Florida Statute 63.042(3): A Policy of Exclusion

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Florida Statute 63.042(3): A Policy of Exclusion

By

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A thesis submitted in partial fulfillment of the requirements of the University Honors Program University of South Florida, St. Petersburg

April 29, 2005

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Honor Thesis

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Acknowledgements

I would like to thank my advisors Dr. Ray Arsenault, Dr. Jessica Cabness, and Attorney Karen Doering for their support and assistance.
A Saint Petersburg couple has decided to start a family; they would like to adopt a child however, there is one obstacle preventing them from applying, they are lesbians living in a state with a homosexual adoption ban. Adoption may be the only option for some gay and lesbian individuals choosing to raise a family, but for homosexuals residing in Florida this is not an alternative. For nearly thirty years the state of Florida has precluded individuals the right to adopt based on sexual orientation.

Adoption has been a galvanizing issue in America since the practice gained acceptance among the general public. All across the country standards have been established regarding the employment of adoption. What started out as a privilege afforded only to middle and upper class white families has gradually included members of minority and lower class communities. In a little over fifty years Florida has altered its adoption policy to allow most members of society to apply for adoption. There is of course one glaring exception: the homosexual community has been statutorily banned from any attempts to adopt a child within the state.

For an individual applying for adoption, it takes an enormous amount of courage to adopt a child and even more patience. In the next four chapters we will move from adoption’s historical past, to the state of Florida’s modern child welfare system, with particular emphasis on gay and lesbian battles with the state (from legislators to judges). As the state’s child welfare system grapples with a growing number of children entering the
system and a shortage of qualified adoptive parents, the legitimization of a ban on an entire group based solely on biased attitudes and vague research can not last without harm to future children.
Chapter 1: Introduction

Nearly thirty years ago the state of Florida launched a campaign against homosexual adoptions. What began in Miami with a public debate over a referendum to make discrimination based on sexual orientation unlawful ended with a community divided and a welfare system taxed even further. "In 1977, Florida became the first state to statutorily ban adoption by gay or lesbian adults by enacting the homosexual adoption provision. Currently, it is the only state with such a prohibition." ¹

Florida's legislative body elected to revise Statute 63.042, the state adoption policy, in 1977. The revision, added under Section (3) of the statute, states "No person eligible to adopt under this statute may adopt if that person is a homosexual." ² The ban, now almost 30 years old, was drafted in the face of mounting demands, and legislators quickly passed a universal ban on homosexual adoption. In light of today's political concerns evolving from an increasing national debt, shrinking employment prospects, and a rising number of children entering the child welfare system, the continuation of a ban on adoption by homosexuals makes little sense. With more children needing homes and fewer people willing to provide them, it would seem prudent for legislators to reexamine their guiding principles. State lawmakers, still clinging to idealized images of the model heterosexual family which developed through the use of outdated research, should consider repealing Statute 63.042(3).
The belief that a child needs a stable, two-parent heterosexual household in order to thrive is the underlying contention of those opposed to gay and lesbian adoptions. The best interest of the child is often the battle cry of the opposition; but if child welfare is the single most important mitigating factor, why do policy makers turn a blind eye when gay or lesbian individuals apply for foster parenting classes? Although Florida law prohibits homosexuals from adopting, the state has no restrictions on foster care. Many homosexual foster parents care for special-needs kids, and the length of stay in these homes can be long term; in some cases, legal guardianship has been granted to those families who remain together for a significant amount of time. But before we can attempt to interpret the present state of Florida’s child welfare services lets try to understand the history behind modern adoption policies.

Adoption is nearly as old as written history; couples unable to bear their own children have successfully acquired heirs using diverse methods for millennia. The Bible detailed the adoption of Moses by the pharaoh’s daughter, and Julius Caesar took in Octavius. Babylonian law put adoption in writing: “If a man has taken a young child from his waters to sonship and has reared him up no one has any claim against the nurslings.” The ancient Romans further practiced two forms of adoption: adrogation and adoption, which was governed by the Laws of the Twelve Tables. According to Adamec and Pierce, adrogation was fairly common in ancient Rome, according to author John Boswell. Its purpose was to enable a childless man to ensure the continuity of his family name and also to provide someone to carry out religious rituals and memorials after his death. In contrast, adoption was the process by which a minor child became a legal heir and dependent of the adoptive parent, with the agreement of his or her biological father. According to the law at that time, and based on the Laws of the Twelve Tables (mid-500s B.C.) the birthfather would perhaps sell his son up to three times and his daughter or granddaughter once, after which he could not reclaim
the children. Unquestioned family allegiance was expected whether the person was adopted as a child or an adult.

As the practice of adoption grew in prominence around the United States, local officials began to tighten legal statutes concerning who could adopt. Between 1950 and 1970, the child most likely to be placed in a new home was typically young, white and female; children with disabilities and ethnic minorities were usually marginalized and were almost completely excluded from the child welfare system. At the same time, some potential parents were systematically disqualified based on standards largely set by an uninformed public. By mid-1970s, state legislators in Florida enacted one more restriction to the lengthy adoption policy by banning gay and lesbian couples from adopting. At that time, the issue of adoption captured national attention.

Florida's ban on gay adoptions began in the summer of 1976, when local politicians sat down with the Dade County Coalition for the Humanistic Rights of Gays. The focus of the meeting centered on the equal treatment of homosexuals. What came from the meeting was a commitment by local politicians to establish a law that would make discrimination based on sexual orientation illegal in the workplace. By the following year, Dade County politicians successfully pushed through the anti-discrimination ordinance. Inequity in housing and employment based on an individual's sexual orientation became illegal.5.

Dade County was seeking to imbue an image of progression and the new anti-discrimination ordinance was seen as a step in the right direction. Local officials were not the only residents to approve of the new regulation, gay and lesbian community members
saw the passage of the ordinance as a breakthrough. According to Newsweek, 40 cities and counties had already passed similar anti-discrimination policies; it was only a matter of time before Miami would become 41. As a whole the nation was moving towards tolerance. While there was some resistance, acceptance was replacing prejudice.

When Dade County’s declaration became common knowledge, some local residents felt disenchanted with their elected representatives. Although Miami was a popular metropolis for the gay and lesbian community, homosexuality also sparked considerable local resistance. Shortly after the passage of the ordinance, various religious groups and conservative members of the community began to voice their opposition to the county’s decision. One of the most vocal opponents, Anita Bryant, a devout Baptist, and former beauty queen, was the spokesperson for the Florida Citrus Commission. 6 As a prominent figure in South Florida, Bryant was an effective voice for the anti-gay coalition. Those who opposed the anti-discrimination bill often claimed that homosexuals practiced deviant behavior and mischaracterized equality as “special rights.” Anita Bryant defined homosexuality as a life-style decision; she also believed that practicing homosexuals were a threat to children.

With state officials rallying behind Bryant and her supporters, the issue of gay and lesbian rights entered the realm of child welfare. Soon discussions on gay rights encompassed adoption. Anita Bryant’s public status gave the anti-gay opposition national notoriety. Bryant and her supporters founded an organization called “Save Our Children,” claiming that, as deviants, homosexuals would pollute the minds of young children and
persuade them to partake in the “homosexual lifestyle.” As the summer of 1976 wore on citizens opposing Miami’s anti-discrimination referendum propagated a campaign to repeal the newly enacted ordinance. Bryant was leading the movement with support from local and national organizations; at the same time Florida legislators were moving to draft a state policy on the issue of adoption by gay or lesbian individuals. By June of 1977 Miami’s first anti-discrimination ban was repealed and lawmakers established Statute 63.042(3), otherwise known as Florida’s homosexual adoption ban.

By the end of the 70s, Florida, along with the rest of the nation, was facing a critical shortage of eligible parents seeking to adopt. Adoption rates were slowing and more children were staying in foster care until their 18th birthdates. Throughout much of the 80s the adoption dilemma was in and out of court systems around the country, but Florida’s first challenge to the anti-homosexual adoption ban took place in 1991. The case of Seebol v. Farie challenged Florida’s selective adoption policy by claiming the ban was unconstitutional. The Seebol trial court concluded with a ruling that Florida’s anti-gay adoption ban was unconstitutional. The Seebol ruling would be overturned in a state appellate court, but it would not be the last time that Florida’s adoption policy would enter a court room.

Today the practice of adoption places new emphasis on the child’s well being; gone are the days of adoption for profit. Now prospective parents typically claim that the choice to adopt stems from compassion and the desire to be parents. With the significance of child welfare entering the equation, adoption has become a complex issue of parental
aptitude. But determining what makes a person qualified to raise a child can be a difficult subject. Although the Seebol ruling was overturned, the case paved the way for future court battles that would force Floridians (and Americans as a whole) to seek legitimate evidence to suggest eventually

By 2001, Florida’s ban on gay adoptions was back in the headlines when Steve Lofton, Douglas Houghton, Wayne Larue Smith, and Daniel Skahen filed a civil suit against Florida’s Department of Children and Family Services. The Lofton case was not the first to challenge the homosexual adoption ban; however it did breathe new life into an issue that had taken a back seat to other child welfare concerns. The case crept through the legal system until it finally reached the U.S. Supreme Court in January of 2005. When the final chapter drew to a close, the balance of Florida’s gay adoption policy was in the hands of the nation’s highest judicial authority.

Although policy makers defend the supposed legislative policy, they are hard pressed to explain why more than one-third of the children adopted are placed in single-parent homes. This contradiction is even more baffling when juxtaposed against other states. For instance, Arkansas and Nebraska both have policies regarding foster care that are contrary to Florida’s. Neither state has sanctions on gay and lesbian adoption. However, both have developed more stringent legislation for foster parents, which state that no gay or lesbian individual can apply to be a foster care provider.
Mississippi and Utah strictly enforce policies in which adoption by a homosexual individual is nearly impossible. In Mississippi, gay and lesbian couples are prohibited from applying for adoption; yet, single individuals, regardless of sexual orientation, can walk into any adoption agency in the state and submit an application to become an adoptive parent. Utah sidesteps the issue by precluding any applicant who is not married; this effectively disqualifies all same-sex couples. For a further breakdown on each state’s adoption policy refer to Appendix I.

One explanation for such diversity among the states becomes apparent on review of the statistics on children in each welfare system. Since the 1970s, the number of children in foster care has sharply increased, but many states are incapable of dealing with a burgeoning system without federal aid. The state of Florida monitors one of the largest child welfare systems in the nation. According to the U. S. Department of Health and Human Services, in 2002 there were 20,800 children entering foster care in Florida, and 17,061 exiting the system during that year. This translated to over 3,000 young people residing in temporary homes and shelters throughout the state in 2002.

The significance of these numbers becomes clearer when we take into account the government aid each state receives. With such a large number of children to support, the state must rely on federal subsidies. One number that is steadily decreasing, however, is the number of foster care providers. Fewer than half the families who enter training remain when classes conclude.
There are numerous fronts on which one could argue for the reversal of Statute 63.042(3). Perhaps the most compelling is the growing number of children languishing in the child welfare system. While Florida lawmakers exclude an expanding pool of potentially competent parents. The state has an obligation to improve the child welfare system. Florida’s ban on gay adoptions was instituted with no empirical research to support its creation. As a result, statewide hysteria placed tremendous pressure on legislators to react. With new research to examine, and countless examples of successful gay and lesbian households to observe, legislators have the opportunity to repeal Anita Bryant’s law.

In the following chapters I will examine the history of the child welfare system, with particular attention to the case of Florida. In chapter two I address the origins of Florida Statute 63.042(3), then move on to federal statistics concerning governmental subsidies. In chapter three I explore concerns for children languishing in foster care, where I will enter the realm of psychology to analyze the topic of family diversity by comparing foster care, legal guardianship, and adoption from both a traditional family view of one mother and one father and from the perspective of a gay or lesbian household. My focus is on gay and lesbian adoptions and the controversy that surrounds them. Chapter four includes recent legal battles affecting Florida’s adoption policy. I conclude with an overview of gay adoptions, and offer several recommendations, based on all the material available, for the future of Florida’s child welfare system.

2. Florida Statute 63.042.


4. Ibid.


6. Ibid.

7. Ibid.


Chapter II: Historical Background, 1851-1976

Origins and Early Policy

Although adoption has a lengthy history in practice, written records for the United States are relatively contemporary. In 1851, the state of Massachusetts drafted “An Act to Provide for the Adoption of Children,” which established the first modern adoption policy. Long before this East Coast codification several forms of adoption were practiced in Texas, Louisiana, and other territories. In fact, informal adoptions were common during the colonial era. As Christine Adamec and William Pierce have written,

[I]t was fairly common for colonial legislatures to pass special bills recognizing the adoption of a child. Some historians have hypothesized that legislators became weary of passing so many bills for individual cases, bills that increased to such a great extent they bottlenecked other legislation. As a result, the legislators may have eased their legislative load by legalizing what was already common.1

Prior to the Massachusetts statute, the process of acquiring a child was simply a matter of exchange; as in a business transaction, both parties agreed to specific contractual terms. Because these circumstances never took the adoptee into account, the Massachusetts law was considered the first (albeit minimal compared with today’s standards) to take the child’s interest into account.

Although many U. S. edicts were rooted in British common law, the United States pioneered the establishment of contemporary adoption guidelines. When the English established a formal adoption policy in 1926 it was largely based on American precedents, specifically a New York statute. Prior to the new adoption policies, children
were viewed by society as property. Perceptions were slow to change. One policy that gave child welfare reform a boost was the loathed English concept of primogeniture—exclusion of all non-firstborn children from inheriting their family estate. With many newly established American settlers loath to adopt anything British, the concept of primogeniture was detested and was eventually discarded.

Another important problem of the times was the attitude towards illegitimacy. The concept of bearing offspring out of wedlock was deemed evil and not at all in line with the socially acceptable behavior of that era. According to Adamec and Pierce, "Many people believed that if they solved the problem of the out-of-wedlock mother and child by arranging for another family to raise the child, they were condoning her ‘sin’ and ‘making it easy’ for her." Society was apathetic to the plight of illegitimate kids, often judging them to be inferior. Moreover, nothing of value was expected of children born outside marriage. By the 19th century poor and illegitimate children were boarded on trains and sent westward to work on frontier land with surrogate parents, for a fee.

Twentieth Century Rights

By the middle of the twentieth century children were gaining new rights; it was no longer acceptable practice to purchase a child with the intention of putting him or her to work. When adoptions began to focus on the best interest of the child, a key issue was the child’s physical attractiveness. Many adoption agencies defined the ideal family as the one that was the most aesthetic. As Gill has observed, "Because biological children resembled biological parents, agencies assumed that adopted children should resemble
adoptive parents. Because most children were not disabled, agencies assumed that disabled children should not be adopted. Because most white, middle-class, married couples followed traditional gender patterns, agencies assumed that adoptive couples should follow traditional gender patterns. 

Adoption in Florida

The state of Florida was no different than any other in this regard. The state’s adoption problems were relatively common mid-twentieth century. By 1941, Florida drafted an adoption policy with the sole requirement that the adoptive parent be a state resident. Additional to the statute commenced two years later when state legislators amended the original to exclude some residents. And over the years Florida’s adoption policies continued to develop, as demographic realities changed with massive in-migration and growing cultural diversity.

Dade County and the Anti-discrimination Ordinance

Throughout the early 70s the United States enjoyed record numbers of placement for children in the foster care system, but these statistics would not continue; the country would see all-time lows in the following decades. “Nonrelative adoptions in the United States fell from a record high of 89,200 in 1970 to 47,700 in 1975.” Florida was feeling the pinch as well, but the state underwent another setback in the business of adoption when it became embroiled in a battle that pitted gay rights advocates against religious activists and several well-known celebrities. During a little less than one year Floridians watched as the communities in and around Dade County approved and then repealed a
highly publicized anti-discrimination ordinance that promised to make discrimination based on sexual orientation illegal. Despite the political backing of Dade County's Coalition for the Humanistic Rights of Gays, the anti-discrimination ordinance could not withstand the pressure of public reactions and the order was repealed. One of the lasting outcomes of the conflict was an addition to Florida's adoption policy.

With sentiment towards the homosexual community growing increasingly hostile government officials seized the opportunity to pass an addition to the Florida adoption policy. The addition, known as 63.042(3), was one sentence that effectively banned the adoption of children by individuals who identified themselves as homosexual. In the fall of 1976 south Florida's gay community began to quietly organize a strong political backing in an attempt to gain seats on the Metro-Dade commission.7

The attempt began in earnest when the Dade County Coalition for the Humanistic Rights of Gays invited local politicians to a meeting at the YMCA where discussions focused on human rights. Sixty-five aspiring politicians showed up, and out of that number 49 won their elections. With a majority of the politicians siding with the gay community, an anti-discrimination policy was promptly drafted and approved. Although the nation had seen edicts of similar substance before, this was a first for south Florida.

Anita Bryant and the “Save our Children” Campaign

As the Metropolitan Dade County Commission passed the ordinance banning discrimination in housing, jobs, and public facilities based on sexual preference, several
local community leaders kept quiet. But this situation did not last long as both sides were soon lashing out in an attempt to sway politicians either to pass or repeal the ordinance by the end of the year. The next setback for supporters of the referendum was a hefty financial price tag, estimated to cost the county $400,000.8

Discussions involving Miami’s newest policy soon attracted the media and Florida became the center of national attention. With nationwide awareness feeding the debate, the focus shifted from anti-discrimination of gay and lesbian adults to the children of the state. One of the most vocal children’s advocates was Anita Bryant. When the former beauty queen, and devout Southern Baptist, moved her family to a lavish 33-room mansion near Biscayne Bay in January of 1970 she maintained a quiet lifestyle. But later, with the backing of the Baptist church, she established the “Save Our Children” campaign attacking the morality of homosexual lifestyles.

Although devoutly religious, Bryant did not initially seek the title of spokeswoman for the anti-gay coalition. Being the spokeswoman for Florida Orange Juice kept her busy; she was eventually felt moved to act when her family narrowly escaped a serious car accident. For Anita this incident was a sign from God that it was time for her to take a stand.9 Yet Bryant was connected to the anti-discrimination policy even before her brush with death. In an odd turn of events Commissioner Ruth Shack, who introduced and supported the gay-rights’ ordinance, was the wife of Anita Bryant’s agent and was publicly endorsed by the singer.10
While Bryant was using her celebrity status to recruit others, the gay community mounted its own campaign. One of the most vocal gay-rights supporters was local businessman John W. Campbell. Campbell owned several bathhouses around the country and, as he witnessed the division among his neighbors, he chose to take a stand. Along with supporters like Campbell, the Coalition for Humanistic Rights of Gays lobbied the ordinance that they had essentially developed. Both sides utilized the media in an attempt to sway the public. In her book, Bryant wrote,

Dade County voters buried the gay-rights ordinance by more than 2-1 margin Tuesday after an emotional campaign-turned-crusade that had the whole nation watching. "Today the laws of God and the cultural values of man have been vindicated," proclaimed singer Anita Bryant in a victory appearance with her husband and other leaders of Save Our Children, the group that forced the issue on the ballot and into the national spotlight with a petition drive launched in Dade's churches. Almost 45 percent of Dade's voters, who underwent a blitz [sic] advertising from both pro and anti-repeal forces for the last two weeks, turned out, voting 69.3 percent for repeal—a lopsided margin that surprised both sides.11

Ordinance is repealed

Both sides appreciated the power the media holds over public opinion, and were quick to exploit this venue. In just one short year the state went from passing an anti-gay ordinance to effectively excluding an entire community. The repercussions from this fight were felt across the nation, and it would be over 20 years before Dade County would have another opportunity to vote on an anti-discrimination bill of similar substance.

With the repeal of the anti-discrimination ordinance, those on the winning side wanted to sustain the momentum. Thus the campaign to "save our children" went after Florida's adoption policy. By the summer of 1977, Florida legislators added one sentence to the
adoption statute that simply stated, "No person eligible to adopt under this statute may adopt if that person is a homosexual."12 This policy remains on the books today and affects those gay and lesbian individuals who wish to adopt.

1 Adamec and Pierce, The Encyclopedia of Adoption, xxi.
2 Ibid., xxxi.
11 Anita Bryant and Bob Green, At Any Cost, (New Jersey: Old Tappan, 1978), 136-137.
12 Florida Statute 63.042.
Chapter III: Child Welfare

Ineligibility

Throughout the 1950s and 60s, adoption was primarily a way for white, middle class couples to obtain white babies (girls were often the first to find homes). Eligibility was generally reserved for those matching this prototype. The ideal image of a successful family included a father and mother raising their children. Despite the social stigma attached to adoption, couples unable to produce their own offspring put their moral contempt aside while they searched for the right match. As the process of adoption transformed, so did the picture of family life; in less than 50 years, the definitions of family began to incorporate divorcees, single parents, and gay and lesbian households. “There are many different types of families, with many different needs, and many different ways of meeting those needs. Family diversity is a way of characterizing the variability within and among families.”

Today state agencies maintain that adoptions transpire with the child’s best interest in mind, but the best interest of the child often conflicts with the principal interests of the child welfare authorities. Three decades of research evaluating family cohesion conclude that the happiness of the child is not always the primary concern of those whose business should be child welfare. Those opposed to gay and lesbian adoptions claim that the psychological effects of raising a child in a same-sex parental household can lead to developmental problems for a child. However, a preponderance of research suggests that the success of a family is dependent on the relationships within the unit, whatever the sexual orientation of the parents involved.
Florida’s Welfare System

When discussing the topic, it is important for us to consider the circumstances surrounding modern adoptions, including the statistics on children in need of homes and those seeking to adopt. Florida’s immediate need for qualified surrogate parents is expressed by data indicating a dire situation. Current statistics for adoptive children are available from the Child Welfare League of America and Florida’s Department of Children and Families (DCF). This numbers indicate a dire shortage of willing and eligible homes for child placement throughout the country. The most updated numbers for the nation were gathered from 2002 statistics while the average number of adoptable children in the state of Florida can be obtained yearly and reflect 2005 figures (See Appendices 2 and 3).

According to the most recent studies Florida’s population is around 17,019,068 (2003) and the population of children-under 18-is approximately 3,924,123. The state poverty rate is around 13.1 percent and the poverty rate for children under 18 is approximately 19.0 percent. When broken down even further, the rate of poverty for children aged 5-17 is 17.7 percent while children 4 and under have a poverty rate of 21.2 percent. In 2002, 2,307 children were legally adopted via the public welfare agency (a 53.3 percent increase from 2001). Of the nearly 32,000 children residing in out-of-home care in 2002, 25.5 percent were waiting to be adopted. Kristen Kreisher notes nationwide numbers,

According to the Adoption and Foster Care Analysis and Reporting System, on September 30, 1999, 127,000 children in the public child welfare system were waiting to be adopted. The median age of children in this group was 7.7 years, and many had spent more than 36 continuous months in foster care. That same year, 46,000 children were adopted from public child welfare agencies. Some were infants. Some were teenagers.
Many were Latino. Many more were white or black. Adoptive parents were equally diverse-31% were single women, 2% were single men, and 1% were unmarried couples. Among these adoptive parents were gay and lesbian individuals and partners.

In light of overwhelming statistics demonstrating the ominous position of America’s child welfare system, the debate over qualified adopters becomes essential (See Appendix 4). The Child Welfare League of America’s Standards of Excellence for Adoption Services states, “Applicants should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their race, ethnicity or culture, income, age, marital status, religion, appearance, differing lifestyles, or sexual orientation.” Furthermore, applicants for adoption should be accepted “on the basis of an individual assessment of their capacity to understand and meet the needs of a particular available child at the point of adoption and in the future.”

Empirical Research on same-sex households
One obstacle experts face when attempting to understand gay and lesbian households derives from the search for potential test subjects. Calculating approximate numbers of gay and lesbian citizens in the nation is complicated; estimates range from just over one percent of the population to 10 percent. “Estimates on the number of gay parents rely on much debated guesses at what percentage of the entire population is lesbian, gay, or bisexual. Some human sexuality studies have found that 10 percent of people are gay. Other studies of sexuality have deduced smaller figures of lesbian and gay people—at 3 to 4 percent of the population—only counting those identifying themselves as gay.”
According to the American Psychological Associations, "... survey data indicate that between 40 percent and 60 percent of gay men and between 45 percent and 80 percent of lesbians are currently involved in a committed relationship. Additional numbers show between 18 percent and 28 percent of gay couples and 8 percent and 21 percent of lesbian couples have lived together 10 years or more. Factors that predict relationship satisfaction, commitment, and stability are remarkably similar for both same-sex cohabiting couples and heterosexual married couples." 6

Determining the eligibility of adoptable parents can prove complicated for state officials. Many adoption agencies rely on family dynamics studies when deciding qualities that should be exhibited by the ideal parent. One fundamental problem with such research is the subject matter; finding families who are willing to participate in these, often long-term, experiments can prove difficult. Other impediments include unreliable answers and the examiner's bias. Despite these obstacles, it is possible to extract information that can be utilized to evaluate characteristics of family life. What follows is a comparison of three distinct family dynamics. First, we will examine the traditional household, consisting of two heterosexual individuals, followed by a review of alternative families with emphasis on single parent homes and an examination of gay and lesbian parents.

Research on Family Dynamics

The emotional and social developments of adoptive children are key themes at the heart of the adoption issue (See Appendix 5). "Current debates about marriage of same-sex couples often lead to discussions regarding the health and well-being of any children"
involved in such relationships." Florida legislators utilize empirical studies from decades past to assert the dangers of gay and lesbian homes, even when new research is produced denouncing older models. If there is a chance to repeal Florida's gay adoption ban it will be with the aid of compelling studies that counter the notion that children raised in same-sex homes will likely develop some type of psychological damage due to their home environment.

Determining what family unit is the most effective, to be utilized as a benchmark for all other families, is not easily attainable or practical. It is true that some families maintain better relationships than others, but to suggest that there is only one way to raise a child is erroneous. For example, married couples may be better equipped to deal with adolescent behavior simply because there are two adults sharing responsibilities. This, however, does not suggest that all two-parent households contribute equally to adolescent development.

Long held beliefs that alternative families--both gay and lesbian families and single parent households--are ill-equipped to deal with children have slowly eroded with the introduction of new research. Some key issues that have been addressed in the last 30 years include gender association, social skills, and educational achievements. Empirical studies often account for such social concerns by examining the economic and emotional conditions under which the child is living.
One of the underlying problems plaguing gay and lesbian homes is the implication that non-traditional families are not associated with the generally accepted notion of a family unit. From the late 1970s to the early 1990s (and beyond in some areas), gay and lesbian couples were viewed as sexual deviants who were destroying the sanctity of the family. In one example, a gay doctor was advised to discourage other gay people from becoming his patients because a doctor’s office filled with homosexuals would “scare away the families.”

Research guides us through the process of determining what makes some families successful while others struggle. In many instances family cohesion is obtained with two parental figures in permanent roles (for more information on permanency see the subsequent section on foster care). This does not imply that all families fitting this category will succeed, in fact step-families are often plagued with as many, and in some cases, more problems than those exhibited in single-parent households. What we do know is that two incomes are better than one, two care givers can split up the work load better, and the child who feels wanted (sense of permanency) is less likely to fail in school, work, and in his/her family.

**Policy Statements from Leading Child Welfare Associations**

The American Psychological Association’s statement on gay and lesbian families suggests that aspects of child development reveal few distinctions among children of lesbian mothers and their heterosexual counterparts in such areas as personality, self-concept, behavior, and sexual identity. “Evidence also suggests that children of lesbian
and gay parents have normal social relationships with peers and adults. Fears about children of lesbian or gay parents being sexually abused by adults, ostracized by peers, or isolated in single-sex lesbian or gay communities have received no scientific support."^9

Those in favor of gay and lesbian adoption never suggested that these homes are any more or less suited for childcare, but only that two parents are better equipped at raising children. “Investigators have concentrated on describing the attitudes and behaviors of gay and lesbian parents and the psychosexual development, social experience, and emotional status of their children.”^10 Those who are opposed to the institution of gay adoptions cite the lack of empirical research and the disintegration of family values as their platform. The American Pediatrics Association has admitted to small sample sizes and non-random selections when discussing their research methods. Opposition groups who suggest that policy statements made by the American Pediatric Association were carelessly utilized to promote gay and lesbian families have seized upon this admission.^11 However, randomly selecting families for gay and lesbian home studies is virtually impossible and new studies identifying and monitoring this group of parents are growing in size.

_Foster Care_

The psychological well being of children is used as an agenda for those who oppose gay adoptions, but what can be said for the kids who remain in foster care while the state denies eligible, caring parents adoption rights because of their sexual orientation? While the state steadfastly refuses to allow gay and lesbian individuals the opportunity to adopt
they do not make such concessions for foster care providers. With the number of children entering the welfare system increasing and the number of qualified adoption and foster care applicants decreasing, there is a serious need for the overhaul of the child welfare foster care provisions.

Even our federal courts have weighed in on the dichotomy between Florida’s adoption guidelines and its foster care policy. In the dissenting opinion for the En Banc rehearing of the Lofton case, Circuit Judge Marcus stated,

I believe there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted felons or drug addicts from adopting. There is undeniably an important question whether this statutory scheme meets a minimal standard or rational basis review.\textsuperscript{12}

What has been offered as justification for this seeming contradiction is the notion that children moving through foster care homes generally do not stay in these homes for lengthy periods of time, therefore limiting any permanent damage that could be sustained from long-term relationships. The flip side to this concept belies the supposed benefits that it provides. Studies have demonstrated that longer time with one family has significant benefits over the alternative. “Longer time in placement was found to be associated with a higher degree of life satisfaction, improved adult functioning, and less criminal activity.”\textsuperscript{13}
Although not the ideal situation, children who reside in one foster home, rather than moving from place to place, benefit from the stability provided. McDonald et al., described several studies on the quality of foster care and found,

Living in fewer placements was found to be associated with better school achievements and more years of education; increased contacts with and feelings of closeness to foster families after discharge; less criminal activity; more informal social supports; increased life satisfaction; greater housing stability; self-support; increased ability to access health care; better chance to avoid early parenthood and being a cost to the community; and better care for one's own children.14

In other words, maintaining a stable home is imperative to individual development that moves well beyond childhood. This fact has been reasserted in countless studies and demonstrates the importance of stability regardless of placement (adoption or foster home). With that in mind, and because of its permanency, adoption is an ideal situation for children. However, when this goal cannot be achieved child welfare officials dealing with foster children should adopt a long-term approach.


11 Glenn T. Stanton, “Examining The Research Literature on Outcomes From Same-Sex Parenting.” *Focus on the Family*.

12 Lofton et al., v. Secretary of the Department of Children and Family Services, 99-10058-CV-JLK (11th CC of FL 2004).


14 Ibid., 135.
Chapter IV: The Legal Battle

Legal Arguments

Adoption is not a right. United States citizens have no reasonable expectation to adopt. Legal arguments have continually emphasized this fact when arguing against the repeal of Florida's gay adoption ban. "Whenever discussing individual rights, it is important to establish the nature of the particular right under discussion, whether it is a mere liberty of interest or, instead, a fundamental right. A mere liberty interest may be regulated or abridged by the state so long as the state does so in a way that is rationally related to the promotion of a legitimate state goal. A fundamental right, however, cannot be abridged by the state unless the state can bear 'especially high' burdens of justification for the infringement."¹

Given this truth, there are three ways to fight the gay adoption ban, the first is takes place in the sphere of public opinion, the second by way of legislative repeal, and the third necessitates legal proceedings. The first two measures require a great deal of cooperation among all parties involved; the third process is no less demanding, although the fighting tactics are somewhat different. The American Civil Liberties Union's Lesbian and Gay Rights Project defines the process as such,

"Decisions about who gets to be a parent (adoption) and who gets to stay a parent (custody) are made by family court judges at the local level. Some states have formal rules about whether gay people can parent, and whether sexual orientation is a factor to consider in either adoption or custody decisions. The family court judges are supposed to follow those rules (which they usually do, though there are exceptions). Those formal rules generally come about in one of two ways. First, the state legislature can pass a law setting out the rule. Second, someone who is unhappy with a decision made by a trial court judge can appeal."²
Since adoption is a state-regulated program, the rights of gay and lesbian adoptive applicants are primarily in the hands of state officials. In 1991, the first case challenging Florida’s adoption statute, concluded with a startling victory for those opposed to the adoption ban. The Florida trial court held in Seebol v. Farie that, “the state’s ban on adoptions by gays and lesbians was an impermissible infringement on the rights to privacy, equal protection, and due process of law, and thus constituted a violation of the state constitution.” This case was the first of its kind—and the last—in which the court required the state to demonstrate a compelling argument to justify its law barring gay and lesbian people from adopting. In Seebol v. Farie, the court found no evidence supporting the state’s contention and ruled the ban unconstitutional.

Although the Seebol case was never appealed, it never truly took root either. Two years after Seebol, a Florida appellate court dismissed a complaint by a gay couple on the grounds that the plaintiffs failed to prove that the legislature’s policy prohibiting gay men and lesbians from adopting was unconstitutional. The appellate court verdict defeated the earlier decision held in the Seebol trial and effectively reversed the trial court’s opinion. All this was done with the appellate court applying the most obsequious and least rigorous test for interpreting legislative policy. The court then concluded that a reasonable person could disagree with regard to the issue and encouraged legislators to reevaluate possible solutions.
Lofton et al., v. Kearney et al.

In 2001, the Florida judicial system tackled one of the longest and highest profile cases since the gay adoption ban was implemented. The case of *Lofton v. Kearney* challenged the long standing adoption policy by arguing that, “...Florida Statute 63.042(3) (homosexual adoption provision) which prohibits adoptions by homosexuals impermissibly infringes on the Plaintiffs’ federal constitutional right to privacy, intimate association and family integrity and violates the Due Process Clause as well as the Equal Protection Clause of the Constitution.”

Eight years would pass from the first trial proceeding until the U.S. Supreme Court weighed in on the *Lofton* case. The dispute began in earnest when several Florida residents independently discovered they were ineligible to adopt children. The plaintiffs included Steve Lofton, Doug Houghton, Timothy Arcaro, Wayne Smith, Daniel Skahen and two foster children identified only as John Doe and John Roe.

Lofton, a registered pediatric nurse and long-time certified foster parent, submitted an application to adopt one of his foster children. The child, known only as John Doe, tested positive for HIV as an infant, but successfully sero-converted during infancy and no longer tested positive for the virus. With a clean bill of health John Doe became free for adoption and child welfare services began searching for a suitable family to adopt him. When Lofton, Doe’s foster care provider for over 10 years, submitted an application to adopt the boy, he learned that he was ineligible to adopt due to his sexual orientation as a gay man.
Douglas E. Houghton, the second plaintiff, was a clinical nurse and foster care provider in the 1990s. While working in the children’s clinic in a Miami hospital Houghton often cared for children who were neglected and sometimes abused by their biological parents.

In 1995, an individual he knew well approached Houghton; it was the father of a young boy named Oscar. The man was homeless and wanted Douglas to care for his son. Houghton immediately agreed to take Oscar home and one year later became the boy’s legal guardian. Although Houghton was legally Oscar’s caretaker, he felt that the only way to assure the boy that he was not unwanted was to obtain an adoption. When Oscar’s dad argued to terminate his parental rights, Houghton began the process of adoption. 7

As Oscar was not in the custody of the Department of Children and Families (DCF), Florida state laws required Houghton to file an adoption petition in the Circuit Court for the Eleventh Judicial Circuit of and for Miami Dade County. Before filing the petition, Houghton was legally required to receive a favorable preliminary home-study evaluation. 8 During his preliminary home study review, Houghton learned that, but for his homosexual orientation, he would receive a favorable home-study review. However, because he was gay, Houghton was excluded from filing an adoption petition for Oscar in the circuit court.

The other plaintiffs, Wayne Larue Smith and Daniel Skahen, became licensed foster care providers in January 2000 after successfully completing a required 10-week course. In short order, they cared for three children who were not free for adoption. In May 2000,
both Smith and Skahen submitted at-large adoption applications with DCF (at large adoption applications do not specify any particular child). As required on the application, both men truthfully indicated that they were gay men. Within two weeks, the men received notices from DCF stating that their applications were turned down based on sexual orientation.

**Trial Court**

On May 26, 1999, the Lofton plaintiffs initiated legal action. At trial, the state argued that Plaintiff Lofton did not have standing to bring the legal action because his adoption application was rejected based on the fact that he failed to complete it (he refused to answer whether or not he was a homosexual) and not because of his sexual orientation. Yet throughout the case, the defendants conceded that Lofton’s application was rejected because of his homosexuality. The state conceded, however, in answering the plaintiffs Amended Complaint that Lofton’s application was denied, “in the course of enforcing Florida Statute Section 63.042(3).”

In analyzing of the case, the court addressed fundamental rights to familial privacy, intimate association, family integrity, and the due process clause. Lofton and Houghton defended their position by emphasizing fundamental liberty interests. The plaintiffs argued, “[T]he critical core of this liberty interest is the emotional bond that develops between family members as a result of shared daily life irrespective of the existence of a blood relationship.” It was apparent to the court that emotional bonds were present in both the Lofton and Houghton households; however, the existence of these bonds did not
intrinsically grant the men any fundamental rights. The court maintained that the Constitution was designed to protect "only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family."\(^{10}\)

When deciding the issue of Equal Protection under the Fourteenth Amendment, a court must determine the level of scrutiny to be applied to the party involved. For *Lofton et al.*, the court determined that the rational basis test applied. At this level of scrutiny the statute "is granted a strong presumption that it is reasonably related to a legitimate government interest, and, therefore, valid under equal protection analysis."\(^{11}\) The court concluded that the statute was reasonably related to a legitimate government interest.

*Eleventh Circuit Court of Appeals*

During the first trial, the district court granted summary judgment to Florida over the equal protection and due process challenge. The plaintiffs had one of two options; they could accept the trial court decision or appeal to the Eleventh Circuit Court. They chose the latter. When the decision was made to appeal the court ruling, the plan of attack was upgraded to include empirical research representing successful gay and lesbian families (during the first trial the plaintiffs chose to exclude this type of research). In *Lofton et al.*, *v. Secretary of the Department of Children and Family Services* 99-10058-CV-JLK, the Eleventh Circuit Court of Appeals was tasked with the job of deciding "[W]hether Florida Statute 63.042(3), which prevents adoption by practicing homosexuals, is constitutional as enacted by the Florida legislature and as subsequently enforced."
The principal argument on appeal was very similar to the first with one significant distinction; the Supreme Court had issued a ruling in *Lawrence v. Texas* 539 U.S. 123 S. Ct. 2472(2003). *Lawrence v. Texas* recognized the fundamental right to private sexual intimacy and overturned all remaining laws in the country that criminalized sodomy between consenting adults. With a U.S. Supreme Court decision that essentially ruled that state and federal agencies have no place in Americans’ bedrooms, the Lofton plaintiffs gained additional ammunition. As stated in the legal briefs filed with the 11th Circuit Court of Appeals, “[A]ppellants argue that the Supreme Court’s recent decision in *Lawrence v. Texas*, 539 U.S. __, 123 S. Ct. 2472(2003), recognized a fundamental right to private sexual intimacy and that the Florida statute, by disallowing adoption by individuals who engage in homosexual activity, impermissibly burdens the exercise of this right.”

The appellate court chose to maintain the rational basis standard set forth in the trial court, and emphasized that the state has a legitimate interest in promoting a stable and nurturing environment for the children. It appeared as though the court did not believe that the best interests of the children would be served by overturning the trial court decision. “The adage that ‘the hand that rocks the cradle rules the world’ hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children. It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for education, socializing and preparing its future citizens to become productive participants in civil
society, particularly when those future citizens are displaced children for whom the state is standing *in loco parentis.*”

The appellate court upheld the trial court’s ruling, finding that the state’s reason for aspiring to place children in the ideal family structure was a rational justification for its gay adoption ban. In the closing paragraphs, the Eleventh Circuit Court suggested that the issue of gay and lesbian adoptions would be more effectively fought in the legislative branch. The plaintiffs then asked the entire 11th Circuit Court (which consisted of 12 judges) to review the case, but the court denied their request by a vote of six to six. Finally, the *Lofton* plaintiffs asked the U.S. Supreme Court. The case was scheduled to appear on the court docket in January 2005. In a disappointing conclusion, the Supreme Court chose not to review the case, and the long battle over the right of gay and lesbian people to adopt came to an abrupt end.

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6. Ibid.,

Florida Statute 63.112(2)(b).

Ibid.,

Ibid.,


Ibid.,

Conclusion

Upon the passage of 63.042(3) twenty-eight years ago, lead Senate sponsor Curtis Peterson acknowledged, “We’re trying to send [homosexuals] a message. We’re really tired of you. We wish you’d go back into the closet.” Although public sentiment has changed since 1977, the role of today’s legislative policies attests to the lack of sincerity influencing government agendas.

To change public policy, activists have three options: they can attempt to sway the legislative ideology through appeal to common sense, fight the ban in the courtroom, or go straight to the top and request executive intervention (although the executive branch cannot overturn a law, legislators can be persuaded by a gubernatorial request). The judicial system may have sidestepped the issue of gay adoption for the time being but future cases will undoubtedly surface, bringing with them new legal challenges.

In light of recent judicial resolutions those opposed to Florida’s gay adoption ban have now shifted their focus to the legislative arena. Legislators have an opportunity to repeal the statute, but any argument in favor of repeal must be strong and convincing, and include empirical data. Various organizations throughout the state (Equality Florida, National Center for Lesbian Rights, and the Child Welfare League of American just to name a few) have come together to exert their collective powers in an effort to make Florida’s legislative branch account for the continued support of such an exclusionary policy.
Whether continued in the judicial, legislative, or the executive branch, the best interests of the children should be the end goal. With the number of children entering the foster care system rising, state officials are left with very few options, one of which is recruiting more qualified adults who want to raise a child. If the state of Florida were to follow the CWLA's *Standards for Adoption Services* (1988), perhaps the foster care system could be salvaged. The standards read in part,

> All applicants should have an equal opportunity to apply for adoption of children, and receive fair and equal treatment and consideration of their qualifications as adoptive parents, under applicable law.

> Applicants should be fairly assessed on their abilities to successfully parent a child needing family membership and not on their appearance, differing lifestyle, or sexual preference.

> Agencies should assess each applicant from the perspective of what would be in the best interests of the child. The interests of the child are paramount.

> Sexual preference should not be the sole criteria on which the suitability of adoptive applicants is based. Consideration should be given to other personality and maturity factors and on the ability of the applicant to meet the specific needs of the individual child.²

The persistent support given to Florida’s gay adoption ban remains a puzzling piece of legislation. With the great need for long-term residence and qualified parental figures policy makers need to be seeking out worthy adoptive parents rather than supporting a policy of exclusion based solely on sexual orientation. With a complete lack of empirical evidence supporting the contention that children living in gay and lesbian households are at higher risks of developing social problems and/or psychological disorders legislators should be reevaluating the ban, but they remain solidly behind the statute.
The future of Florida’s ban on homosexual adoptions remains unclear. The state’s child welfare system, whether public or private, is in dire need of renovations. With more children entering the system than are leaving it, the problem of placement will continue to plague the Sunshine State. Proving that same-sex households are just as successful as traditional heterosexual homes will expose Statute 63.042(3) for what it is, a policy of blanket exclusion based on personal bias.


Appendices
### Appendix 1

#### States

<table>
<thead>
<tr>
<th>States</th>
<th>Adoption Policies</th>
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<tbody>
<tr>
<td>Ohio</td>
<td>Only state to specifically state that single lesbians and gay men are not barred from adopting.</td>
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<tr>
<td>California</td>
<td>States that presently allow adoptions by gay couples or by partners of gay parents.</td>
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<tr>
<td>Connecticut</td>
<td>States permit courts statewide recognition of second parent adoptions.</td>
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<td>Illinois</td>
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<td>Massachusetts</td>
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<td>Vermont</td>
<td>States that explicitly permit joint adoptions by gay and lesbian couples.</td>
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<td>Washington D.C.</td>
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<td>California</td>
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<td>Washington D.C.</td>
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<tr>
<td>Florida</td>
<td>Only state to expressly prohibit adoption by homosexuals.</td>
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Appendix 2

Florida's Department of Children and Family Services
Current listing for Adoptable Children (2005)

Current Numbers for Children Awaiting Adoption (DCF 2005)

Source: Florida Department of Children and Families, accessed at:
http://www.dcf.state.fl.us/adoption/.
Appendix 3

As of 2002 the number of kids entering foster care was three times the number of adopted children leaving the system during the entire year. Here are some more statistics on our child welfare system:

- 568,000 kids are in foster care nationwide.
- 117,000 of these kids are waiting to be adopted.
- 46,000 kids are adopted from public child welfare agencies yearly.
- In the six months between Oct. 1, 1998 and March 31, 1999, 143,000 kids entered foster care.

Appendix 4

Eligible Adoptive Applicants (1999)

Appendix 5

Comparative Studies: Traditional vs. Alternative Households.

Socialization

Homosexual (Lesbian Two-Parent) vs. Heterosexual Households- Flaks et al., study found that children of lesbians and children of heterosexuals were equally healthy in both psychological well-being and social adjustment.

Eleven studies were conducted to interpret socialization skills for adults coming from out-of-home care; of those eleven four Quinton et al. [1986], Russell [1984], Cook [1992], and Festinger [1983], provided comparative data. Three out of four found social support to be lacking, Festinger [1983] found evidence which contradicted the other studies.

Educational Performance

Single Parent vs. Two Parent Homes- National surveys found that children raised in single-parent homes do perform as well in the classroom as their counterparts in two-parent homes.

Foster Care- McDonald et al. [1985] provided 29 studies from various countries regarding foster care and childhood development. Several studies found much higher drop out rates in children who reside in foster care; secondary schooling is rare and almost never completed.

Division of Labor

Lesbian vs. Heterosexual Parents- Chan et al. found that division of labor and decision-making were evenly divided among lesbian and heterosexual couples. According to the Chan et al., study, “The lesbian couples placed a high value on an equal distribution of household decision-making tasks, and were generally pleased with their current family situation. The heterosexual mothers generally wanted their husbands to take more responsibility for childcare, but the fathers preferred leaving this to their wives.”

Psychological Effects

Foster Care- “[I]t is difficult to say anything beyond the general finding that adults formerly in care as children seem as adults to exhibit problems in the area of mental health. They were more likely to be referred to and use psychiatrists than were adoptees or persons in the general population.”

1 Chan et al.,
2 It is difficult to say anything beyond the general finding that adults formerly in care as children seem as adults to exhibit problems in the area of mental health. They were more likely to be referred to and use psychiatrists than were adoptees or persons in the general population.
Sources:
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1 Eric Ferrero and others, To High a Price: The Case Against Restricting Gay Parenting, (New York, American Civil Liberties Union, 2002), 38.

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Title 6 CIVIL PRACTICE AND PROCEDURE, CHAPTER 63. Adoption, 63.042 Who may be adopted; who may adopt, LEXISNEXIS® Florida Annotated Statutes Copyright © 2004 Matthew Bender & Company, Inc.

