in the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM-IV") (4th ed. 1994), which is the authoritative manual prepared by the American Psychiatric Association that enumerates all known and treatable psychological conditions and details recommended treatment. In addition, gay bowel disease is absent from STEDMAN'S MEDICAL DICTIONARY (26th ed. 1995), a comprehensive listing of all known medical conditions and related terminology.

233. See *supra* notes 95-96; see also Adrienne L. Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as Moral Code*, 94 COLUM. L. REV. 1451, 1461-67 (1994) (detailing history of the times in which American society has pathologized perceived socially inferior groups of people as outcasts).

234. See *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900). See Hiegel, *supra* note 233, at 1464 for an excellent analysis of this issue.

235. Dr. Satinover's and Paul Cameron's "reports" were in the administrative record upon which the DHS relied upon in promulgating the rule. See State of Utah Brief, *supra* note 195, at iii (submitting administrative record "as part of the pleadings" pursuant to UTAH CODE ANN. § 63-46a-12.1(3)(b)(iii)).

2. Poverty

In their briefs defending the preference for marriage, Florida, Arkansas, and Utah assert that "it is in the best interest of children to be raised by mothers and fathers who are married."²³⁶ Utah explains that one reason for this preference is that children "do better on every measure of adjustment when compared to other family constellations,"²³⁷ which include "less poverty."²³⁸ The State of Utah later emphasizes that "[m]arital status is [the] factor most closely related to whether a child grows up in poverty."²³⁹ Despite its use of inclusive language, Utah acknowledges that in 1998, all adoptions to Utah single parents were to single mothers.²⁴⁰

The term "single mother" is loaded with ideological meaning, which, as illustrated in the historical overview of adoption placement practices, has changed over time.²⁴¹ In contemporary understandings, the term "single mother" is used to describe a widow, divorcee, pregnant teenager, adult woman who chooses to raise a child without a husband or partner, or welfare recipient. However, the defenders of the adoption bans rely on studies documenting the poverty rates among *divorcing* mothers and black, poor, urban *teenagers* to claim that all single mothers will experience poverty.²⁴² The states' reliance on the first type of studies lacks logic. Arguably, the divorce statistics would apply only to married couples who have an actual risk of divorce. Single mothers, by definition, are immune from experiencing family dissolution. The second type of studies cited by the states are even

236. State of Florida Brief, *supra* note 136, at 19; State of Utah Brief, *supra* note 195, at 14 ("For a child to obtain optimal emotional and physical well-being, a home with a married mother and father is best suited."); State of Arkansas Brief, *supra* note 206, at 5 (defending exclusion of gay individuals as rationally related to a legitimate state interest).

237. State of Utah Brief, *supra* note 195, at 14-15.

238. *Id.* at 17.

239. *Id.*

240. *Id.* at 15.

241. For the past 150 years, the meaning of a black single mother in particular has undergone enormous changes in American society. Today, despite the possible socio-economic status of a given single mother, the black single mother often is presented as a lazy, shiftless, welfare recipient who had children to burden the tax system and fill the jails. The etiology of this racist and sexist caricature is revealing, especially as the anxieties around the black mother have been pronounced through repeated efforts to punish and control her through family and social policies. White society's concern over black unwed mothers has not always been this vehement. William Harper, chancellor of the University of South Carolina during the 1800s, described an unmarried slave who gave birth out-of-wedlock in a drastically different way: "The unmarried slave mother was not a less useful member of society than before . . . she has not impaired her means of support, not materially lowered her character, or lowered her station in society; she has done no great injury to herself, or any other human being." In a telling remark, Chancellor Harper's assertion ends with: "Her offspring is not a burden, but an acquisition to her owner." SOLINGER, *supra* note 39, at 44 (citing Herman Gutman, *Marital and Sexual Norms Among Slave Women*, in *A HERITAGE OF HER OWN: TOWARD A SOCIETY OF AMERICAN WOMEN* 305 (Nancy Cott & Elizabeth Pleck eds. 1979)).

242. See, e.g., State of Utah Brief, *supra* note 195, at 17-19 (citing "culture of poverty" studies that assert children of poor mothers grow up criminal and sexually promiscuous).

more troubling because they employ the “culture of poverty” ideology, which traces its contemporary origin to the 1965 Moynihan Report.²⁴³ Proponents of the “culture of poverty” theory assert that poverty is caused by the immorality of single mothers rather than socioeconomic factors such as employment opportunities, educational attainment, effect of segregation, and illegal hiring practices of employers.²⁴⁴ There are three flaws with the states’ contemporary reliance on the culture of poverty ideology in justifying their adoption bans.²⁴⁵ First, the states claim that single mothers cause poverty and

243. The Moynihan Report, completed by Senator Daniel Patrick Moynihan, a professed liberal, had the ill effects of solidifying the Progressive Era’s myth of the “culture of poverty” to explain economic inequality in the 1960s. Instead of focusing on macro-economic and social forces that cause income inequality and prevent people from rising out of poverty, the culture of poverty discourse sets up the theory that poverty is a contagious, defective behavior attribute of the individual who brought it upon herself. See Lisa A. Crooms, *The Mythical, Magical “Underclass”: Constructing Poverty in Race and Gender, Making the Public Private and the Private Public*, 5 J. GENDER RACE & JUST. 87, 89 & nn.12-16 (2001) (citing a number of scholars who have critiqued the Moynihan Report’s reification of the image of the pathological black, poor, single mother). The most notable contemporary critics include DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) and PATRICIA HILL COLLINS, *FIGHTING WORDS: BLACK WOMEN AND THE SEARCH FOR JUSTICE* 27 (1998).

244. See Crooms, *supra* note 243, at 107-128 nn.92-191 and accompanying text (citing various critics of the culture of poverty); Cheryl D. Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working-Class Black Families, and New York States’ Wayward Minor Laws, 1917-1928*, 151 U. PENN. L. REV. 2077, 2079 n.11 (2003) (citing critics). As an example of how Moynihan perpetuates this ideology, in Chapter 3 of the report, Moynihan comments that “[u]nquestionably [the institution of Jim Crow laws] worked against the emergence of a strong father figure. The very essence of the male animal, from the bantam rooster to the four-star general, is to strut. Indeed, in 19th century America, a particular type of exaggerated male boastfulness became almost a national style. Not for the Negro male. The ‘sassy nigger’ was lynched.” Senator Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, at 16, reprinted in LEE RAINWATER & WILLIAM L. YANCY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 38-124 (1967). In an almost unbelievable rhetorical move, Moynihan subsequently aligns the female-headed family with a dangerous influence and control of white supremacy. “The Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of the American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male.” *Id.* at 75. Jim Crow laws, which had barred employment, housing, and educational opportunities to blacks, are problematic only to the extent of the hampered male masculinity. The matriarchal structure—giving power to women—becomes the cause of black poverty and the “tangle of pathology.” *Id.* The legacy of segregation, according to Moynihan, is not unequal opportunity, but the strong black woman who continues to dominate the black men around her, preventing them from functioning like the normal, strutting white American men.

245. Despite the extensive academic criticism of the Moynihan Report, its conclusions and recommendations were, and still are, widely accepted by many policymakers. Conservative thinkers such as Lawrence Mead and Charles Murray, perpetuate the notion that a person’s illicit and immoral behavior causes her poverty. See, e.g., LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* (reprint in paperback 2001) (1986); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984). In an updated spin on the Eugenics movement, other contemporary conservatives such as Orlando Patterson state that blacks are more likely to be poor because the trauma of slavery has left a near-irremediable biological defect predisposing them to poverty. (In fact, Patter-

that marriage will prevent it. However, contemporary studies show that ideology, rather than evidence, supports the claim that marriage guarantees wealth.²⁴⁶ Second, through the 1970s, white policy-makers relied on the same culture of poverty ideology when justifying their mass removals of Indian children from their biological families.²⁴⁷ Indeed, the extent of alleged harm to the Indian children was the vague charge that they were emotionally damaged by being "subjected to living with their parents."²⁴⁸ Third, all states have minimum separate and independent income requirements for prospective adoptive parents. The teenagers who are the subject of the poverty studies are poor because their pregnancy disrupted their educational attainment and career development. The divorced women are poor because of their sudden decline in income. The states' assertion that single women with professional careers and advanced degrees, based on their marital status alone, will become poor thus is patently false.²⁴⁹ The claim that states must guard

son's "cure" for this defect is for black women to marry white men.). See ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES* (1998).

246. See Lynette Clemetson, *Study Finds Welfare Initiatives Do Not Address Needs of Immigrant Families*, N.Y. TIMES, Nov. 26, 2002, at A20. At the national level, the George W. Bush administration has undertaken a \$300 million dollar investment in marriage promotion programs and welfare reform emphasizing marriage rather than education, jobs, or income support. Nina Bernstein, *Strict Limits on Welfare Benefits Discourage Marriage, Studies Say*, N.Y. TIMES, June 3, 2002, at A1 (reporting the Bush administration's proposal "to spend \$300 million on demonstration projects like premarital counseling and pro-marriage education campaigns"). The programs are being implemented by Wade F. Horn, who is the current Assistant Secretary for Children and Families, HHS, and a proponent of the Fatherlessness ideology. See Wade F. Horn, *Promoting Marriage as a Means for Promoting Fatherhood, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE* (Alan J. Hawkins, et al., 2002). Despite the studies demonstrating that such programs are neither helping families out of poverty nor even resulting in more marriage, the Bush administration is standing firm behind its policies and the House passed a bill spending \$2 billion to allow states to promote marriage among the poor. See, e.g., *id.* (reporting that providing work to women increases their self-reliance and they "may have become less willing to settle for the wrong man"); Clemetson, *supra*, at A20 ("Many programs intended to lift people out of poverty by promoting marriage and mandating work do not address the realities of poor immigrants, a study released today has found."); Michael Tanner, *Wedded to Poverty*, N.Y. TIMES, July 29, 2003, at A23 (criticizing the welfare reauthorization bill that passed the House for spending "nearly \$2 billion over the next six years to encourage people to marry. . . . Single people on welfare who marry might even get cash bonuses.").

247. See YOUNG ONCE, *supra* note 139, at 87 (criticizing the "[n]on-Indian workers and court personnel [who] have been exposed to a perspective of Indian life as it is viewed through the premises developed out of the 'culture of poverty' theories"); see also *supra* notes 139-47 (discussing removals of Indian children and ICWA).

248. *Id.*

249. See Crooms, *supra* note 243, at 100-07 (criticizing contemporary policymakers who attribute "female-headed households" as a problem leading to poverty); see also KATHRYN NECKERMAN ET AL., *Family Structure, Black Unemployment, and American Social Policy, in THE POLITICS OF SOCIAL POLICY* 215 (Margaret Weir et. al. eds., 1988) (concluding that poverty among black teenagers results from the birth of the child disrupting the teenager's educational attainment and employment track).

against children being placed with otherwise qualified single parents lacks logic and merit.

3. Violence

The states also assert that the problem with same-sex families, unmarried heterosexuals, and single mothers is that their homes, rife with gender confusion, are purported to be filled with violence, immorality, and unrest. In its opposition to a motion for summary judgment, the State of Arkansas defended its ban against gay individuals from becoming foster parents because "the Board believed that there was a higher degree of . . . violence among homosexuals."²⁵⁰ The State of Utah argued that "[s]tudies repeatedly documented higher rates of domestic violence including all forms of child abuse when cohabiting, sexually involved adults are not married"²⁵¹ and that "American and Canadian studies have repeatedly confirmed that compared to marriage, nonmarital cohabitation is extremely unstable, . . . involves more fighting, more abuse, and more severe forms of abuse. . . . During a one year period, about 35% of cohabiting couples will physically abuse one another, compared to 15% of married couples."²⁵² (The latter statistic was submitted by the State of Utah and was "evidence" prepared by Joseph Nicolosi of NARTH.)²⁵³

What is odd is that no mainstream domestic violence organization attributes an abuser's violent tendencies to his or her marital status.²⁵⁴ David Blankenhorn, whose *Fatherless America* book and another anthology are both cited in Utah's briefs, explains why people believe violence in unmarried homes is more prevalent.²⁵⁵ According to Blankenhorn, "married father-

250. See State of Arkansas Surreply, *supra* note 217, at 1.

251. State of Utah Brief, *supra* note 195, at 19 (citing in support for this proposition Lynn Wardle, law professor at Brigham Young University).

252. *Id.* at 20 (citing Zheng Wu & T.R. Balakrishnan, *Dissolution of Premarital Cohabitation in Canada*, 32 DEMOGRAPHY 521, 526, 529 (1995) and materials submitted by Joseph Nicolosi of NARTH).

253. See *supra* notes 229-32 for discussion of NARTH.

254. See, e.g., American Bar Association Commission on Domestic Violence, *Who Is Most Likely to Be Affected by Domestic Violence* ("Unlike victims, perpetrators do have at least two common traits—the majority of perpetrators (1) witnessed domestic violence in their family of origin and (2) are male."), at <http://www.abanet.org/domviol/whois.html> (last visited Sept. 26, 2003); National Coalition Against Domestic Violence, *Why Do Men Batter Women?* ("Many theories have been developed to explain why some men use violence against their partners. These theories include: family dysfunction, inadequate communication skills, provocation by women, stress, chemical dependency, lack of spirituality and economic hardship. These issues may be associated with battering of women, but they are not the causes. Removing these associated factors will not end men's violence against women. The batterer begins and continues his behavior because violence is an effective method for gaining and keeping control over another person and he usually does not suffer adverse consequences as a result of his behavior.") at <http://www.ncadv.org/problem/why.htm> (last visited Sept. 26, 2003).

255. State of Utah Brief, *supra* note 195, at 18 (separately citing FATHERLESS AMERICA,

hood emerges as the primary inhibitor of male domestic violence" because men are naturally aggressive and violent and that only when these impulses are channeled toward caring for a child or wife can the violent nature be tamed.²⁵⁶ According to Blankenhorn, there is no domestic violence in a proper marriage; therefore the problem of domestic violence is solved if all parents remain married and all children are raised by one traditionally masculine father and one traditionally feminine mother.²⁵⁷ Blankenhorn dismisses statistics of domestic violence by married men against their wives and biological children as "disconfirming evidence" but fails to explain why these men are abusive, beyond saying the civilizing influences of marriage failed in those instances.²⁵⁸ Despite the acknowledgment that no mainstream social scientist agrees with him, Blankenhorn persists in his assertions.²⁵⁹ Blankenhorn submits textual readings of Hollywood movies as evidence of social trends and gives apocalyptic warnings that men will degenerate into violent beasts unless society sanctions marriage for all.²⁶⁰ This is the "scientific support" of the states' defense of the contemporary adoption bans. The states' claim that a categorical presumption against unmarried couples will protect a child from domestic violence is devoid of any rational support and is akin to the Reverend Brace's claims that a Catholic home is a depraved environment in which to raise a child.²⁶¹

supra note 14 and an essay by Urie Bronfenbrenner, *Discovering What Families Can Do, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY* (David Blankenhorn et al. eds., 1990)).

256. BLANKENHORN, *supra* note 14, at 35 ("By reducing the likelihood of sexual jealousy and paternal uncertainty, and by directing the male's aggression toward the support of his child and the mother of his child, married fatherhood dramatically reduces the tendency among men toward violent behavior.").

257. *Id.* at 116 ("Historically and currently, the breadwinner role matches quite well with core aspects of masculine identity. Especially compared to other parental activities, breadwinning is objective, rule-oriented, and easily measurable. It is an instrumental, goal-driven activity in which success derives, at least in part, from aggression. Most important, the provider role permits men to serve their families through competition with other men. In this sense, the ideal of paternal breadwinning encultures male aggression by directing it toward a prosocial purpose."); *id.* at 121-22 ("[S]exual division of labor within the family . . . is integral to the survival and reproduction of the society.").

258. *Id.* at 37 (stating that "marriage has clearly failed to inhibit male violence" when describing married fathers who abuse their own wives and biological children).

259. *Id.* at 67-75.

260. *See, e.g., id.* at 141 (the movie *FALLING DOWN* (Warner Studios 1993) is proof that men become violent when faced with a divorce); *id.* at 163 (the movie *MRS. DOUBTFIRE* (Twentieth Century Fox 1993) is proof that genderless parenting is an attempt to rid the world of men); *id.* at 31 ("The rapid growth of crime in our society over the past three decades does not derive from traditional male norms but from the decline of certain traditional male norms. . . . Put simply, we have too many boys with guns primarily because we have too few fathers.").

261. *See supra* notes 63-65, 73 and accompanying text.

*C. State Interest in Protecting Children from Perceived
Immorality of their Parents*

In the court filings, the parties focus on the influence that a gay, lesbian, and single parent will have on his child. The plaintiffs typically offer studies that they claim show children raised by gay parents are as well if not better adjusted than children raised by straight parents.²⁶² The states typically contend that these studies are faulty, and submit evidence or make assertions (1) that children raised by gay parents will lack heterosexual role-modeling, experience improper gender role socialization, and suffer from stigmatization; and (2) that children raised by single parents will be more violent, promiscuous, and immoral, than children raised by married parents.²⁶³ Under such circumstances, no court has found that the plaintiffs' evidence is sufficient to defeat a motion for summary judgment, and all courts that have considered the question, have found the states' evidence sufficient to withstand the scrutiny of rational review.²⁶⁴

However, it should be noted that any success that the state had in meeting various legal standards, which are designed to balance separation of powers and evidentiary concerns,²⁶⁵ the state has not submitted any study that has been published in a peer-reviewed medical or psychological journal that establishes the superiority of a two-parent married family's ability to raise children or that the alleged harms are in fact experienced by children raised

262. See, e.g., ACLU LESBIAN & GAY RIGHTS PROJECT, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 52-96 (2002) (summarizing 22 studies performed on children raised by gay parents between 1981 and 1998 measuring factors such as a child's psychological well-being, self-esteem, social adjustment with peers, quality of parent/child relationship, child's gender behavior, child's sexuality, and parent's preference for child's gender/sexuality). The ACLU has assisted in the representation of plaintiffs in the Arkansas and Florida cases. See also NATIONAL CENTER FOR LESBIAN RIGHTS, LESBIAN & GAY PARENTING BIBLIOGRAPHY 12-14 (1st ed. 1994) (listing twenty-seven legal and academic publications). The NCLR was co-counsel on the Utah case.

263. See, e.g., State of Utah Brief, *supra* note 195, at 22-25 (alleging that the studies demonstrating children of gay parents are well-adjusted are flawed).

264. See *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1380, 1394 (S.D. Fla. 2001) (survives rational review on summary judgment); Opinion of the Justices, 530 A.2d 21, 24-26 (N.H. 1987) (rational review); see also *Cox v. Florida Dep't of Health & Rehabilitative Servs.*, 656 So.2d 902, 903 (Fla. 1995) (upholding denial of state right of privacy and federal due process challenges to gay adoption ban and remanding for further development with respect to federal equal protection claim).

265. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (commenting that the materiality element evaluated on a summary judgment motion "is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes"); *Lofton*, 157 F. Supp. 2d at 1385 ("In areas of social . . . policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.") (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)).

in alternative families.²⁶⁶ Indeed, all mainstream child welfare organizations reject the states' assertions that a child must be raised by two married heterosexual individuals. For instance, in 2002, the American Academy of Pediatrics released a report in which it stated that after reviewing all available research, "No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents."²⁶⁷ Nonetheless, an examination of the proffered harms claimed by the states that are experienced by children raised by gay and single parents is instructive. The states' arguments are supported only by speculation and conjecture and are revealed to be asserting moral panic and condemnation, which was once the favored persuasion method of the Eugenic reformers of the past.

1. Heightened Criminal Activity and Promiscuity

The State of Utah claims that children in single-parent households experience "psychiatric problems," and "behavioral and educational [sic] problems, including . . . smoking, drinking, early and frequent sexual experience, and in extreme cases, drugs, suicide, vandalism, violence, criminal behavior."²⁶⁸ In addition, the state emphasizes that "the likelihood that a young male 'will engage in criminal activity doubles if he is raised without a father, and triples if he lives in a neighborhood with a high concentration of single parent families.'"²⁶⁹ The state further claims: "Most criminals are from single parent homes or without either parent. A survey of 14,000 prisoners in state correctional facilities found 43% were from single parent homes and another 14% grew up without either parent."²⁷⁰ In support of its claim, the State of Utah fails to use any data that has been published in a peer-review medical or scientific journal, relying instead on assertions set forth by David Blankenhorn and NARTH.

It is notable that criminologists do not claim any correlation between the likelihood of criminal activity and a child being raised by single mothers.²⁷¹ Likewise, mainstream child welfare experts addressing violence and pregnancy among youth do not cite the marital status of the child's parent as a

266. Pietrzyk, *supra* note 228, at 10.

267. Ellen C. Perrin & American Academy of Pediatrics Committee on Psychological Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109:2 PEDIATRICS 341-344 (Feb. 2002). Based on this study, the American Academy of Pediatrics declared its "support [for] legislative and legal efforts to provide the possibility of adoption of the child by the second parent or coparent . . ." See American Academy of Pediatrics, *Policy Statement*, 109:3 PEDIATRICS 339-40 (Feb. 2002). See also *supra* notes 12, 262.

268. State of Utah Brief, *supra* note 195, at 18 (citing Bronfenbrenner, *supra* note 255).

269. *Id.* at 18 (citing FATHERLESS AMERICA, *supra* note 14, at 30).

270. *Id.* (citing material submitted by NARTH, see *supra* notes 229-32).

271. See, e.g., Laurie Goodstein & William Glaberson, *The Well-Marked Roads to Homicidal Rage*, N.Y. TIMES, Apr. 10, 2000, at A1 (observing that criminologists do not know the reasons why people commit crimes).

cause or correlation of those behaviors.²⁷² The distortion of data by the contemporary adoption bans to the contrary is revealed as an attempt to lend scientific authority to the Utah statute's revival of the Eugenic Era myth that an immoral single mother pollutes her children by passing on bad behavior to them.²⁷³ Her lack of ability to discipline, a task that purportedly only a father can perform, causes her son to commit crime; and her flagrant sexual promiscuity, a violation of her traditional femininity, encourages her daughter to sleep around. Despite the evidence disputing these findings, the trope is established that single mothers are the problem to be stopped.²⁷⁴

The Reverend Brace justified the Orphan Trains as a means by which he "rescued" children from their biological families, most of whom were single mothers. Reverend Brace believed that the removal of the children from the urban vices and placement in the homes of the good rural Christian families was in the children's best interest. Reverend Brace believed that this process would transform the children, whom he referred to as "street Arabs," "little vagabonds" and "homeless creatures," into "decent, orderly industrious children."²⁷⁵ In the Eugenic Era, the children of single mothers were considered to be more violent and sexually promiscuous because "[s]tudies like Henry

272. See, e.g., CHILDREN'S DEFENSE FUND, THE STATE OF CHILDREN IN AMERICA'S UNION: A 2002 ACTION GUIDE TO LEAVE NO CHILD BEHIND (2002). Although the CDF documents the number of youth who are killed by gunfire and teenage pregnancy, *id.* at 46, 59, 66-67, the CDF does not attribute the marital status of the youth's parents to this happening. Instead, the CDF correlates these statistics to high school drop-out rates and unemployment rates. Marian Wright Edelman, the president of CDF, proposes solutions to child poverty and at risk youth to include investments in health care, Head Start programs, tax reform, and increase in minimum wage. MARIAN WRIGHT EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 44-46 (1987). Notably absent are all calls for the promotion of marriage.

273. See *supra* notes 95-111 and accompanying text.

274. The proponents of the Fatherlessness ideology strongly advocate that the non-marital status of a child's parent will lead to crime and promiscuity. See, e.g., BLANKENHORN, *supra* note 14, at 45 ("For boys, the most socially acute manifestation of paternal divestment is juvenile violence. For girls, it is juvenile and out-of-wedlock childbearing. One primary result of growing Fatherlessness is more boys with guns. Another is more girls with babies."); Horn, *supra* note 246, at 101 ("Moreover violent criminals are overwhelmingly males who grew up without fathers, including up to 60 percent of rapists, 75 percent of adolescents charged with murder, and 70 percent of juveniles in state reform institutions."). The Fatherlessness proponents do not rely on statistics to support these claims or even their own experience demonstrating otherwise. For instance, in January 1995, William Bennett, former Secretary of Education, testified before the Ways and Means Subcommittee on Human Resources in defense of the bill and the underlying Fatherlessness ideology. Acknowledging that his mother, a single mother, did a "fine job" raising him and his brother alone, Mr. Bennett nonetheless calls the rise in single motherhood "a ruinous social slide." His evidence for his proposition mirrors the circular logic and conclusory justification of the contemporary adoption bans. Mr. Bennett explains that "we know that the chances of successfully raising children in a single-parent home are not nearly as good as raising children in a two-parent home. Every civilized society has understood the importance of keeping families together." Written Testimony, William J. Bennett, January 1995, reprinted at www.empower.org/html/policy/welfare/testimony.htm (last visited Sept. 24, 2003).

275. See *supra* note 57 (citing to CARP, *supra* note 7, at 9-10 (quoting Reverend Brace)). See also *supra* notes 54-82 and accompanying text for discussion of the Orphan Trains.

H. Goddard's *The Kallikak Family* (1912) claimed to demonstrate the tendency of generations of children to inherit the social pathology of their parents, particularly criminality and feeble-mindedness.²⁷⁶ Likewise, today, Arkansas, Florida, Mississippi, and Utah offer the adoption bans as a means by which children can be rescued from the corrupt influences of single mothers. Contemporary adoption bans thus revive the misguided impulses that were behind the Progressive Era's improper removals of children and the Eugenic Era's warnings of what will happen to the children of single mothers.

2. *Heterosexuality and Gender Role Socialization*

The states also claim an interest in promoting proper gender role socialization and heterosexuality in children. In its 2003 brief filed with the United States Court of Appeals for the Eleventh Circuit, the State of Florida claimed a state interest in having children raised by heterosexual couples "due to the vital role dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling,"²⁷⁷ which the State of Florida argues is related to a claimed state interest in "discourag[ing] promoting homosexuality to children."²⁷⁸ In its 1999 filing, Utah contends that "nearly one-fourth of the children raised by gay or lesbian parents expressed homosexual interests,"²⁷⁹ and that because, "homosexual behavior entails tremendous risks, it would be irresponsible for the state to ignore the risk of children mimicking the risky behavior of their adoptive parents."²⁸⁰ In 1987, the New Hampshire Supreme Court reached the same conclusions with respect to this issue on speculation alone: "Although . . . a number of studies . . . find no correlation between a homosexual orientation of parents and the sexual orientation of their children, . . . [g]iven the reasonable possibility of environmental influences, we believe that the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity."²⁸¹

As an initial matter, these assertions are contrary to the conclusions reached by mainstream psychologists and psychiatrists.²⁸² As observed by the

276. CARP, *supra* note 7, at 18.

277. State of Florida Brief, *supra* note 136, at 16.

278. *Id.* at 44.

279. State of Utah Brief, *supra* note 195, at 24.

280. *Id.* at 25.

281. Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (emphasis added). It should be noted that although the state supreme court upheld the constitutionality of the gay adoption prohibition, (and the majority included Justice Souter when he sat as a state judge), the New Hampshire statute differs fundamentally from the contemporary statutes. The state supreme court premised its holding of constitutionality based on the fact that there was no statutory presumption of unfitness. *Id.* at 26 (observing "that the bill does not speak of a presumption, although the request for opinion does employ the term. We answer that the classification so created is not one of the sort struck down by the United States Supreme Court in *Stanley v. Illinois* . . . or in *Vlandis v. Kline* . . .").

282. See *supra* notes 262, 267 and accompanying text; see also Jane E. Brody, *Gay*

dissent in New Hampshire's advisory opinion, in 1987, "apparently the overwhelming weight of professional study on the subject concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents."²⁸³ When ascertaining the state interest in Hawaii's restriction of same-sex couples from marriage, the Hawaii court concluded that the "evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy, and well-adjusted child is the nurturing relationship between parent and child."²⁸⁴

Moreover, the claim that a parent transmits her sexual orientation to her child defies common sense. The fact that most gay and lesbian individuals were raised by heterosexual parents, often who remained married and some who are even prominent Republicans, demonstrates the fallacy behind the asserted syllogism that heterosexual parents raise children who develop into heterosexual adults.²⁸⁵ The claim that heterosexual parents raise children who possess traditional gender roles is further unsubstantiated by the extensive and long-standing research in the area of Gender Identity Disorder ("GID").²⁸⁶

Families Flourish as Acceptance Grows, N.Y. TIMES, July 1, 2003, at F7 (reporting that according to DR. SUZANNE M. JOHNSON & DR. ELIZABETH O'CONNOR, *THE GAY BABYBOOM: THE PSYCHOLOGY OF GAY PARENTHOOD* (2002) "as many as 14 million children in the United States are being raised by at least one parent who is a gay man or lesbian" and "our study and many other studies that have been done on gay- and lesbian-headed families show that gay men and lesbians make very effective parents").

283. *Opinion of the Justices*, 530 A.2d at 28 (Batchelder, J., dissenting).

284. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *17 (Haw. Cir. Ct. Dec. 3, 1996).

285. For instance, Parents, Families & Friends of Lesbians & Gays ("PFLAG") is an organization founded in 1972 by two married heterosexual parents of a gay man for the purpose of providing education to other parents with gay children. Today, the organization has over 200,000 members in 500 communities across the United States. The members self-identify as "parents, families and friends of lesbian, gay, bisexual, and transgendered persons." Parents, Families & Friends of Lesbians & Gays, at <http://www.pflag.org/about/mission.html> & <http://www.pflag.org/about/history.html> (last visited Sept. 29, 2003). Mary Cheney, daughter of Vice President Dick Cheney is a lesbian, and John Schlafly, son of conservative spokeswoman Phyllis Schlafly, is gay. See, e.g., *A Legacy of Names* at http://www.queertheory.com/histories/c/cheney_mary.htm (last visited Sept. 29, 2003) (listing two articles identifying Mary Cheney as a lesbian woman who had worked for Coors Brewing Co. "as its liaison to the gay community" and openly lives with her girlfriend); *The Out List*, at <http://www.gay.alb.de/infos/outlis2.htm> (last visited Sept. 29, 2003) (listing "John Schlafly, son of anti-gay conservative activist Phyllis Schlafly and lawyer for her organization, the Eagle Forum").

286. For an excellent overview of the medical profession's development, application, and later renunciation of treating children for gender identity disorder, see Shannon Minter, *Diagnosis and Treatment of Gender Identity Disorder in Children* in *SISSIES AND TOMBOYS: GENDER NONCONFORMITY AND HOMOSEXUAL CHILDHOOD* (Matthew Rottnek ed. 1999). Although the international and national medical profession considers GID a legitimate diagnosis for transsexual adults who seek medical treatment, including sex-reassignment surgery and hormone treatment, the treatment of children with purported gender identity is a criticized practice. See Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination against Transsexuals*, 81 COLUM. J. GENDER & L. 88, 104-07 (2001)

Further, the debate over whether a parent in fact transmits these values and whether in fact a child follows them presents a more troubling dimension. The debate masks the state's claimed interest in preventing its citizens from developing into gay and lesbian adults. The only "harm" identified by the states is the production of more adults who are like the gay parents, whom the states find morally reprehensible. Similar arguments were made by a Protestant social worker at the turn of the century who advised a foster family against returning the biological child to his parent because "we dread Catholic influence more than the bite of the rattle-snake, for that only destroys the body while the other destroys the immortal soul . . ."²⁸⁷ In the 1950s, Judge Harry A. Woodward, a judge who colluded with a social worker to place for adoption the babies of single mothers without their consent, justified his practices by stating that "the children now are in the homes of decent people and honest people of Christianity. . . . I will not let a person who wants to live a life of immorality inflict upon her children, regrettable as it may be, her ways. If she has decided to live that life, I will not allow the children to also do so in her path."²⁸⁸ And as already mentioned, the desire to annihilate a culture was the reason why white policy makers removed Native American children from their own homes.²⁸⁹ By enacting the contemporary

(discussing controversy of GID diagnosis in adults and children). Although usually pre-teens are treated, a GID diagnosis in children begins as early as two to four years old. *Id.* As described in the DSM-IV, boys with GID "have a marked preoccupation with traditionally feminine activities," "dress[] in girls' or women's clothes," "draw[] pictures of beautiful girls and princesses," play with "[s]tereotypical female-type dolls, such as Barbie," play[] a "mother-role" while playing house, and do not play "rough-and-tumble play and competitive sports" or having "little interest in cars and trucks." DSM-IV, *supra* note 232, at 533. Girls who purportedly suffer from GID suffer from symptoms such as eschewing playing with "dolls or any form of feminine dress up or role-play activity," identify with "intense negative reactions to parental expectations or attempts to have them wear dresses or other feminine attire," prefer to wear "boy's clothing and short hair," admire "powerful male figures, such as Batman or Superman," prefer to play with boys "with whom they share interests in contact sports, rough-and-tumble play, and traditional boyhood games." *Id.* The treatment of children with GID includes behavior modification techniques that reward the child for playing with her gender's toys and punish her for playing with her opposite gender's toys. *See* Minter, *supra*, at 15-16. The diagnosis and treatment of childhood GID was devised specifically with the intent to prevent adult homosexuality and transsexuality. *Id.* at 15-19 (reporting that therapists tell children things such as: "as [you] grow up, and if [you] continue to do sissy things, [you] won't have many friends, and people will not like you." In extreme cases, kids with gender identity disorder are sent to mental institutions where they are subjected to abuse and prodding to conform into proper gender socialization. *See* DAPHNE SCHOLINSKI, *THE LAST TIME I WORE A DRESS* (1997). In addition to being ineffective treatment, most children are traumatized from growing up in a mental hospital inhabited by insane adults. As parents have complete legal authority over their children, children are forced into these institutions until age eighteen, when they are no longer legally obliged to stay there and most insurance companies end their medical coverage of the condition. *Id.*

287. *See supra* note 65 (citing CARP, *supra* note 7, at 103); *see also supra* notes 54-82 (discussing Orphan Trains).

288. SOLINGER, *supra* note 39, at 165 (quoting Judge Woodward); *see also supra* notes 121-29 and accompanying text for discussion of Baby Selling scandals.

289. *See supra* notes 136-47 (discussing ICWA and parallels to gay adoption bans).

adoption bans, the states are marshaling state resources to prevent single mothers, unmarried couples, and gay people from transmitting their non-traditional view of gender onto adopted and foster children. The pink triangle is a poignant reminder of the last time that a state-sponsored social experiment attempted to achieve the same end.²⁹⁰

3. Stigmatization

All states also rely upon claims that children will be stigmatized if raised by single parents or gay or lesbian ones. The State of Florida claims that its policy is rationally related to "minimiz[ing] social stigmatization of the child,"²⁹¹ Arkansas asserts that its policy is premised on "the stigmatization that gays may face,"²⁹² and the New Hampshire Supreme Court speculated that a child raised by gay parents would experience stigmatization based on its own inferences drawn from *Bowers v. Hardwick*.²⁹³

Nearly twenty years ago, the courts were presented with a similar situation. In *Palmore v. Sidoti*,²⁹⁴ the father of a child brought suit to deny the child's mother custody of her after the mother, who is white, married a black man.²⁹⁵ The Florida state court granted the father's request, concluding that the child "will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come."²⁹⁶

On review, the Supreme Court agreed with the state court's assumption that a child raised by an interracial couple will be subject to more "pressures and stresses not present if the child were living with parents of the same ra-

290. The German Nazi party did not exclusively persecute Jews during the Holocaust. Gay men also were sent to and killed in concentration camps. Whereas the Nazis made Jewish individuals wear yellow stars, gay men wore pink triangles on their prison uniforms. See GAD BECK, *AN UNDERGROUND LIFE: MEMOIRS OF A GAY JEW IN NAZI BERLIN* (1st ed. 2000); HEINZ HEGER, *MEN WITH THE PINK TRIANGLE: THE TRUE, LIFE-AND-DEATH STORY OF HOMOSEXUALS IN THE NAZI DEATH CAMPS* (Alyson Publications, rev. ed. 1994); RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* (1988); see also Rob Epstein & Jeffrey Friedman, *PARAGRAPH 175* (1999) (a documentary that "moves and inspires, revealing the tragic, untold stories of gay men living under the Nazi regime. Friedman and Epstein use a masterful blend of interviews, archival material, and new footage to weave the stories of lesbian and gay survivors of Nazism into a nightmare-like tapestry of German gay life before, during, and after World War II.").

291. State of Florida Brief, *supra* note 136, at 21.

292. State of Arkansas Brief, *supra* note 206, at 3.

293. *Opinion of the Justices*, 520 A.2d at 23 ("Additionally, the general court finds that being a child in such programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce. The general court makes this statement in a deliberative and balanced manner both recognizing the rights of consenting adults, as limited by the Supreme Court of the United States in *Bowers v. Hardwick*.").

294. 466 U.S. 429 (1984).

295. *Id.* at 430.

296. *Id.*

cial or ethnic origin."²⁹⁷ Nonetheless, removing a child for this reason was inimical to the Constitution because "the law cannot, directly or indirectly, give [private biases] effect."²⁹⁸ Because the mother was found a fit parent, the Supreme Court rejected the claim that stigma arising from a parent's interracial marriage should terminate the mother's custody.²⁹⁹

In the one instance in which *Palmore v. Sidoti* has been presented to state courts in opposition to the adoption bans, the State of Florida has disavowed any similarity between the cases, claiming that *Palmore v. Sidoti* was limited to a race-based claim.³⁰⁰ This argument is erroneous. *Palmore v. Sidoti* makes clear that "private biases" may not be given effect in removing a child from the care of an otherwise fit parent. In light of the urgency of finding qualified parents for foster and adoptive kids, the wisdom of that policy appears even more compelling in the adoption and foster care context.

The act of parenting is a means by which an individual influences and shapes the values that another will hold in the next generation. This right to "affect the culture and embrace, act upon, and advocate privately chosen values" is a means by which a parent chooses and propagates values, which in essence becomes an individual's salient contribution to the democratic order.³⁰¹ It is this contribution that the states are attempting to eliminate by denying gay people and single parents the ability to parent children. History establishes that the contemporary adoption bans thus fit squarely in the legacy of the Orphan Trains, Tennessee Baby Snatching Scandal, and the conditions that lead to the passage of the ICWA. These policies were misguided then and, in light of *Lawrence v. Texas*, an impermissible exercise of state power today.

III. LEGAL CHALLENGES TO ADOPTION AND FOSTER CARE BANS: *LAWRENCE v. TEXAS, STANLEY v. ILLINOIS*

The removal of children from intact families that are deemed "morally inferior" is not just a theoretical danger, but is a real component of how the contemporary adoption bans operate. In *Lofton v. Kearney*,³⁰² plaintiffs challenged Florida's statute due to actual and prospective removals of children from their existing families.³⁰³ The most well-known plaintiff, Steve Lofton,

297. *Id.* at 433.

298. *Id.*

299. *Id.* at 432, 434.

300. See, e.g., State of Florida Brief, *supra* note 136, at 21 (citing *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (affirming trial court's removal of biological child from custody of mother who is a lesbian)). *Bottoms* involved a custody case in which allegations of child abuse were present. *Bottoms* does not cite to *Palmore v. Sidoti* in reaching its conclusions.

301. See Davis, *supra* note 45, at 1371 (discussing how the history of slavery informs the notion of family liberty).

302. 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

303. *Id.* at 1375. Plaintiff Douglas E. Houghton, Jr. is "a clinical nurse specialist and legal guardian" who has been the caretaker for a child since age four when the biological

has served as a foster parent to his ten-year-old son, Bert, since he was an infant.³⁰⁴ In 1988, Lofton worked as a pediatric nurse for infants infected with the HIV virus and lived with his partner of five years, Roger Croteau.³⁰⁵ The State of Florida asked Steve and Roger to take care of an infant foster child with HIV, and within the next couple of years, Steve and Roger became foster parents to five more babies, all of whom were HIV positive.³⁰⁶ The State of Florida asked Steve to quit his job to provide the necessary care for the infants, and Steve “did without hesitation.”³⁰⁷ The care Steve and Roger provided was remarkable and did not go unnoticed. The Children’s Home Society, which was “a child placement agency licensed by Florida’s predecessor agency to the Florida Department of Children and Families,” presented Steve and Roger an “Outstanding Foster Parenting Award,” which they named the “Lofton-Croteau Award” in their honor.³⁰⁸

In an unexpected turn of events, the medication administered to Bert resulted in the successful sero-conversion of the HIV virus, a medical phenomenon that occurs in a small number of infants who receive AZT and other such medication at an early age.³⁰⁹ In 1994, the State of Florida learned of Bert’s HIV negative status and subsequently released him for adoption because he no longer had a medical condition that made him a hard to place child.³¹⁰ Steve immediately applied to adopt Bert, but the State of Florida denied his application pursuant to its statutory ban categorically prohibiting all gay men and lesbian women from adopting children.³¹¹ Steve then brought suit in federal district court challenging Florida’s law. From the date of Bert’s release for adoption, through the present day, the State of Florida

father voluntarily left the child with Houghton. *Id.* Plaintiffs Brenda and Gregory Bradley, who are a married heterosexual couple, “intended to designate a homosexual relative to be the guardian and eventual adoptive parent of their children in the event of their deaths,” but are denied the option based on the adoption ban. *Id.* at 1376. *See also* Zubeck, *supra* note 12 (according to the Colorado DHS, if a similar ban had been implemented in El Paso County, the policy would present the likelihood of disrupting a larger number of existing families).

304. *Lofton*, 157 F. Supp. 2d at 1375.

305. *See Lofton-Croteau Family: Steve and Roger*, at http://www.lethimstay.com/loftons_steveroger.html (last visited Sept. 29, 2003) [hereinafter *Steve and Roger*].

306. *Id.* Frank and Tracy were placed with Steve and Roger in 1988, and Bert in 1991 by the State of Florida. Another child, Ginger, also was placed with Steve and Roger and died of AIDS complications in 1995. The family moved to Oregon in 1999 to be closer to Steve’s elderly parents. The family’s new pediatrician told an Oregon caseworker of Steve and Roger and the State of Oregon subsequently asked Steve and Roger to take in Wayne and Ernie who were five and two years old at the time and also HIV positive. Technically, only Steve registered as a foster parent with the State of Florida. Florida’s marriage laws did not allow Steve and Roger to marry or serve as joint foster parents. *Id.*; *see also Lofton-Croteau Family: Ginger’s Story*, at http://www.lethimstay.com/loftons_ginger.html (last visited Oct. 16, 2003).

307. *Steve and Roger*, *supra* note 305.

308. *Id.*; *see also Lofton*, 157 F. Supp. 2d at 1375.

309. *Lofton*, 157 F. Supp. 2d at 1375.

310. *See id.*; *Steve and Roger*, *supra* note 305. For a definition of a “hard to place” child, *see supra* note 9.

311. *Lofton*, 157 F. Supp. 2d at 1375.

sends Steve a letter every "few weeks" that provides an update on the status of finding another family to adopt Bert.³¹²

The Florida district court found that there was no doubt that "a deeply loving and interdependent relationship between Lofton and [Bert] . . . exists,"³¹³ and that "the emotional tie[] between Lofton and [Bert] . . . is quite close—as close as those between biological parents [and their children]."³¹⁴ Nonetheless, the State of Florida defended its decision to remove Bert because the adoption bans serves the state interest of "reflect[ing] the State's moral disapproval of homosexuality" and that the "provision serves the best interest of Florida's children . . . [by] rais[ing] [them] in a home stabilized by marriage, in a family consisting of both a mother and a father."³¹⁵

The district court soundly rejected moral opprobrium as a legitimate state interest, but it agreed that, in light of the fact that there was no fundamental right to adoption, the removal of Bert from his home, two fathers, and four siblings serves the best interest of the child and is a permissible and rational act.³¹⁶ The decision is on appeal to the Eleventh Circuit Court of Appeal, where a decision is pending.³¹⁷ *Lofton v. Kearney* demonstrates that Florida's statute, and others like it, fit squarely in the legacy of now-disavowed practices in the history of adoption placements that have removed children from immigrant families, poor single mothers, Mexican-Americans, and Native Americans for the proffered reasons that the children will be raised by parents who are perceived to be morally inferior based on their marital or caste status.³¹⁸ An important lesson from history is that when these practices were stopped, there was no universal consensus with respect to their impropriety. Rather, social reformers used legal mechanisms to end practices that defenders continued to assert were in the interest of children.³¹⁹

312. See *The Lofton-Croteau Family: Bert's Story*, at http://www.lcthimstay.com/loftons_bert.html (last visited Oct. 16, 2003) (reporting that Florida rejected stipulation to stop placement efforts during pendency of the lawsuit).

313. *Lofton*, 157 F. Supp. 2d at 1379.

314. *Id.* at 1379.

315. *Id.* at 1382-83.

316. *Id.* at 1383-85.

317. The decision is on appeal to the United States Court of Appeal for the Eleventh Circuit, No. 01-16723-DD. After oral argument was held, the U.S. Supreme Court decided *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

318. See *supra* notes 54-82 and accompanying text (Orphan Train); notes 94-115 and accompanying text (Eugenic Era); notes 121-129 and accompanying text (Baby Selling scandals); notes 136-48 and accompanying text (ICWA); notes 150-66 and accompanying text (Arizona Orphan Abduction).

319. For instance, legal procedures necessary to secure a birth mother's consent and government licensing of adoption agencies arose from the Orphan Trains and Baby Selling scandals. See, e.g., Cole & Donley, *supra* note 8, at 277 (observing that the black market and rigidity of eligibility requirements "gave rise to cries for reform in the field of adoption (and foster care). These cries led in 1955 to a National Conference on Adoption sponsored by the Child Welfare League of America. . . . Many of these changes took place in the 1960s and 1970s and were due to massive political, social and moral changes of that period."). The ICWA introduced a system under which tribes receive jurisdiction to determine the placement

Challenges to the contemporary adoption bans have been brought in four states over the past twenty years. No court has yet struck the bans down.³²⁰ Indeed, the courts upheld the bans in both *Lofton v. Kearny* and *Opinion of the Justices*,³²¹ which was an advisory opinion on New Hampshire's adoption ban, a statute later repealed by the state legislature.³²² However, both of these decisions were issued before *Lawrence v. Texas*, and consequently they both failed to recognize the liberty interests that adoptive and foster parents have in the relationships with their children.

A. Liberty Interest Implicated by Adoption: Substantive Due Process

Arkansas, Florida, Utah, and New Hampshire assert that because there is no fundamental right to adopt or to be adopted, their respective statutory and regulatory schemes are shielded from judicial inquiry.³²³ The Supreme Court has defined a fundamental right as one that is "implicit in the concept of ordered liberty,"³²⁴ and "deeply rooted in this Nation's history and tradition,"³²⁵ without which neither liberty nor justice would exist.³²⁶ Accordingly, any judicial declaration of a new right must proceed with caution and assurance that the right at issue is as fundamental as claimed.³²⁷

It is true that no case has held expressly that there is a fundamental right to adopt. However, neither is there a case explicitly holding that there is a fundamental right to use contraceptives, a fundamental right to solicit legal business, a fundamental right to vote in state elections without paying a fee, or a fundamental right not to disclose a membership list to the state. Nonetheless, the Supreme Court has held that a general right to privacy,³²⁸ access to the courts,³²⁹ voting,³³⁰ and association³³¹ exist, and that the above described activities fall within these general rights.

of foster and adoptive children. See KENNEDY, *supra* note 45, at 485-86.

320. *Lofton v. Kearny*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) and *Cox v. Florida Dep't of Health & Rehab. Servs.*, 656 So. 2d 902, 903 (Fla. 1995) both upheld the Florida statute. *Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) upheld New Hampshire's. A challenge to Utah's administrative regulations was rendered moot once the statute was passed. As of September 2003, no decision has been issued with respect to Arkansas's statute.

321. 530 A.2d 21 (N.H. 1987).

322. See *supra* note 171.

323. See, e.g., *Lofton*, 157 F. Supp. 2d at 1380 (holding that "[i]t is undisputed that there is no fundamental right to adopt, nor is there a fundamental right to be adopted. Instead, adoption is a privilege created by statute and not by common law.") (internal citations omitted); *Opinion of the Justices*, 530 A.2d at 24 (upholding New Hampshire's adoption ban in part because "[t]here is, further, no such right to adopt, to be a foster parent, or to be a child care agency operator, as these relationships are legal creations governed by statute.").

324. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

325. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

326. *Palko*, 302 U.S. at 326.

327. *Glucksberg*, 521 U.S. at 720-21.

328. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

329. *NAACP v. Button*, 371 U.S. 415 (1963).

330. *Harper v. Virginia*, 383 U.S. 663 (1966).

In *Lawrence v. Texas*,³³² the Supreme Court emphasized the importance of properly framing a right asserted to be a fundamental one. The Court observed that *Bowers v. Hardwick*'s³³³ rejection of what it characterized as the right of "homosexuals to engage in sodomy" "discloses the Court's own failure to appreciate the extent of the liberty at stake."³³⁴ Indeed, "[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."³³⁵

Likewise, defenders of the adoption bans cannot obviate the liberty interest implicated by adoption through a particular spin. The Supreme Court recently explained that substantive due process rights are not determined by express language contained in the Constitution.³³⁶ Because the nation's founders recognized the limitations of an attempt to anticipate "the components of liberty in its manifold possibilities," the Constitution functions as a living document, allowing "persons in every generation [to] invoke its principles in their own search for greater freedom."³³⁷ In light of the fact that "times can blind us to certain truths," the Supreme Court explained that "later generations" are the ones uniquely able to realize that "laws once thought necessary and proper in fact serve only to oppress."³³⁸ Indeed, the history of adoption placement practices repeatedly exemplifies this phenomenon. The Orphan Trains, baby selling, and removal of Native American children were policies once thought rational and in the best interest of the children, but now are considered misguided and a shameful exercise of power.³³⁹

The starting point in understanding the liberty interest implicated by an individual's decision to adopt a child begins with the Supreme Court's right of privacy cases. *Griswold v. Connecticut*³⁴⁰ was the first case to strike down a state law that forbade the use of contraceptives.³⁴¹ The Supreme Court determined that "specific guarantees in the Bill of Rights have penumbras," that some of those penumbras "create zones of privacy," and that therefore, a state may not interfere with certain "sancit[ies] of [the] home and the privacies of life" absent a compelling state interest to do so.³⁴² Because the statute at issue achieved its end by authorizing "marital bedrooms" to be subject to

331. *NAACP v. Alabama*, 357 U.S. 449 (1958).

332. 123 S. Ct. 2472 (2003).

333. 478 U.S. 186 (1986).

334. *Lawrence*, 123 S. Ct. at 2478.

335. *Id.*

336. *Id.* at 2484.

337. *Id.*

338. *Id.*

339. See *supra* notes 54-82 and accompanying text (Orphan Train); notes 122-130 and accompanying text (Baby Selling Scandals); notes 139-147 and accompanying text (ICWA).

340. 381 U.S. 479 (1965).

341. *Id.* at 485.

342. *Id.* at 484-85.

government control and scrutiny, the Court struck it down.³⁴³ In particular, the Court held that because the law “seeks to achieve its goal by means having the maximum destructive impact upon [the marriage] relationship,” the State of Connecticut was employing a form of government control that “is repulsive to [] notions of privacy.”³⁴⁴

Although the Griswold’s announced liberty interest in the right of privacy was subject to much controversy and criticism,³⁴⁵ the Supreme Court has relied upon such interest over the past thirty years to invalidate state regulations that impermissibly regulated an unmarried individual’s access to contraception,³⁴⁶ marriage to someone of a different race,³⁴⁷ access to abortion,³⁴⁸ and most recently, intimate sexual activity with someone of the same gender.³⁴⁹ As the contours of the right to privacy evolved, the Supreme Court observed that “the outer limits of this aspect of privacy have not been marked by the Court.”³⁵⁰

When a child is placed in a home, adoption legally provides that the child will be integrated fully into the adoptive family, receiving all legal rights and obligations of a naturally born child.³⁵¹ The adoption of a child thus is an act to create or expand a family, which is protected fully by the liberty interest implicated in an individual’s decision to form a family. Such a liberty interest is not diminished by the lack of a biological connection be-

343. *Id.* at 485.

344. *Id.* at 486.

345. Justice Black’s scathing dissent is the most notable criticism of the majority’s establishment of right of privacy and its reliance on the Constitutional zones of privacy. *See, e.g.,* *Griswold v. Connecticut*, 381 U.S. 479, 509-10 (1965) (Black, J., dissenting).

346. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

347. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing the freedom to marry “as one of the vital personal rights” protected under the due process clause).

348. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

349. *Lawrence v. Texas*, 123 S. Ct. 2472, 2478 (2003) (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

350. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977).

351. *See* HOLLINGER, *supra* note 6, at 1-12 to 1-13 (observing that a “characteristic of adoptive relationships is that once they are created, . . . [t]he adoptive family is said to replicate and displace the child’s original family ‘in all respects.’ Adoptive parents have exclusive responsibility for the child, . . . [and] acquire the same rights to parental autonomy and family privacy that the biological parents previously had. . . . This complete absorption of the child into the legal and economic web of the adoptive family presumably encourages the emergence of a lasting personal and psychological bond between the child and adoptive parents.”) (internal footnotes omitted).

tween the parent and child, or by the fact that the parent child relationship is created by the state. As explained in *Smith v. OFFER*,³⁵² "biological relationships are not [the] exclusive determination of the existence of a family," and the existence of the marriage contract is evidence that the state is in fact involved in the formation of all family relationships.³⁵³ Because the Supreme Court has recognized that "the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association,"³⁵⁴ a decision to adopt a child must receive the same protection as the decision to beget or bear one. As observed by the Seventh Circuit Court of Appeals, "a couple deciding to adopt must make decisions that are not essentially different from the decision to beget a child biologically. Under the Supreme Court's constitutional approach to . . . a family rights claim, we should not belittle the similarities between adoption and natural child birth."³⁵⁵ Adoption is therefore a decision that is protected by the fundamental liberty interest an individual has in forming his or her family.

Turning to the permissibility of the adoption bans, the states have authority over the parentless children in their care and a statutory duty to place them in homes that advance child welfare and social concerns.³⁵⁶ The adoption bans limit which individuals or couples can expand their families, based on the parents' marital status or sexual orientation. The adoption bans include provisions requiring an individual to sign an affidavit stating he or she is celibate or that he or she is heterosexual, and some states allow for the state to investigate whether a prospective parent is having consensual sexual intimacy with an adult in her home or is living with a gay or lesbian person.³⁵⁷ Although all prospective parents who wish to adopt are subject to a rigorous and highly intrusive investigation of their home environment, this criterion differs substantially in its character and nature.

Unlike criteria such as financial status, emotional stability, past criminal history, or views on child discipline, no state in the union or mainstream child welfare organization designates sexual orientation, marital status, or private adult intimacy as legally cognizable grounds to remove a child from her biological parents.³⁵⁸ Likewise, unlike criteria such as religious beliefs,

352. 431 U.S. 816 (1977).

353. *Id.* at 843-844 ("The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation."); *id.* at 846 n.53 ("The legal status of families has never been regarded as controlling: 'Nor has the Constitution refused to recognize those family relationships unlegitimized by a marriage ceremony.'") (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (internal modifications omitted)).

354. *OFFER*, 431 U.S. at 844.

355. *Lindley v. Sullivan*, 889 F.2d 124, 130 (7th Cir. 1989).

356. *See supra* notes 37-38, 49 and accompanying text.

357. *See supra* notes 2-5.

358. No state considers a parent's sexual orientation, marital status, or adult consensual intimacy as a ground that may *per se* terminate parental rights. *See, e.g.*, *ADAMEC & PIERCE*, *supra* note 9, at 287-90 (listing grounds for terminating parental rights, which include neglect, abandonment, or abuse. In addition, most states provide that if a birth parent suffers from particular mental illness or physical incapacities (usually lengthy incarceration) that "mak[e]

spending practices, career choice, and existing disabilities, no state or mainstream child welfare organization has deemed sexual orientation, marital status, or intimate associations as dispositive to the question of a biological parent's fitness to raise a particular child.³⁵⁹ Because the states fail to provide evidence of demonstrable harm or even relevance to parenting skills, the criteria of sexual orientation, intimate associations, and marital status solely involve a parent's status and lack any correlation to his or her conduct that may affect a child.³⁶⁰ The means employed by the contemporary adoption bans do nothing more than seek to police the prospective parent's constitutionally protected decisions to enter into or refrain from entering into a marriage, decide to create a family, associate with particular adults based on their status, or engage in consensual adult intimacy.³⁶¹ The contemporary adoption bans therefore are similar to the regulation at issue in *Griswold*, which "seeks to achieve its goal by means having [the] maximum destructive impact upon [a protected] relationship," between the prospective parent and her intimate associations.³⁶²

The interest implicated by the adoption bans is not an asserted entitlement to adopt one particular child, a right to adopt all children, or a right to receive all benefits to which a naturally born child is entitled. Rather, the discrete issue implicated by the adoption bans is whether the state can deny

it impossible for them to provide normal parental care," parental rights may be terminated. The level of harm to a child required to be demonstrated before a court will terminate parental rights is an exceedingly high threshold. See *id.* at 290 (quoting attorney Richard Ducote who observes that, "We adopt a higher standard of proof in parental-termination cases than in criminal cases. With the same evidence that would enable a D.A. to send a parent away for 15 to 20 years for what he did to his kids, some juvenile- and family-court judges are still reluctant to terminate rights.").

359. Although a handful of states take sexual orientation into account as an adverse factor in making custody or visitation determinations, no state considers a parent's sexual orientation as a basis for terminating parental rights. See, e.g., LITTLE, *supra* note 210, at 1-171 to 1-174. See also *supra* note 358.

360. Indeed, the majority of private adoption agencies routinely place children with gay and lesbian parents seeking to adopt. See Cray, *supra* note 13, at A5.

361. The right to enter into a marriage and right to be protected from unconstitutional distribution of benefits based on marital status are protected by *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("Nor has the [Constitution] refused to recognize those family relationships unlegitimized by a marriage ceremony."); and *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating regulation that barred unmarried individuals access to family planning). When the Supreme Court struck down the sterilization statute in *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942), it relied upon the principle that an individual has a fundamental right to procreate and the state may not administer a regulation that would permanently deprive one class of individuals this right over another. Arguably the adoption bans prohibition on family formation achieves the same end, the elimination of a class of individuals from having children over another. In addition, the right to associate with others in non-criminal activities is protected under *NAACP v. Alabama*, 357 U.S. 449 (1958) and the right to protection from government interference in consensual adult intimacy is established in *Lawrence v. Texas*, 123 S. Ct. 2472, 2478 (2003). The contemporary adoption bans infringe upon each of these protections by denying children to individuals based on their marital status or sexual orientation.

362. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

an individual the right to parent and raise a child—based not on her ability as a parent, but on her status as an unmarried, gay, or cohabiting individual.

Until the 1960s and 1970s, the states exercised control over which individuals or couples were entitled to receive contraception and information about birth control. In holding such regulation unconstitutional, *Griswold* and *Eisenstadt* established that an individual's decision to start a family, *rather than the biological act of procreation*, is the fundamental right protected by the Constitution. As explained in *Carey v. Population Services International*,

The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, . . . “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁶³

The state regulation over contraception at issue in *Griswold* and *Eisenstadt*, and regulation of abortion at issue in *Carey* and *Roe*, control the means by which children are brought into families. The contemporary adoption bans regulate the placement of already born children into families. Both types of regulations therefore are analogous attempts by a state to control a person's ability to form a family by preventing a particular individual—either gay, lesbian, unmarried, or cohabiting with another adult—from parenting the children over which the state has control. Because the adoption bans baldly interfere with a liberty interest without any compelling state interest, they too are constitutionally infirm and must go the way of the regulations in *Griswold* and *Roe*.

Other federal authority that has held that there is no fundamental right to adopt does not interfere with this conclusion. For instance, in *Mullins v. Oregon*,³⁶⁴ the Ninth Circuit held that there is no “constitutionally protected liberty interest in the adoption of [a] grandchild.”³⁶⁵ However, the case addressed the discrete issue of whether a grandmother who had maintained minimal contact with her grandchild was entitled to adopt her.³⁶⁶ In contrast to individuals affected by the adoption bans, the grandmother was able to apply to adopt the child, the state considered the application and evaluated the merits of her parenting skills, and the basis for denying the application was not a categorical exclusion or irrebuttable presumption regarding her fitness.³⁶⁷ Likewise, *Lindley v. Sullivan*³⁶⁸ rejected an equal protection chal-

363. 431 U.S. 678, 685 (1977) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (emphasis omitted in *Carey*).

364. 57 F.3d 789 (7th Cir. 1995).

365. *Id.* at 791.

366. *Id.* (“[T]he Mullinses never have had more than minimal contact with their grandchildren, seeing them only occasionally and even then only for a few hours at a time.”).

367. *Id.*

lenge to a government program that provided insurance to disabled parents for children born to them but not for adopted children.³⁶⁹ The classification at issue was one that conferred a government benefit to a child based on her status as a naturally born or adoptive child, and it was not a provision that categorically precluded any individual from adopting based on his or her status.³⁷⁰ Neither case addressed a type of government regulation that sought to prevent an individual from becoming a parent to every child. Moreover, the cases do not alter the conclusion that adoption implicates one of the most precious of liberty interests, the right to form a family, and that therefore the adoption bans impermissibly abridge substantive due process guarantees.

B. Liberty Interest Implicated by Foster Care: Procedural Due Process

Foster care indisputably involves a different type of familial relationship than other situations. This difference is that the foster parents enter into a binding contract with the state concerning various conditions under which they will surrender the child. The foster care system operates with the underlying premise that a biological parent who gives up her child to the state will have the child returned when she once again is able to care, emotionally and physically, for her child.³⁷¹ Indeed, "the natural parent initially gave up his child to the State only on the express understanding that the child would be returned in those circumstances."³⁷² Due to these unique circumstances, any substantive due process right that exists between a foster parent and her child may be abridged when the biological parent seeks the return of his child pursuant to the terms of the foster care agreement.³⁷³

Florida and Arkansas have relied upon this aspect of foster care to argue that the adoptions bans are permissible as applied to foster parents in light of the fact that "foster parents do not have a justifiable expectation of an enduring companionship because the emotional ties originate under state law."³⁷⁴ The Florida district court agreed, claiming that *Smith v. OFFER*³⁷⁵ stands for the proposition that "unlike natural families, foster parents do not have a justifiable expectation[] of an enduring companionship because the emotional ties originate under state law."³⁷⁶ However, the Supreme Court's holding in

368. 889 F.2d 124 (7th Cir. 1989).

369. *Id.* at 126.

370. *Id.* at 131-32.

371. *See Smith v. OFFER*, 431 U.S. 816, 846-47 (1977).

372. *Id.* at 846.

373. *Id.* at 846-47 ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.").

374. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001); *see also* State of Florida Brief, *supra* note 136, at 50-54; State of Arkansas Brief, *supra* note 206, at 9.

375. 431 U.S. 816 (1977).

376. *Lofton*, 157 F. Supp. 2d at 1379; *see also id.* at 1380 ("Plaintiffs Lofton and Houghton entered into relationships to be a foster parent and legal guardian, respectively, with an

OFFER was more narrow. *OFFER* recognized that in particular circumstances, the emotional bond between a child and her parent, independent of any underlying biological relationship or the level of state involvement in formalizing that relationship, forms a cognizable liberty interest with which the state must not interfere.³⁷⁷ The contractual aspect of foster families becomes relevant in the limited circumstance in which a natural parent in fact seeks the return of her child.³⁷⁸ Notably, the *OFFER* court expressly declined to comment further on the contours of the substantive due process rights afforded to a foster parent and her child in situations other than when the biological parent seeks the child's return.³⁷⁹ Because adoption bans barring particular classes of individuals from serving as foster parents do not involve a natural parent exercising her contractual rights for the return of her child, the Florida district court erred in concluding that Supreme Court precedent precludes the recognition of substantive due process rights for foster parents.

As demonstrated above, the adoption bans implicate a substantive due process right in family formation, and thus the states' regulations over foster care are subject to constitutional scrutiny.³⁸⁰ "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."³⁸¹ As relevant to prospective and existing foster parents, a state thus may not deprive an individual of the ability to form a family by imposing an irrebuttable presumption of unfitness.

inherent understanding that the relationships they forged would not be immune from DCF and State oversight but permitted only upon their approval. Thus, while this Court recognizes the need, importance, and value of foster parent and legal guardian relationships, it cannot extend to those relationships the liberty interest granted to biological parents in the care, custody, and control of their children. Lofton, Doe, Houghton and Roe have no expectation of permanency and, therefore, no right to exclude the State from their family lives.").

377. *Smith v. OFFER*, 431 U.S. 816, 844 (1977) ("Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promotion a way of life' through the instruction of children as well as from the fact of blood relationship.") (internal citation omitted) (some internal modifications omitted).

378. *See id.* at 846-47 ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.").

379. *See id.* at 847 ("As this discussion suggests, appellees' claim to a constitutionally protected liberty interest raises complex and novel questions. It is unnecessary for us to resolve those questions definitively in this case, however, . . . [because] we conclude that 'narrower grounds exist to support' our reversal.").

380. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 771-72 (1975) (holding that general social welfare legislation will not have impermissible irrebuttable presumptions unless the statute implicates a constitutionally protected interest).

381. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

1. As-Applied to Prospective Foster Parents

In *Bell v. Burson*,³⁸² the State of Georgia passed the Motor Vehicle Safety Responsibility Act, which provided that the vehicle registration and driver's license of an uninsured motorist involved in an accident would be suspended unless the motorist were to post a security covering the amount of damages claimed by aggrieved parties.³⁸³ The plaintiff contended that the statute violated due process because it failed to provide him with an opportunity to present evidence that he was not in fact liable for the accident.³⁸⁴ Georgia contended that it can apply the statute without considering such evidence because "fault and liability are irrelevant to the statutory scheme."³⁸⁵ The Supreme Court disagreed, holding that liability "plays a crucial role in the Safety Responsibility Act," because suspension of a license is triggered by a finding of liability.³⁸⁶ The State of Georgia therefore "must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment [of liability] being rendered against [the uninsured motorist]."³⁸⁷

The adoption bans present an analogous procedural due process defect, imposing an irrebuttable presumption of unfitness on a class of prospective foster parents based upon their marital status or sexual orientation. The states contend that their presumptions of unfitness are proper and no different from statutory prohibitions against placing a child with an individual who has been convicted of child abuse, a violent felony, or a sex offense.³⁸⁸ There is no question that a state has the statutory authority to avoid placing a child with a foster parent who is a demonstrated danger to the child.³⁸⁹ However, unlike the criminal prohibitions, the adoption bans differ significantly by prohibiting all gay or unmarried individuals from parenting despite the absence of evidence of harm to a child. The nature of the purported harm to children raised by single parents or same-sex couples consists of improper gender role socialization, disinclination towards heterosexuality, immoral

382. 402 U.S. 535 (1971).

383. *Id.* at 535-36.

384. *Id.* at 537.

385. *Id.* at 541.

386. *Id.* In particular, the Act provides that a license will be not be suspended if a release of liability is executed by the injured party or a judgment of non-liability is entered. Likewise, if suspension has been imposed, these conditions will lift it. *Id.* at 537 n.1.

387. *Id.* at 542.

388. See, e.g., State of Florida Brief, *supra* note 136, at 28 (defending its adoption ban against charges of eliminating eligible prospective parents on the basis that "[t]here are any number of restrictions—statutory, regulatory, practical, categorical, and non-categorical—who may adopt . . . Each of these restrictions restricts the pool of prospective adoptive parents available to adopt children out of foster care; that is what restrictions do.").

389. See, e.g., *K.H. v. Morgan*, 914 F.3d 846, 849 (7th Cir. 1990) (holding that "the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger . . . without thereby violating her rights under the due process clause of the Fourteenth Amendment . . .").

role modeling, and stigmatization.³⁹⁰ These behaviors, however morally reprehensible to some people in this country, are not criminal offenses and are not the type of conduct that any mainstream child welfare organization has determined results in harm to a child.³⁹¹ Congress recently has recognized that many of the former criteria that states and agencies used to screen out prospective parents with disabilities was based on a similar animus that had no relevance to parenting.³⁹² The adoption bans perpetuate a similar arbitrary bias that has no place in child-placement considerations.

Florida, Arkansas, and all other states interview, investigate, and evaluate prospective foster care or adoptive parents, individually determining parental fitness.³⁹³ The evaluations take into account whether a particular parent can provide for a particular child in light of potential unique concerns such as a medical condition, specific religious belief or cultural background, or need for continued contact with biological family members; a state will deny placement with any prospective parent who is determined to present a likelihood of harmful or even inadequate care.³⁹⁴ Because a showing of parental fitness is the crucial determination of the child placement process, *Bell* establishes that a state may not deny any prospective foster or adoptive parent the opportunity to present evidence of his or her fitness.

Indeed, a fatal flaw to the adoption bans is that they circumvent the provision to which every other prospective parent is subjected, an extensive home study and evaluation to determine their fitness. Because an existing mechanism exists to ensure that a parent's behavior, conduct, lifestyle, and judgment will not harm a child, the presumption of unfitness accorded only to individuals who reside outside of a heterosexual marriage is suspect. As

390. See *supra* notes 268-301 and accompanying text.

391. See *supra* notes 262-67 and accompanying text. In addition, the Child Welfare League of America ("CWLA") supports the placement of children with gay individuals and unmarried couples and adamantly opposes the adoption bans' categorical presumptions of parental unfitness towards them. In listing its objections to an administrative rule that served as a template to Utah's statute, the CWLA stated that every state should allow all prospective parents to "have an equal opportunity to apply for the adoption of children, and receive fair and equal treatment and consideration of their qualifications as adoptive parents, under applicable law." See Ex. R00823, Submission of Statement by CWLA, Administrative Record, *Utah Children v. Utah State Bd. of Child & Family Servs.*, Civ. No. 990910881 (3d Dist. Ct., Salt Lake County, Utah 1999). Neither the CWLA nor any other such organization is making a similar call to place children with child molesters and violent felons.

392. See Madelyn Freundlich, *The Americans with Disabilities Act: What Adoption Agencies Need to Know*, available at <http://www.adoptioninstitute.org/policy/ada.html> (last visited Oct. 20, 2003) (summarizing the "non-discrimination mandates of the ADA" as applied to adoption agencies).

393. HOLLINGER, *supra* note 6, at 1-12.

394. See generally Eligibility Guidelines for Adoption, *supra* note 9 (listing guidelines prepared by a licensed agency of the State in its evaluation of prospective parents. Categories include age of parents, marital status, number of divorces, insurance, existing children in the home, when a parent can return to work, health of parents, criminal record, and infertility.); ADAMEC & PIERCE, *supra* note 9, at 23-28 (listing grounds that agencies use to evaluate prospective parents).

observed by the Supreme Court in *Department of Agriculture v. Moreno*,³⁹⁵ when there is an existing provision that is “aimed specifically at the problems of fraud and of the voluntarily poor,” and an additional measure justified by this basis affects only a small subset of the population, “considerable doubt” arises with respect to whether the additional measure “could rationally have been intended to prevent those very same abuses.”³⁹⁶ This legal principle holds true here as well. Given that there is a highly developed, sophisticated mechanism to ensure that a child is placed with a fit parent in a suitable home, the adoption bans are superfluous, and indeed, nothing more than a thinly veiled pretext for impermissible discrimination. The adoption bans run afoul of procedural due process by foreclosing to certain foster and adoptive parents the opportunity to present evidence of fitness, which is provided to every other member of the population.³⁹⁷

2. As-Applied to Existing Foster Parents

With respect to existing foster parent and child relationships, the adoption bans present an even more egregious violation of procedural due process. In *Stanley v. Illinois*,³⁹⁸ Joan and Peter Stanley had three children together.³⁹⁹ Although Joan and Peter never entered into a legal marriage, they lived together “intermittently for 18 years,” during which time Peter shared in the parenting duties, financially supported all of the children, and lived with the children for all of their lives.⁴⁰⁰ Joan died while two of the children were still minors, and at the time, under Illinois law, children of unwed fathers became wards of the state.⁴⁰¹ Upon Joan’s death, the State of Illinois instituted dependency proceedings, removed the children from Peter’s custody, declared them wards of the state, and placed them with court appointed

395. 413 U.S. 528 (1973).

396. *Id.* at 536-37. Although *Moreno* addressed an equal protection claim, the principle applies to a determination as to whether a statute presents an impermissible irrebuttable presumption. As observed by the Supreme Court, the “‘irrebuttable presumption’ cases must ultimately be analyzed as calling into question not the adequacy of procedures but—like [the] cases involving classifications framed in other terms . . . the adequacy of the ‘fit’ between the classification and the policy that the classification serves.” *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1991) (citing to *Craig v. Boren*, 429 U.S. 190 (1976); *Carrington v. Rash*, 380 U.S. 89 (1965)).

397. There is no question that when allowed to present their qualifications, gay and lesbian parents remain qualified to adopt and raise children. A recent survey showed that over 60 percent of private adoption agencies routinely place children with gay and lesbian parents and the only agencies that regularly resist such placement are religious-based organizations, which appear to resist based on moral, rather than child-welfare, considerations. See Crary, *supra* note 13, at A5 (reporting findings of national survey).

398. 405 U.S. 645 (1972).

399. *Id.* at 650 n.4.

400. *Id.* at 646. The record states that Peter lived with the two children who are involved in the case and is silent with respect to whether Peter lived with the child whose legal status was not at issue. *Id.* at 647 n.2.

401. *Id.* at 646.

guardians.⁴⁰² Peter challenged the action because the State of Illinois had never demonstrated his unfitness as a parent.⁴⁰³ The state supreme court rejected the challenge, holding that "Stanley could be properly separated from his children upon proof of the single fact that he and the dead mother had not been married."⁴⁰⁴

Before the United States Supreme Court, the State of Illinois defended its actions by asserting that "unwed fathers are presumed unfit to raise their children and that [therefore] it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents"⁴⁰⁵ The State of Illinois' defense of its illegitimacy statutes in removing children from Stanley is strikingly similar to Florida's defense of the adoption ban's removal of Bert from Steve Lofton's care. Illinois asserted that unwed fathers are "unnatural" and Florida claims that gay parents are "immoral."⁴⁰⁶ Illinois claimed that based on "history or culture . . . real differences [exist] between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children, [and] that the statute here fulfills the compelling governmental objective of protecting children"⁴⁰⁷ Florida asserts that same-sex couples fail to provide stability and legal protections to their children and that the best interest of a child is to be raised by a married couple.⁴⁰⁸ The Supreme Court found the following three flaws with Illinois' justifications and action.

First, the Supreme Court emphasized the fact that the emotional relationship between Stanley and his children presented a "cognizable and substantial" interest that favored Stanley's retention of his children, despite the fact that his familial relationship was "unlegitimized by a marriage ceremony."⁴⁰⁹ There can be no question that the district court's findings with respect to "a deeply loving and interdependent relationship between Lofton and [Bert]," presents a comparable liberty interest, which the contemporary adoption bans impermissibly infringe.⁴¹⁰

Second, the Supreme Court soundly rejected Illinois' "assumption that placing [an illegitimate child] for adoption is inherently preferable to rearing by his [biological] father, that uprooting him from the family which he knew from birth until he was a year and a half old, secretly institutionalizing him and later transferring him to strangers is so incontrovertibly better that no

402. *Id.*

403. *Id.*

404. *Stanley v. Illinois*, 405 U.S. 645, 646-47 (1972).

405. *Id.* at 647.

406. *See Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001) (stating that Florida asserts that its adoption ban permissibly "reflect[s] the State's moral disapproval of homosexuality. . . .").

407. *Stanley*, 405 U.S. at 653 n.5.

408. *See supra* notes 211, 279-280 and accompanying text.

409. *Stanley*, 405 U.S. at 651.

410. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001).

court has the power even to consider the matter.”⁴¹¹ Illinois’ proffered studies and theories of harm were thus rejected because:

We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child’s father.⁴¹²

Likewise, Florida’s assertions that a child will benefit from being raised by a married couple is rendered irrelevant in the consideration of whether Florida may remove Bert from his home of ten years, two parents, and four siblings.

Third, the Supreme Court then invalidated the state statute because even if Illinois’ assertion that “most unmarried fathers are unsuitable and neglectful parents” were true, Illinois may not rely upon presumption instead of individualized determinations in light of the reality that not “all unmarried fathers” are unfit parents.⁴¹³ “Procedure by presumption is always cheaper . . . [b]ut when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities . . . it cannot stand.”⁴¹⁴ Thus, whatever the apparent advantages that a more traditional family may provide, the State of Florida may not remove Bert without a proof that Steve Lofton in fact is an unfit parent. If the State of Florida removes Bert without such a finding, “the State registers no gain towards its declared goals . . . [I]f [Lofton] is a fit father, the State spites its own articulated goals when it needlessly separates [a child] from his family.”⁴¹⁵

All statutes that impose irrebuttable presumptions pose a potential procedural due process violation. However, in *Michael H. v. Gerald D.*,⁴¹⁶ the Supreme Court set forth the limits of this principle. *Michael H.* upheld a

411. *Stanley v. Illinois*, 405 U.S. 645, 654 n.7 (1972) (quoting *In re Mark T.*, 154 N.W.2d 27, 39 (Mich. 1967)).

412. *Id.* (quoting *In re Mark T.*, 154 N.W.2d 27, 39 (Mich. 1967)).

413. *Id.* at 654.

414. *Id.* at 656-57.

415. *Id.* at 652-53, 658 (“Under the Due Process Clause [the offered] advantage [of children being raised by married fathers] is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.”). Indeed, the irrebuttable presumption of unfitness afforded to gay and lesbian individuals, single mothers, and unmarried couples is as arbitrary and invidious as a state statute that would prohibit any child placement with a heterosexual man based on the fact that “the vast majority of sexual acts committed upon children are committed by adult heterosexual males.” *Matter of Appeal in Pima County*, 727 P.2d 830, 838 (Ariz. Ct. App. 1986) (Howard, J., dissenting) (citations omitted). There is no question that these studies are true. However, unless a fact is established that no straight man could ever be a fit parent, a statute providing an irrebuttable presumption would run afoul of due process. The subsequent efforts to deny gay individuals the right to a process that is successful in determining parental fitness is similarly illogical and irrational discrimination.

416. 491 U.S. 110 (1989).

California law that created a legal presumption that the husband of a child's mother is the father of the child if the parents are living together at the time of the child's birth.⁴¹⁷ Under the statutory scheme at issue, an individual—who is either the husband or biological father—may contest this presumption within two years of the child's birth, but after that time, the presumption becomes irrebuttable.⁴¹⁸ In the facts of the case, Gerald D. was the husband of the child's mother. Michael H., however, produced blood tests demonstrating a ninety-eight percent probability that he was the child's biological father.⁴¹⁹ Michael H. contended that the statutory presumption violated his right to procedural due process, because it terminated his liberty interest in his relationship with his biological child without affording him an evidentiary hearing to demonstrate his paternity.⁴²⁰

The Supreme Court nonetheless rejected his procedural due process claim, finding that the presumption was a permissible one, in part because Michael H. did not bring his paternity claim within the two-year window afforded to him by the statute.⁴²¹ The irrebuttable presumption in *Michael H.* thus differs significantly from the one set forth in the adoption bans. Whereas Michael H. was disadvantaged by a rebuttable presumption that became irrebuttable after he had failed to contest within the window of opportunity provided under the statute, the adoption bans present a categorical presumption that an individual may never challenge. The adoption bans thus are a rare form of legislation that presents a legal presumption of unfitness and denies an individual all opportunity to produce any countervailing evidence. Like the irrebuttable presumptions at issue in *Stanley* and *Bell*, the contemporary adoption bans violate a prospective and existing parent's right to due process. Moreover, the state asserted opposition to gay and unmarried parents fails to rely upon evidence of harm or concrete relevance of fitness used in child placement contexts.⁴²² The contemporary adoption bans are justified by moral opprobrium alone; and indeed become indistinguishable from the past policies in which the State of Illinois presumed unwed fathers unfit parents, Reverend Brace removed children from the "depraved" Catholic families, corrupt judges terminated rights of the "immoral" single mothers in the 1950s, armed vigilantes took away children from the "half-breed savages," and racist policymakers took children away from Native American families.⁴²³

417. *Id.* at 113.

418. *Id.* at 115 (citing CAL. EVID. CODE § 621).

419. *Id.* at 114.

420. *Id.* at 119.

421. *Id.* at 121.

422. *See supra* notes 211-301 and accompanying text.

423. *See Stanley v. Illinois*, 405 U.S. 645, 653 n.5 (1972) (listing studies of unfitness of unwed fathers); *see supra* notes 54-82 and accompanying text (Orphan Train); notes 122-30 and accompanying text (Baby Selling scandals); notes 137-49 and accompanying text (ICWA); notes 151-67 and accompanying text (Arizona Orphan Abduction).

CONCLUSION

The states defend their contemporary adoption bans as benign preferences for placing children in the homes of married heterosexual couples; a family structure, it is contended, that is the ideal environment in which to raise a child. The application of these statutes and regulations, however, has the effect of disrupting and dismembering existing families. Moreover, the claimed benefits that a child receives from being raised in a nuclear family echo the claimed benefits that advocates once used to defend the Orphan Trains, the Tennessee Baby Snatching Scandal, and the conditions that led to the enactment of the Indian Child Welfare Act. History counsels that the contemporary reservations of parenthood to heterosexuals are part of an ignoble legacy; the legal landscape now compels such a reservation of parenthood to fall.