Adult Sexuality and Risks of Liability for Harm in Adoption or Foster-Care Placement

by Lynn D. Wardle

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I. Introduction

The recent series of lawsuits against the Roman Catholic church and its officials alleging sexual molestation of children and adolescents by priests serves as an unmistakable reminder that persons who hold fiduciary positions of trust working with children may incur substantial liability for themselves and the organizations in which they serve if the children entrusted to their care are sexually molested. These lawsuits have been very expensive, resulting in “settlements

1Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, Utah. The helpful research assistance of William J. Perkins, R. Spencer Macdonald, and Justin W. Starr is gratefully acknowledged.

2While the Catholic Church has been the target of greatest attention recently, the problem of sexual abuse by clergy cuts across denominational lines. O’Reilley & Strasser, supra note __, at 34 (“The Presbyterian Church U.S.A. estimates that 10 to 23 percent of clergy nationwide have engaged in inappropriate sexual behavior or sexual contact. Since 1991, at least four rabbis of major congregations have lost their positions due to claims of sexual relations with congregation members. Buddhist teachers have been accused of exploiting women at Zen communities in the United States. The United Methodist Church reported in a 1990 survey that nearly 23 percent of the laywomen had been sexually harassed, 17 percent by their own pastor and 9 percent by another minister. In a survey of evangelical ministers, 23 percent admitted to engaging in sexually inappropriate conduct, and 12 percent admitted to having sexual intercourse with someone other than their spouse.”)

3See also William Lobdell and Christine Hanley, California; Child Porn Tests Rules in Diocese; Allegations against two Orange County priests don’t -- yet -- fall under a firing policy triggered only by sexual abuse that's physical, L.A. Times, July 30, 2003, at B1 (2003 WL 2423980) (victim of sex abuse won $5.2 million settlement from Los Angeles and Orange County dioceses in 2001); Lance Pugmire, Diocese Will Pay Record Settlement, L.A. Times, July 2, 2003, at B1 (2003 WL 2417789) (“Roman Catholic Church officials in San Bernardino said Tuesday they will pay a $4.2-million settlement to the victims” - two alter boys molested by priest); Elizabeth Mehren, L.A. Times, May 23, 2003, at A16 (2003 WL 2407144) ($6.5 million
of about one million dollars per significant case,” according to one knowledgeable Catholic attorney with years of experience representing the Catholic church. The record $85 million settlement earlier this month of some pending suits in the Boston area bring the total amount the Boston diocese alone has paid or agreed to pay to over $106 million in a period of less than 10 years to resolve claims of sexual abuse inflicted on adolescents and children by priests. It is very

settlement of sexual abuse claims in New Hampshire makes a total of $15.45 million paid there in 18 months); Rachell Zoll, Church Abuse Costs Mount, L.A. Times, June 14, 2003, at B24 (2003 WL 2412416) ($25.7 million settlement by Archdiocese of Louisville with 243 victims of sexual abuse by priests); Editorial, Church in Murky Waters, L.A. Times, Dec. 3, 2002, at B12 (2002 WL 103221797) (“In Dallas . . . a jury in 1998 awarded almost $120 million to 11 victims of sexual abuse by a single priest. The archdiocese dropped the bankruptcy threat after the alleged victims settled for $31 million.”); Fred Bayles, Abuse victims say it's not about the money; 'The pain, the guilt, the agony' remain after settlements, USA Today, Sept. 10, 2003, at D.08 (2003 WL 5318568) (describing, in addition to some of the settlements and judgments noted in this footnote, $10 million paid by Boston diocese to sex abuse victims of priest John Geoghan; $18 million paid in 1998 by Lafayette, Louisiana diocese to families of 35 boys and girls who accused former priest Gilbert Gauthe of sexual abuse; $25 million paid in 1995 by the Santa Fe, New Mexico diocese and its insurers, to victims of sex abuse; Manchester, N.H. diocese paid estimated $15.5 million to settle 176 cases; Tucson, Arizona diocese paid estimated $15 million in January 2002 to settle 11 lawsuits; $15 million paid in Bridgeport, Connecticut, in 2001 to settle claims by 24 people who alleged abuse by six priests.); James T. O'Reilly & Joann M. Strasser, Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues, 7 St. Thomas L. Rev. 31, 33 (1994) (“Some $15 million was paid for one set of Louisiana molestation, and $7.7 million in a settlement for twenty-five victims of one former priest. . . . A 1991 jury verdict of $2.7 million punitive damages against a diocese was an early landmark, according to plaintiffs' lawyers who have begun to specialize in this area of torts. Another verdict for $1.5 million was reported in a 1994 Pennsylvania case. Claims of a lesbian nun's multiple molestation of a young postulant led to a $3.7 million lawsuit against the Sisters of the Holy Family.”).


credibly (I would say conservatively) estimated that all totaled, the Roman Catholic Church
(through its various dioceses, who are organized and are sued independently) has paid or agreed
to pay in the past 20 years over $1 billion to settle claims or judgments because of the sexual
abuse of children and youth.6 And the claims continue to pour in. For example, just five months
ago (in April 2003) lawsuits seeking a total of $1.5 billion in compensatory and punitive
damages were filed against the Catholic diocese on Long Island, New York (Rockville Centre)
by nearly three dozen people who claim they were victims of sexual abuse by priests.7 The
General Counsel for the National Conference of Catholic Bishops was quoted earlier this year as
stating that “about a 1,000 people” have asserted sexual abuse claims against the Catholic
Church in the past year alone.8

Similar foster care scandals and lawsuits also provide state and private adoption agencies
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according to secret annual reports prepared by church officials that were made public
yesterday.”).

6 O’Reilly & Strasser, supra note __, at 32 (states that the Roman Catholic dioceses in
America paid “more than $400 million in legal and medical costs because of sexual misconduct”
between 1982 and 1994, and cites estimate that the total costs “could hit $1 billion by the end of
the decade [of the 1990s].” Id. at 33; see also Rachell Zoll, Church Abuse Costs Mount, L.A.
Times, June 14, 2003, at B24 (2003 WL 2412416) (“Estimates of the amount that dioceses have
paid to abuse victims in the past two decades go as high as $1 billion.”); Elizabeth Mehren,
Scandal Shaking Catholicism to Core Clergy: Pedophilia crisis is spreading throughout the
WL 2460739) (“In 20 years, it has been estimated that the church already has paid out between
$600 million and $1.3 billion to sexual abuse victims.”);

7 Associated Press, N.Y. Diocese Faces Suits Seeking $1.45 Billion, L.A. Times, April 15,
2003, at A22 (2003 WL 2398760) (one of the suit seeks $100 million in compensatory and $100
million in punitive damages; another seeks $1 billion in punitive damages, $100 for pain and
suffering, and $50 million for special damages).

2412416) “In the past year, about 1,000 people have come forward with new [sexual abuse]
allegations against dioceses, according to Mark Chopko, general counsel for the U.S. Conference
of Catholic Bishops.”).
and personnel with notice of their potential liability for damages because of sexual abuse of children who came under their responsibility. Newspapers are filled almost daily with stories of children sexually abused in foster care. 9 Even in Utah children in foster care have been subject to sexual abuse.10 The long, continuing history of abuse of children in the foster care system is a constant reminder that government and private agencies and well-meaning personnel engaged in laudable, endeavors intended to help children in need of protection may cause those very children to suffer traumatic injury when they placed children in dangerous environments or with exploitative adults.11

9See supra note __; Rene Stutzman, Audit Exposes Flaws in Foster Care, Orlando Sentinel, March 31, 2002 (internal audit shows state agency cannot handle 30% of abuse and neglect cases; sexual abuse of foster children found in five confirmed cases and possibly 12 other cases in four-county area in Florida); Perspectives, Exposed weaknesses; Changes are required to guard against abusive guardians, Sarasota Herald-Tribune, May 25, 2003, at F2 (children placed in foster care with uncle who had 9 arrests, five for lewd and lascivious exhibition on a child); Susan K. Livio, Fed audit likely to affirm the sloppiness, (Newark) Star-Ledger, April 15, 2003 (after learning that adult son living in home of foster parents had history of sexual abuse, state removed two adopted children but left two foster children; and in another case 16-year-old son sexually assaulted two foster children); see also supra note __.

10O’Neal v. Division of Family Services, 821 P.2d 1139 (Utah1991) (jury verdict for man who was sexually molested as a teenager by the foster father with whom he was placed by DFS overturned because of statute of limitations). See also Ex-ward of state sues for $6.7 million, Deseret News (Salt Lake City, Utah), Feb. 7, 1980 at 14A (woman plaintiff in federal court suit against Utah state and county officials alleges that while she was in foster care with “Jim and Mary Roe,” her foster father subjected her to forcible sexual intercourse and other forms of sexual abuse; that while she was in the care of another woman who ran a ranch and farm for wards of the state, she was “continuously subjected to forcible sexual intercourse and other forms of sexual abuse” by the woman’s husband, her retarded son, and other foster children, and that later the state had her involuntarily sterilized). *

11U.S. Department Of Health and Human Services, Administration for Children & Families (hereinafter “HHS/ACF”), Child Maltreatment 2000 <http://www.acf.hhs.gov/programs/cb/publications/cm00/figure5_2.htm> (seen Sept. 23, 2003) (foster parents are perpetrators of 0.7 percent of child maltreatment victims and 1.2 percent of child fatality victims; another 2.6% of the victims had been in foster care but had been returned to their homes; 1,200 children died of abuse or neglect in 2000). The Department of Health and Human Services reports that in 2000, 937 perpetrators of physical abuse and 424 perpetrators of
Recent decisions approving “second-parent” adoptions by same-sex partners and other adoptions by same-sex couples (which collectively will be called “adoption by same-sex couples” in this paper) call attention to growing numbers of children who are placed with or approved for adoption by adults actively involved in ongoing homosexual relations. This paper reviews in Part II the lessons about liability that adoption agencies and personnel might learn from the recent Catholic Church child sex abuse cases and from foster care sex abuse cases. In Part III, the paper presents general principles of adoption agency and personnel liability for sexual abuse of children placed for adoption. Application of those general principles to specific context of adoption of children by same-sex couples or partners requires some care, sensitivity, and courage because it raises some delicate issues.

Part IV discusses the general context – the growing movement for allowing same-sex couples and partners to adopt children. Public and scholarly opinion is noted (showing that public opinion the United States is much supportive of legalizing adoption by same-sex couples...
than in Europe), perhaps due to the one-sided barrage of support for same-sex adoption by legal writers in America. The status of the law (statutes and appellate case determinations) concerning the legality of same-sex couples adopting is next reviewed. Special attention is paid to the decision last month by the California Supreme Court in *Sharon S. v. Superior Court*, 73 P.3d 554 (2003), the latest state appellate court ruling that interprets adoption laws as allowing “second-parent” adoption by the same-sex partner of the biological parent of a child. The majority opinion in *Sharon S.* is critiqued; the failure of the court to even consider the potential risks to children is disappointing, albeit consistent with the overall analytical nonchalance of the majority.

Part V suggests how the general principles of adoption agency and personnel liability for sexual abuse to children they have placed for adoption require careful investigation and consideration of special potential risks in the context of adoption of children by same-sex couples or partners.

The state and its agents have a heavy *parens patriae* duty to act in the best interests of children and to protect them from danger, when they come under their supervisory powers in adoption cases. Legal duties are imposed by common law and also created by statute. Private individuals and agencies who act for and with the authority of the state in protecting children in adoption placement also assume these significant common law and statutory duties to act in the best interests of children without negligence. Violation of these fiduciary duties to children can result in terrible harm to children and lead to serious legal claims against state and private placement agencies, personnel, and agents. Substantial legal liability and monetary damages may be imposed upon state and private placement agencies, personnel, and agents as a result of their negligent or incompetent investigation, placement, and supervision.
Placing children for adoption with adults who are or have been involved in extramarital sexual activity involves special considerations by adoption agencies because of unique conditions associated with nonmarital sexual relationships. Placing agencies and personnel reasonably should be aware of those conditions and potential risks, and should investigate, place and supervise with appropriate thoroughness, prudence and care, for the sake of the children.

II. The Lessons of the Catholic Church and Foster Care Sexual Abuse Scandals for Adoption Agencies and Personnel

A. Institutional Liability for Abuse of Children by Clergy

The lawsuits against the Catholic Church dioceses because of sexual abuse of children and adolescents by priests provides a clear warning to state and private child placement agencies to be vigilant to protect children in adoption and foster care placements because main allegations that have led to such extraordinary liability could apply to adoption agencies. Those allegations include the failure of the institutions to screen out abusers, failure to seek or to respond reasonably to information that would have shown that a particular individual who was given a position of power and trust over children posed or had a high potential to pose a risk to the children of sexual abuse, failure to supervise, and that the institutional systems fostered an attitude that valued the reputation of the institution over the welfare of the victimized youths. For example, in the lawsuits filed in April 2003 against the diocese on Long Island, New York

12 Nicholas R. Mancini, Comment, Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church, 8 Roger Williams U. L. Rev. 193, 194 (2002) (“[T]wo main themes run through almost every allegation: 1) failure on the part of Church hierarchy to ‘react vigorously when clergy are accused of sexual misconduct;’ and 2) violations of the ‘religious leader's position of trust and abuse of the spiritual leader's power over the victim.’”).
(Rockville Centre) seeking nearly $1.5 billion in damages, the plaintiffs assert that the Church “did nothing to protect victims from the abuse and sought to protect its own reputation rather than comfort the victims.”13 As one of the plaintiffs’ lawyers put it: “‘This is very much about the church’s refusal to accept responsibility.’”14

A review of the liability of the Catholic Church for sexual abuse of children and adolescents by priests provides a useful paradigm for the potential liability of state and private agencies for the sexual abuse of children they placed for adoption by the adoptive parents or their adoptive parents’ friends. Sexual abuse lawsuits against the Catholic church and its priests have generally rested upon tort principles of negligence (in hiring, screening, placing, training, supervising, or responding to information), intentional misconduct, and respondeat superior principles.15 One of the recurrent themes of clergy sex abuse claims against the Catholic Church is “failure on the part of the religious hierarchical organization to react vigorously when clergy are accused of sexual misconduct.”16 Another recurrent theme is “the violation of the . . . position of trust, and abuse of the [defendant’s] power over the victim. “‘Sexual exploitation is

13 Associated Press, N.Y. Diocese Faces Suits Seeking $1.45 Billion, L.A. Times, April 15, 2003, at A22 (2003 WL 2398760) (one of the suit seeks $100 million in compensatory and $100 million in punitive damages; another seeks $1 billion in punitive damages, $100 for pain and suffering, and $50 million for special damages).

14Id. See also Diane Urbani, Diocese asks court to dismiss abuse suit, Deseret News, April 1, 2003, at B01 (2003 WL 17215084) (Catholic diocese in Salt Lake City, Utah sued for $80 million by two men who as boys in 1970-71 were repeatedly assaulted by a priest at a Catholic high school, and that even though multiple complaints were made about the priest’s inappropriate behavior “school officials appeared to be more concerned about protecting the reputation of Rapp and the Oblate order rather than the safety of students.”).


16O’Reilly & Strasser, supra note __, at 36.
not as much about sex as it is about the abuse of power . . .” 17 Vicarious liability of an institution for the sexual misconduct of its agents and personnel is often claimed under the theory of respondeat superior. “This doctrine is a long-recognized tort theory under which institutional supervision and control is a premise for allocating the risk of damages to the institution. Under this theory, the [institution] is liable for the intentional torts of the employee if the employee was acting within the scope of employment, or if other conditions of principal-agent relationships are satisfied. The liability is least likely to attach where the employee violates the employer's rule in committing the tort[, or if the institutional hierarchy] lacked notice of the misconduct.” 18 Respondeat superior claims fail when courts find the abusive behavior was not foreseeable. 19 Liability for the sexual abuse inflicted by a volunteer “generally depends on the [institution’s] right to control the activities of the volunteer.” 20 Claims that the institution itself was negligent in hiring, investigating, and supervising are often asserted. 21 In additional to negligence claims, allegations of “willful indifference or deliberate lack of concern for misconduct of a [person] with past experience of abuse are frequently asserted.” 22 An institution “‘may be held liable for acts beyond the scope of employment because of its prior knowledge of the dangerous tendencies of its employee,’ or its failure to adequately investigate

17 O’Reilly & Strasser, supra note __, at 36.
18 O’Reilly & Strasser, supra note __, at 39.
19 O’Reilly & Strasser, supra note __, at 39.
20 O’Reilly & Strasser, supra note __, at 42.
21 O’Reilly & Strasser, supra note __, at 43.
22 O’Reilly & Strasser, supra note __, at 43.
the employee.” Under the “apparent agency” doctrine, the institution “is held liable for the actions of the employee if ‘the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or (the employee) was aided in accomplishing the tort by the existence of the agency relationship.’” Other theories of recovery against an institution for the sexual abuse inflicted by an agent or employee include statutory claims of sexual harassment, and RICO.

B. Insititutional and Employee Liability for Abuse of Children in Foster Care

The experience of liability of state and private agencies for sexual abuse of children in foster care provides further warning notice to adoption agencies and personnel. “[T]here is evidence that abuse is more prevalent in foster families than in the American population at large.” Numerous reported cases establish clearly that both public and private agencies and personnel may be held liable for placing children in foster care into unsafe environments or with persons who have high risk of causing harm to the children. Just this summer a jury in the Eastern District of Pennsylvania “awarded $2.8 million to an 11-year-old girl who was living in

23 O’Reilly & Strasser, supra note __, at 48.

24 O’Reilly & Strasser, supra note __, at 53.

25 O’Reilly & Strasser, supra note __, at 58-59. See also Mancini, supra note __, at 201-209 (reviewing RICO claims against the Catholic Church for conspiracy to protect priests who engaged in sexual abuse).


27 See, e.g., B. Scott Bortnick, Convicted Sex Offender was “Leading Double Life,” The Denver Post, Feb. 18, 2003, at B-04 (man convicted for sexually abusing two young men, one a neighbor, the other his foster son who had reported the abuse to a county social worker but no action was taken).
foster care when she was sexually assaulted at the age of 4 by a man whose criminal record
should have barred him from living in or even visiting the foster home."  

Earlier the City of Philadelphia had settled claims in the case against two city officials for $500,000. The plaintiff’s lawyer focused on showing that the foster parent and placing agency “either knew of should have known” that the boarder had a criminal record for sexual assault, and on the agency’s failure to immediately remove the child once the sexual assault was discovered (even though the perpetrator had already left the home). The San Francisco case of Thomas Bertinuson is another one that stands out. Bertinuson pled guilty to 51 counts of child molestation involving eight former foster parents, resulting in two lawsuits by former victims against the county; social workers were allegedly told by victims that Bertinson had engaged him in masterbation, but nothing was done. In San Diego, a foster father reportedly offered his foster son for sexual services to other men forced him to engage in sex act with men he met on internet chat rooms for gay men. One of Florida’s first single foster fathers and one of the state’s first bachelors to adopt, David Lindsey, adopted 11 boys before pled guilty to molesting three of his eleven adopted sons.


29 Id.


31 Gregory Alan Gross, Man is Arrested in Molest Case Tied to Internet: Foster Father of Boy is Also Held, San Diego Union-Tribune, June 23, 2000, B-6:7; B 8:1; B-1:2 (2000 WL 13972486).

32 Susan Spencer-Wendel, Judge: Molester Can’t Go Near Parks that Kids Use, Palm Beach Post, July 13, 1999, at 2B.
In *Babcock v. State*, the state foster care agency placed four young girls in foster care with their uncle-by-marriage (instead of other relatives) even though he had a discoverable (but not detected) criminal record including charges of forcible rape, sexual assault, and attempted rape; and over a two year period, starting before and ending long after formal placement, he sexually abused all four foster children (as well as his own daughter). The trial court held the agency and workers had absolute or qualified immunity, but the Washington Supreme Court reversed as to the state (the only claims appealed). Because the juvenile court had not ordered the actions complained of, and because the caseworkers controlled the flow of information, and allegedly did not reasonably investigate the uncle, the caseworkers were not entitled to quasi-judicial immunity or prosecutorial immunity; and were entitled to qualified immunity for foster care placement decisions, only if carrying out a statutory duty, according to procedures dictated by statute or superiors, and acting reasonably. However, “the immunities of governmental officials do not shield the governments which employ them from tort liability, even when liability is predicated upon respondeat superior.”

C. *Comparisons: The Duty of State and Private Child Placement Agencies and Personnel To Protect Children from Child Molestation*

The Catholic Church and foster care agencies generally have been held liable for (1) failure take reasonable steps to weed out potential abusers, (2) failure to train adults

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34809 P.2d at 150-152.

35809 P.2d at 155. Ironically, the plaintiff’s federal (§1983) claims were rejected by the Ninth Circuit which held that the caseworkers were entitled to absolute immunity. *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989).

36809 P.2d at 156.
working with children and minors not to abuse, (3) failure to institute procedures to prevent abuse by those in positions of trust working with young people, (4) willingness to look the other way and ignore evidence, (5) willingness to justify, to make excuses and to cover up incriminating information, and (6) the allegation that the institutional systems fostered an attitude that valued the reputation of the institution over the welfare of the victimized youths.

It is useful to compare and contrast adoption with foster care and with natural parenting with regard to liability when a child is abused. Placement of children in foster care and adoption are similar conceptually and practically, and many adoptions begin as foster care placements. It is well established in numerous state and federal cases that public child care agencies and personnel may be held liable for injuries suffered by children under their supervision or control who are placed into negligently screened, negligently prepared, or negligently supervised foster care placement. Of course, if the specific elements of the asserted claim are not established (in tort, usually duty, breach, causation, and damage), or if various defenses (such as statutes of limitations, governmental immunity, and policy discretion) are raised and not overcome, liability may be avoided or limited. But the principle of liability is well-established in foster care.

A key element of liability in foster care cases is that the institution is exercising some

37A cause of action for negligent investigation may also lie when children have been removed and separated from their parent for substantial time due to alleged negligence of agency personnel. Tyner v. State Dept. of Social and Health Services, 1 P.3d 1148 (Wash. 2000) (claim lies when children removed for four and one-half months; $201,000 judgment reinstated).


39See, e.g., Beltran v. State, 989 P.2d 604 (Wash.App. 1999) (Department of Social and Health Services was not liable in suit by mother of three children sexually abused in foster care by teenage son of foster parents because the plaintiff did not show that the foster parent was negligent); *
control of the child. That distinguishes many cases in which state agencies whose mission is to protect children have been exonerated from liability for abuse causes by natural parents. The most famous probably is *Deshaney v. Winnebago County*.⁴⁰ Four-year-old Joshua was severely beaten by his divorced, custodial father leaving him permanently brain damaged and expected to spend the rest of his life in an institution for the profoundly retarded. Through his guardian ad litem, Joshua (and his mother) sued the Winnebago County Department of Social Services and its employees, claiming that the department knew or reasonably should have known that he was the victim of child abuse, and that the agency and its workers violated his constitutional rights by not protecting him. The Supreme Court found that the state (and its agencies) did not have a constitutional duty to protect its citizens from harm and abuse, even if it was aware of such dangers. The Due Process Clauses of the Fifth and Fourteenth Amendments were intended to “protect the people from the State, not to assure that the State protect them from each other.”⁴¹ The Court acknowledged that when the State takes a person into its custody “the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”⁴² The Court also noted that it was quite possible that “by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.”⁴³ The Court also


⁴¹*Id.* at 196.

⁴²489 U.S. at 199-200.

⁴³489 U.S. at 201-202 (citing “Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984) (discussing ‘special relationships’ which may give rise to affirmative duties to act under the common law of tort).”).
noted in a footnote: “Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.” 44 Lower courts have used this footnote as a signal to allow §1983 claims when a child was in foster care. 45

Children who have been finally adopted may be out of the control of the state or adoption agency, but adoption usually involves a process taking some time and involving one or more home visits and/or evaluations by state or state-certified or agency-employed personnel. If abuse occurs during this process, the control nexus may exist sufficient to impose liability.

III. Potential Liability of State and Private Child Placement Agencies and Personnel When Children are Victims of Molestation in Adoption Placements

In general, the principles of tort and statutory liability discussed above in the context of clergy sexual abuse of children and sexual abuse of children in foster care apply to claims against adoption agencies and personnel arising out of the sexual abuse of children placed for adoption.

Most claims assert negligence, either of the agency directly or vicariously of an agent of the agency. The elements required to prove negligence are duty, breach of duty, causation, and damage.

The duty may be imposed by common law or by statute. The common law duties might

4489 U.S. at 201 n. 9.

45See Nicini v. Mora, 212 F.3d 798, 807 (3rd. Cir. 2000); Norfleet v. Arkansas Dep’t of Human Servs. 889 F.2d 289, 292 (8th 1993); Yvonne L. v. New Mexico Dep’t of Human Servs., 959 F.2d 883, 891 (10th Cir. 1992); Kara B. v. Dane County, 555 N.W.2d 630, 636 (Wisc. 1996).
arise under the *parens patriae* doctrine for state agencies, or under the *in loco parentis* doctrine for both state and private agencies. “Anytime the state assumes *parens patriae* role over minor child, then by definition, it owes a duty to that child.” Since private agencies are licensed and regulated by the state and perform state-delegated responsibilities, they also might be held to be acting in the *parens patriae* role. State and private adoption agencies have also been held to stand *in loco parentis* to the children who are relinquished to their supervision. One who stands in *loco parentis* assumes all the duties and responsibilities that a natural parent would owe to her child.

Often the duties of state agencies and agents are defined in the statutes creating the agencies, or in applicable lawfully-promulgated regulations. A leading adoption law treatise explains:

Licensing regulations and standards ordinarily require that agencies, before approving prospective adoptive parents for adoptive placement, conduct a thorough study of the prospective adoptive parents and their home. This preplacement home study serves several functions, two of the most important being to detect unsuitable prospective adoptive parents who have managed to get through the preliminary screening process and to determine the specific strengths


47See *In Interest of McAda*, 780 S.W.2d 307, 311 (Tex. App. 1989) (adoption agency that receives parental consent to adopt child stands *in loco parentis* to that child); *Drummond v. Fulton County Dep’t Family & Children Services*, 228 S.E.2d 839 (Ga. 1976) (county agency stands *in loco parentis* to child that it placed in foster care and has right to choose adoptive parents); *In the Interest of Baby Boy N.*, 874 P.2d 680 (Kan. App. 1994) (Kansas statute states that adoption agency stands *in loco parentis* to child relinquished to it).
and weaknesses of prospective adoptive parents which may make them particularly well-suited or ill-suited to meet the needs of certain children or categories of children.\textsuperscript{48}

For example, \textit{Adams v. Arizona},\textsuperscript{49} involved two sisters who sued the Arizona child protection agency (DES) and its employees for sexual abuse they experienced from their adoptive father. While the children were in foster care, Owen and Frances Crossman applied to adopt. Following investigation by the DES workers in 1980, the agency recommended the Crossmans be approved for adoption. The girls were placed with them pending termination of parental rights in 1981, and the adoption was finalized a year later. Mr. Crossman allegedly began fondling them shortly after they were placed with him, and that he had oral, anal, and vaginal intercourse with them three times per week since 1983. After they were removed, they sued alleging that the state was negligent in its investigation of Mr. Crossman because the DES investigator did not learn that Crossman had been sexually abused as a child; did not contact Crossman’s stepdaughter (even though they had her name and address) who was an adult at the time of the investigation, and who could have told them that during her teenage years she had been sexually abused by her stepfather; also a thorough home study would have revealed that Crossman began sexually abusing the two adopted girls soon after they were placed in his home (before the adoption was finalized). The court noted that the duty to investigate prospective adoptive parents was statutorily imposed on the DES and its employees, that the agency not only had to investigate before placement but within 90 days after placement and during the first year

\textsuperscript{48}Joan Hollinger, et al, eds. 2 Adoption Law and Practice, § 7.02[2][b].

\textsuperscript{49}916 P.2d 1156 (Ariz. App. 1995).
again, and that the plaintiffs’ allegations sufficiently claimed that the agency and personnel had not fulfilled their statutory duty.\textsuperscript{50}

On the other hand, after adoption is finalized the “duty” to investigate or supervise probably expires. For example, in Department of Health & Rehabilitative Services. v. L.N.,\textsuperscript{51} two girls were placed in foster care sometime after 1981 and adopted by the foster parents in 1984; in 1987 when it was reported that they were being abused by the natural older son of the adoptive they were removed. In response to the plaintiffs’ claim that the state agency “had a duty to supervise the adoptive home after the plaintiffs had been adopted” the court stated: “We know of no such duty, and can perceive no basis on which it can be said that HRS should have been conducting inspection visits of the adoptive home subsequent to the adoption.”\textsuperscript{52}

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\textit{Breach of duty} is primarily a factual matter, as distinct from establish duty which is a legal matter. The plaintiff must “adduce evidence of facts from which [the agency] knew, or in the exercise of due diligence should have known, that sexual abuse had occurred or that there was a risk of such abuse.”\textsuperscript{53}

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\textit{Causation} requires that the plaintiff establish both causation in fact and proximate cause. One of the most common tests for causation in fact is the “but for” test – that “the defendant’s conduct is a cause of the event if the event would not have occurred but for the conduct;

\textsuperscript{50} 916 P.2d at 1156-1157.

\textsuperscript{51} 624 So.2d 280 (Fl. App. 1993).

\textsuperscript{52} 624 So.2d at 281.

\textsuperscript{53} 624 So.2d at 281.
conversely, the defendant’s conduct is not a cause of the event, if the event would have occurred without it. 54 That usually is not hard to establish in the case of child sexual abuse at the hands of an adult with whom a child in state or agency care was placed for adoption. *

Proximate cause or “legal” causation focuses on foreseeability of harm. 55 It is sometimes said that the nexus between the act or omission of the agency and the injury received must be direct. For example, in Milburn v Anne Arundel County Dep’t of Social Services, 56 a father sued various public officials for injuries that his son sustained while in foster care. The Fourth Circuit noted that since the child had been placed in the foster care voluntarily by his natural parents and the State did not remove the child from his natural parents, the state did not restrain the child’s liberty nor was the child ever in state custody. 57 The court found that the state did not control the foster parents, and was not responsible for their actions. The state could not be charged with a deprivation of the child’s liberty interests if the state did not act to separate the child from the parents and if the state did not have custody of the child.

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Liability under statutes may exist apart from common law liability. For example, federal civil rights claims may be asserted. Under 42 U.S.C. § 1983 liability exists for any person who, 58

54 Prosser & Keeton on Torts, § 41 (W. Page Keeton et al., eds) (5th ed. 1984).

55 Haagen v. Department of Soc. & Health Ser., 980 P.2d 800 (Wash. App. 1999) (if caseworker gave incorrect information about a group home to parent and professional who placed child there, there may be proximate cause for subsequent death of child); L.D.S. Social Services Corp. v. Richins, 382 S.E.2d 607 (Ga. App. 1989) (agency not liable if foster parents not liable for death of child disciplined).

56 871 F.2d 474 (4th Cir.1989).

57 Id. at 476.
under color of state law, causes the plaintiff a “deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” Whether a private agency or personnel may be liable under § 1983 may depend upon whether the agency or employee is a “state actor.” Several courts, including state and federal courts in Utah, have held that private adoption agencies are “state actors” for federal civil rights claims. In *Milburn v Anne Arundel County Dep’t of Social Services,* the court rejected the plaintiff’s contention that foster parents were state actors when the natural parent had voluntarily placed the child in foster care. In *In re Williams,* the court held that foster parents are employees of the states for purposes of respondeat superior.

A number of federal courts have found that children under state supervision (to date, in foster care cases mostly) have a “liberty” interest in not being harmed by their caretakers. For example, in *Taylor v. Ledbetter,* the Eleventh Circuit Court of Appeals reversed the dismissal of claims against state and county employees under §1983 asserted on behalf of a girl who was physically abused by her foster mother so severely that she was put into a coma. The Eleventh Circuit ruled that the §1983 claim was actionable because the Fourteenth Amendment “liberty”

58 *Swayne v. L.D.S. Social Services*, 795 P.2d 637, 640 (Utah 1990) (church adoption agency was a state actor when it facilitated the termination of the father’s parental rights); *Swayne v. L.D.S. Social Services*, 670 F.Supp. 1537, 1544 (D. Utah, 1987). See also *Scott v. Family Ministries*, 135 Cal. Rptr. 430 (Cal. App. 1976) (private adoption agency was a state actor for establishment clause claim when it placed children based on the religion of the prospective parents; *Appeal of H.R.*, 581 A.2d 1141, 1164 (D.C. 1990) (private adoption agency is a state actor in terminating a parent’s rights as well as in placing children for adoption).

58 *871 F.2d 474* (4th Cir.1989).
61 *818 F.2d 791* (11th Cir. 1987).
interest included the right of children in foster care “to be free from the infliction of unnecessary pain . . . and the fundamental right to physical safety.”\textsuperscript{62} Likewise, the Seventh Circuit held in \textit{K.H. v. Morgan},\textsuperscript{63} that a girl’s § 1983 suit against state employees working for the Department of Children and Family Services properly asserted a violation of a constitutional right when the girl, had been placed in nine different homes within a four year time period, and due to the moves and alleged abuse by some of her foster parents, she needed to be institutionalized for psychiatric treatment. The constitutional right being claimed was a “negative liberty” under the Due Process Clause to be free from government oppression.\textsuperscript{64} Once the State removes a child from her natural parents, the state has the duty to protect that child, and, Judge Posner stated, failure to do so was like throwing Christians to the Lions.\textsuperscript{65}

While courts uniformly hold that a child that is taken by the state and placed in foster care has a constitutional right of protection and safety, the courts are split as to what standard of care the state must take in order to protect that right.\textsuperscript{66} It is clear that proving negligence is insufficient to be actionable under § 1983. One standard of care used by the courts is that of professional judgment. In \textit{Youngberg v. Romeo} the Supreme Court ruled that an individual who

\textsuperscript{62}Id. at 794. The court cited \textit{Youngberg v. Romeo}, 457 U.S. 307 (1982) in which the Supreme Court held that one who has been committed to state custody has a constitutional right to safety and upheld a mother’s§ 1983 claim against officials at a Pennsylvania institution for the mentally retarded after her son was involuntarily committed to that institution and suffered injuries that were both self inflicted and caused by others.

\textsuperscript{63}914 F.2d 846 (7th Cir. 1990).

\textsuperscript{64}Id. at 848.

\textsuperscript{65}Id. at 849.

was involuntarily committed to a state mental health institution could bring suit if his Due
Process rights had been violated due to a departure of professional judgment on the part of the
state employees.67 “The decision, if made by a professional, is presumptively valid; liability may
be imposed only when the decision by the professional is such a substantial departure from
accepted professional judgment, practice, or standards as to demonstrate that the person
responsible actually did not base the decision on such a judgment.”68

Some courts have applied the simple “professional judgment” standard to liability for
injury to a child in foster care.69 Other courts have added more exacting requirements. Several
have held that the state has no duty under § 1983 to investigate. For instance, the Seventh Circuit,
in Lewis v. Anderson,70 held that state officials who placed five siblings with an abusive foster
family could not be held liable under § 1983 unless they placed the children in the custody of a
foster parent “whom the state knows or suspects to be a child a abuser,”71 and the state could act
on the basis of information it is aware of, it has no independent duty of inquiry under § 1983.72

Some courts have narrowed the duty further and adopted a “deliberate indifference”

67457 U.S. at 322-23.

68Id. at 323.

69See Yvonne L. v. New Mexico Dep’t of Human Servs., 959 F.2d 883, 893-94 (10th Cir.

70308 F.3d 768 (7th Cir. 2002).

71Id. at 773 (emphasis in the original).

72Id. See also White v. Chambliss, 112 F.3d 731, 737 (4th Cir. 1997) (to be liable,
defendant must be placed on notice of danger and must ignore it). Cf T.M. ex rel. Cox v. Carson,
93 F. Supp. 2d 1179 (D. Wyo. 2000) (actual knowledge of foster parent’s potential for abuse it
not necessary to be liable under professional judgment standard.).
standard (originally applied to prisons) for children placed in foster care.\textsuperscript{73}

\textit{Defenses}

The most common defenses are expiration of the statute of limitations and governmental immunity. In the absence of waiver, governments enjoy sovereign immunity from suit by citizens. However, waiver is not uncommon. Generally only judicial and legislative officials enjoy absolute immunity. Executive officers usually have qualified immunity, and it is usually limited to officials who exercise “discretionary” not “ministerial” responsibilities. Historically, adoption agencies might have enjoyed “charitable immunity” but the scope of that immunity is much attenuated today.

Several courts have ruled that agencies and personnel have substantial immunity from suits alleging liability under §1983 for placing them in homes where harm occurs. The Ninth Circuit has held that absolute immunity applies in some cases, but the scope and status of that position is not entirely settled.\textsuperscript{74} The Eleventh Circuit has adopted a qualified immunity rule, but

\textsuperscript{73} \textit{Taylor}, 818 F.2d at 796 (if “a state official’s deliberate indifference is a substantial factor in denying” a child’s liberty interest, that state official “may be liable under section 1983.”); see also Doe v. New York City Dept. of Social Services, 649 F.2d 134 (2nd Cir. 1981); McCall v. Department of Human Resources, 176 F.Supp. 2d 1355, 1366 (M.D. Ga 2001); Roes v. Florida DCFS, 176 F.Supp.2d 1310, 1321 (S.D. Fla. 2001) (deliberate indifference requires “subjective knowledge of the risk of serious harm.”) Nicini v. Morra, 212 F.3d 798, 809-10 (3rd Cir. 2000) (in suit by person alleged abused in foster care, caseworkers will not be found liable unless their conduct shocks the conscience).

\textsuperscript{74} See Babcock v. Tyler, 884 F.2d 497, 503 (9th Cir.1989) (facts discussed \textit{supra} note __) (“Throughout this [dependency] process, caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties. The fear of financially devastating litigation would compromise caseworkers' judgment during this phase of the proceedings and would deprive the court of information it needs to make an informed decision. There is little sense in granting immunity up through adjudication of dependency, and then exposing caseworkers to liability for services performed in monitoring child placement and custody decisions pursuant to court
it did not protect the Florida child care agency or caseworkers in \textit{Roes v. Florida DCFS},\textsuperscript{75} In that case six children brought a § 1983 lawsuit against the Florida State DCFS and various social workers employed there alleging that they had been placed for foster care, then adoption in the home of the Lynches, even though Mrs. Lynch’s former husband had previously sexually abused her daughter and she was aware of it but did nothing about it; all of her natural children were eventually removed because of abuse, her son and his friend both of whom were arrested for a sex crimes with an underaged girl also lived with the Lynches, case-workers were aware of this yet placed the children with the family, where they were repeatedly sexually abused. The District Court held that qualified immunity protects “government actors performing discretionary functions from being sued in their individual capacities,”\textsuperscript{76} but it did not apply to government workers who “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\textsuperscript{77}

Statutes of limitations may cut of claims that are asserted long after the sexual abuse occurred. Because there are profound and powerful pressures which may create significant psychological and practical obstacles to prevent abused children and adolescents from bring claims against their abusers, tolling of statutes of limitations during minority, and “delayed discovery” doctrines may allow claims to be asserted after the statute of limitations time has

\textsuperscript{75}176 F.Supp.2d 1310 (S.D. Fla. 2001).

\textsuperscript{76}\textit{Id.} at 1317-18.

\textsuperscript{77}\textit{Id.} at 1318.
expired. For example, in *D.M.S. v. Barber*, a 19-year old man filed suit against an organization of foster homes alleging it negligently hired, supervised, and retained a man as a foster parent who had sexually abused him when he was thirteen years old and in his foster care, and also claimed that the agency was liable for his abuse under the doctrine of respondeat superior doctrine. After a lower court held the action barred under the statute of limitations, the Minnesota Supreme Court held that the delayed discovery rule applied and that the statute of limitations tolled until boy sexually abused by his foster father turned eighteen. The court noted that “a reasonable person under the legal disability of infancy is incapable of recognizing or understanding that he or she has been sexually abused. More fundamentally, children, unlike adults, lack the psychological, emotional, and sexual maturity necessary to fully appreciate the fact that they have been sexually abused.”

One of the most controversial defenses has been “consent.” In *Andrea L. v. Children & Youth Services*, 987 F.Supp. 418 (W.D. Pa. 1997), a fourteen year old girl, was taken into state custody and the placed in a foster home by a private agency that had a contract with the state. Andrea’s natural mother informed the agency that her daughter was sexually active and a later psychological report confirmed this information. Nevertheless, the agency placed the girl in a foster family that had a biological son that was seventeen years old. Andrea and the biological son had consensual sex and the Andrea became pregnant. The District Court rejected the § 1983

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78 *C.f., O’Neal v. Division of Family Services*, 821 P.2d 1139 (Utah 1991) (jury entered verdict for man who was sexually molested as a teenager by the foster father with whom he was placed by DFS; state supreme court overturned the judgment because the suit filed when he was 27 years old was after 4-year statute of limitations had expired and the mental incompetence and discovery rule exceptions were held not to apply).

79 645 N.W.2d 383 (Minn. 2002).

80 645 N.W.2d at 389-390.
suit against the state because the plaintiff failed to state a claim. The Court ruled that while the state had a duty to protect Andrea and to find a safe environment for her to live in, it did not have the responsibility of preventing her from participating in consensual sex. Since the plaintiff did not assert that her sexual relationship was brought on by abuse, force, or coercing, she did not state an actionable claim. The notion that a fourteen-year-old girl can “consent to have sex” must come as a surprise to prosecutors who enforce statutory rape laws, and the notion that the state does not have a duty to protect children from premature sexual behavior with older siblings in a foster care setting is very troubling.

IV. The Movement to Legalize Adoption by Same-Sex Couples

A. Public Opinion and Academic Preference

In the United States, there is a growing, vocal movement to legalize adoption by same-sex couples. There is strong support for the movement among legal intellectuals. For example, I did a survey of law review literature in 1997 and found that of forty-six articles, comments and notes published in American law reviews between 1990 and 1996 on the subject of adoption by same-sex couples or partners, all of them were supportive of and none of them opposed adoptions by same-sex couples, partners, or individuals engaged in same-sex relations.

Public opinion also is moving toward support of gay adoptions. Initially, there was little support for adoptions by gay couples. For example, a 1977 Gallup poll reported that 77% of persons surveyed responded that homosexuals should not be allowed to adopt children, while

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81 Id. at 422.

only 14% favored such adoptions.83 CNN/Time/Yankelovich surveys in 1992 put support for legally permitting homosexual couples to adopt was only 29% (compared to 63% opposed), and in 1998 support was 35% (compared to 57% opposed).84 However, in the past few years, support for adoption by gay couples has substantially increased. The Gallup poll conducted May 5-7, 2003, shows support for adoption by same-sex couples and partners is 49% compared to 48% opposition.85 Most other public opinion surveys in the past three years report similar results.86

By contrast, the Gallup organization’s European Omnibus Survey (EOS) showed strikingly different results based on interviews with over 15,000 persons living in 30 European countries in January 2003.87 The respondents were grouped into three categories depending on


86Karlyn Bowman, Attitudes About Homosexuality, supra at 24-25 (citing PSRA/Kaiser Feb. 7-Sep. 4, 2000 survey reporting 46% favoring and 47% adoption rights for gay spouses; PSRA/Newsweek poll of April 25-26, 2002 finding 46% favoring and 44% opposing adoption rights for gay spouses; ABC poll of Mar. 27-31, 2002 finding 47% favor and 42% oppose “homosexual couples should be legally permitted to adopt children;” but a couple of Harris Interactive polls in January 2000 reported support for female and male couples adopting children at 22% and 21% respectively, and opposition at 55% and 57% respectively). However, it is important to note that all of these surveys of public attitudes about allowing same-sex couples to adopt were taken before the June 27, 2003 Supreme Court ruling in Lawrence v. Texas, , and it has been reported that since the Lawrence decision there has been a “backlash” in public opinion against homosexual relations, including a drop in support for legalized same-sex unions, which had bee increasing in support prior to Lawrence. See generally Susan Page, Poll Shows Backlash on Gay Issues, USA Today, July 29, 2003 at <http://www.usatoday.com/news/washington/2003-07-28-poll_x.htm> (seen Sept. 22, 2003).

whether they lived in *Old Europe* (the 15 existing EU countries including Austria, Belgium, Denmark, France, Germany, Italy, Netherlands, Sweden, the UK, etc.), *New Europe* countries (the 13 countries seeking to join the EU, including Bulgaria, Cyprus, Czech Republic, Latvia, Lithuania, Malta, Poland, Romania, Turkey, etc.), or *Not-Aligned-with-EU* nations of Europe (Norway and Switzerland). The EOS reported that 55% of persons from the Old Europe nations opposed the authorization of adoption by homosexual couples throughout Europe and only 42% supported it; 57% of persons from Norway and Switzerland opposed such gay adoption; and in the nations of New Europe European 76% opposed legalization of adoption by same-sex couples, while only 17% supported it. In only four of the thirty countries of total Europe did a majority of those surveyed favor European legalization of adoption of children by same-sex couples, while in 26 nations (eleven of the liberal nations of Old Europe, both non-EU nations, and all 13 of the countries of New Europe), at least 50% of the population (up to 87% of the population) opposed legalization of adoption by same-sex couples throughout Europe.

Conventional wisdom has noted that one difference between European and American attitudes about same-sex families is that European countries are more liberal about permitting and giving equal legal recognition to many forms of adult consenting relations, but when it came to children, Europe (including the liberal Scandinavian countries) generally had more “conservative” regulation in the interests of children than America. The EOS partially validates that dichotomy because it shows overwhelming opposition to legalizing adoption by homosexual couples in Europe, compared to the wide-spread (albeit possibly thin) support for gay couples possession).

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88 Id.
Support for same-sex marriage was stronger in Europe, but showed the same difference between Old Europe and New Europe. On the question whether homosexual marriage should be allowed throughout Europe, the 15 affluent nations of Old Europe strongly were in favor, 57% to 39% opposed; both two non-aligned nations (also very affluent, post-industrial countries) were even more supportive (65% to 31%); but the New Europe nations were even more strongly opposed to same-sex marriage (70% to 23%). A majority of those polled in nine of the fifteen nations of Old Europe favored European same-sex marriage, and in only three of those nations (Greece, Portugal, and Italy) did the majority oppose legalization. Nearly two-thirds of those surveyed in both non-aligned nations favored legalizing same-sex marriage. In twelve of the thirteen nations of New Europe, majorities opposed legalization of same-sex marriage. Thus, of the total of 30 European nations surveyed, majorities in a majority - fifteen (15) - of those nations oppose European legalization of same-sex marriage, while majorities in only eleven nations favor legalization of same-sex marriage. Id.

B. The Estimates of Gay Adoptions and the Census Reports

It is not uncommon for advocates of new policies to assert that social conditions have changed and that the policy they advocate should be adopted to reflect the new social reality, or to suggest a “bandwagon” argument for a legal expression of social approval. This often involves the substantial inflation of numerical estimates. For example, sensational estimates that six million or fourteen million children are being raised by gay father or lesbian mothers have been widely cited (probably due in part to groups like the American Psychiatric Association unabashedly using them). Other popular figures for the number of children being raised by gay parents

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or lesbian parents include eight to ten million children, another estimate is six million children, and one million to six million children; another popular estimate is from 1.5 million to five million


91Betsy J. Walter, Resolving custody and Visitation Disputes when Couples End Their Relationships, 41 Fam. Ct. Rev. 104 (2002) (“It is believed that there are approximately 4 million gay men and lesbian women raising approximately 8 to 10 million children.”); Martha J. Stone, Comment, Tick . . . Tick . . . Tick: As Biological Clocks Wind Down, the Laws Governing Inheritance and Parental Rights Issues Heat Up, 43 S. Tex. L. Rev. 233, 238 n. 31 (2001) (“According to the American Bar Association, Family Law Section, there are four million gay and lesbian parents raising eight to ten million children.”).


93Kenneth L. Karst, Law, Cultural Conflict and the Socialization of Children, 91 Cal. L. Rev. 967, 971 (2003) (“Estimates for the number of American children living with at least one gay or lesbian parent range from one million to over six million.”).
lesbian mothers raising children.94 Most often, these figures are bandied about without any
discussion of how the figures were computed. They are often simply “proof-text,” fill-in-the-
blank numbers inserted for effect rather than accuracy.

Less frequently-cited estimates based on Census data are “a minimum estimate of
100,000 families with minor children headed by coupled gay and lesbian parents in the United
States, and more than 1 million children with one GLB parent.”95 While there are undoubtedly
many same-sex couples who are raising children, there is a huge difference between “significant”
as tens of thousands and “significant” as ten or more millions.

Estimates of the number of children being raised by same-sex couples also vary; popular
estimates are from 500,000 children to 5 million children,96 1.5 million to 4 million children,97

94D. Flaks, et al., Lesbians Choosing Motherhood: A Comparative Study of Lesbian and
that between 1.5 and 5 million lesbian mothers resided with their children in United States

95 See Marcus C. Tye, Special considerations for the Custody and Adoption Evaluator, 41
Demographics of the gay and lesbian population in the United States: Evidence from available
systematic data sources, 37 Demography, 139-154 (2000) (1990 Census analysis showed
28% of partnered lesbians and 14% of partnered gay men reported children in their households;
applying that figure to latest reports of number of same-sex couples gives 100,000 same-sex
families with children).

96 “The number [of children being raised in lesbian and gay families] in the United States
varies from one and a half million to five million depending on which study is consulted.” “See
Barbara Kantrowitz, Gay Families Come Out, Newsweek, Nov. 4, 1996, at 50.

97 Leslie Dreyfous, “Divorced” Lesbians and Gays Challenging Legal Definition of a
Parent, L.A. Times, Apr. 28, 1991, at A39 (estimating that at least 1.5 million, and up to 4
million, children nationwide are being raised by lesbian or gay couples.”) cited in Lin, supra
note __, at 740 n.5.
and 8 million to 10 million children.\textsuperscript{98} Again, these estimates are usually cited without any explanation of how the numbers were compiled.

The most reliable objective data about numbers of children living in various households comes from the Census. The 2000 Census report revealed that that year there were a total of 5,475,768 unmarried partner households.\textsuperscript{99} Of that number, only 301,026 were male householders with male partners, and 293,366 were female householders with female partners; in total, there were 594,392 same-sex couples reported by the 2000 Census, just under 11% of the total population of nonmarital cohabitants.\textsuperscript{100}

One rational method to compute the number of children living with same-sex couples would be to multiply the number of children living with unmarried couples by 11\%, the percentage of unmarried couples that are same-sex. The reliability of this calculation depends upon whether the same proportion of same-sex and heterosexual couples are raising the same number children as each other group.

The most recent Census report on the number of children living with a parent and an unmarried partner reveals that a total of 2,880,000 children being raised by a parent and a

\textsuperscript{98}Developments in the Law--Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1629 (1989) (estimating that 8 million to 10 million children are raised in lesbian or gay households); see also Timothy E. Lin, Note, Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases, 99 Colum. L. Rev. 739, 740 n.5 (1999) (citing various estimates).


\textsuperscript{100}2000 Census <http://www.census.gov> cited in World Congress of Families Update, Online! Vol. 03, Iss 02 (15 Jan 2002). Likewise, the total nonmarital cohabitant householder population including by same-sex and heterosexual cohabitants, constituted only 5\% of all households in USA in the 2000 Census, compared to 52\% for married couple households. 2000 Census, *
nonmarital partner (both heterosexual and homosexual couples). Applying the proportion of heterosexual and same-sex nonmarital cohabitant couples (11%) suggests that only 317,000 children are being raised by same-sex couples.

Another rational method of computing the number of children being raised by gay and lesbian couples is to apply a similar computation to the Census data on children being raised by POSSLQs (Persons of the Opposite Sex Sharing Living Quarters). The 2000 Census revealed that 2,570,000 children under 15 are living with a single parent and his or her unmarried partner, included 2,101,000 POSSLQs and 469,000 “others.” It is not possible that all of these “others” were same-sex couples because roommates, housemates and other non-sexual-partners are included in that number, so that puts a less-than “roof” on the credible range of the number of children being raised by same-sex couples.

A third method using Census data is to apply to the Census data for same-sex couples the computation of how many gay and lesbian couples are raising children. Using that data, one study estimated that “a minimum estimate of 100,000 families with minor children headed by coupled gay and lesbian parents in the United States . . . .” Using more recent data on the

101 Jason Fields, Children’s Living Arrangements and Characteristics: March 2002, in Current Population Reports (June 2003), at 2, Table 1, Children by Age and Family Structure, March 2002, at <http://www.census.gov/prod/2003pubs/p20-547.pdf> (visited August 28, 2003) (1,799,000 children are living with their mother and her unmarried partner (both heterosexual and homosexual), and 1,081,000 children are living with their father and his unmarried partner.).


percentage of same-sex couples raising children would increase that estimate to 160,000 gay and lesbian couples raising children.\textsuperscript{104}

Thus, using Census Bureau data, the rational range of the number of children being raised by same-sex couples in 2000 is probably closer to 300,000 - 400,000 (about two -three percent the widespread 14 million children estimate) and the number of gay and lesbian couples raising children is probably closer to 160,000 (about three percent of the popular 5 million figure).\textsuperscript{105}

There are fewer estimates of the number of children who have been adopted by same-sex couples or partners. A few years ago one estimate was “10,000 lesbians and gay men have had or adopted children during the past 10-15 years.”\textsuperscript{106} But in August of 2003, the California Supreme Court cited highly-unreliable estimates from pro-gay newspapers (on one side) and from Christian opponents’ sensational speculations (on the other), that between 10,000 and 20,000

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28\% of partnered lesbians and 14\% of partnered gay men reported children in their households; applying that figure to latest reports of number of same-sex couples gives 100,000 same-sex families with children).
\end{flushleft}

\textsuperscript{104}The 2000 Census reportedly indicates that about 20\% of gay couples and about one-third of lesbian couples are raising children. Christopher Seeley, \textit{Gay Parents face back-to-school jitters}, Southernvoice.com <http://www.sovo.com/2003/8-8/news/localnews/gayparents.cfm> (Seen August 28, 2003). If this report is accurate, it would mean that roughly 60,000 gay couples and roughly 100,000 lesbian couples are raising a child or children.

\textsuperscript{105}Of course, under-reporting to the Census Bureau, or underestimation of the percentage of same-sex couples raising children could affect the validity of these calculations.

children in California alone have been adopted by the same-sex partner of a parent.\textsuperscript{107} As usual, the court did not explain how those figures were compiled or calculated.

The latest Census Bureau report on adopted children shows that a total of 57,693 adopted children were living with men or women with an unmarried partner in America in 2000.\textsuperscript{108} That includes children living with heterosexual adult nonmarital partners as well as same-sex partners.\textsuperscript{109} The 2000 Census also revealed that there were a total of just under 5,500,000 adult couples living together unmarried (5,475,768 unmarried partner households) of whom eleven percent (11% - or 594,392 couples) are same-sex couples.\textsuperscript{110} If 11% of all adopted children living with unmarried partners were living with same-sex couples, that would amount to only about 6,350 children in all of America. Even if same-sex couples adopted more children – even three times (300%) more gay and lesbian couples than heterosexual nonmarital couples adopt – (which is bald conjecture deliberately favorable to gay and lesbian couples), that would amount to only about 14,100 (19,000) children in the entire United States had been adopted by same-sex couples in 2000.\textsuperscript{111}

\section*{C. Legislation and Cases in General}
Legislators in most states have shown little interest in amending the adoption laws to

\textsuperscript{107}\textit{Sharon S. v. Superior Court}, 73 P.3d 554, 568(2003); \textit{id}. At 568, n. 14.


\textsuperscript{109}\textit{Id}.

\textsuperscript{110}2001 Statistical Abstract of the United States, 52-60, tables 54-59.

\textsuperscript{111}The formula is $3/9x + 8.9x = 57,700$. 
explicitly allow gay couples to adopt. Legislatures in six states have passed laws to allow gay couple adoption,\textsuperscript{112} while five state legislatures (including one that also allows some gay adoptions) have enacted laws that appear to bar all (or, in one state, to give discretion to deny some) adoption by homosexual couples.\textsuperscript{113}

\textsuperscript{112}Cal. Fam. Code §§ 9000(b) (West. 2002) (“A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.”); Conn. Stat. § 45a-724(a)(3) (2000) (“Subject to the approval of the Court of Probate as provided in section 45a-727, any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.”); N.H. Rev. Stat. Ann. § 170-B:4 (1999) ((In 1999, New Hampshire legislators repealed that state's 12-year ban on gay adoption and foster parenting); N.Y. Dom. Rel. § 110 (McKinney 1999) (allowing unmarried adults to adopt); In the Matter of Jacob, 600 N.E.2d 397, 401 (N.Y. 1995) (interpreting the state's adoption statute as "encouraging the adoption of as many children as possible regardless of the sexual orientation... of the individuals seeking to adopt them"); Vt. Stat. Ann. tit. 15A, § 1-102(b) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."). Some of these laws were passed after state courts had interpreted earlier statues to allow gay couple adoptions.

\textsuperscript{113}See Ala. Code § 26-10A-6 (2002) (statute does not restrict adoption, but the Code Commissioner’s Notes state: “Act 98-439, HJR 35, a joint resolution, stated ‘that we hereby express our intent to prohibit child adoption by homosexual couples.’”); Fla. Stat. Ann. § 63.042(3) (West 1985) (bars adoption by homosexuals); Miss. Code Ann. § 93-17-3(2) (2000) (“Adoption by couples of the same gender is prohibited.”); Utah Code Ann. §§ 78-30-1(b) (2000) (“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.”); see also Conn. Gen Stat § 45a-726a (2002) (“Notwithstanding any provision of sections 4a-60a and 46a-81a to 46a-81p, inclusive, the Commissioner of Children and Families or a child-placing agency may consider the sexual orientation of the prospective adoptive or foster parent or parents when placing a child for adoption or in foster care. Nothing in this section shall be deemed to require the Commissioner of Children and Families or a child-placing agency to place a child for adoption or in foster care with a prospective adoptive or foster parent or parents who are homosexual or bisexual.”). See generally William C. Duncan, In Whose Best Interests: Sexual Orientation and Adoption Law, 31 Capital Univ. L. Rev. 787 (2003). Additionally, in August 2003 a bill was introduced in the South Carolina legislature to bar placement of a child “in any home where the child would be exposed to sexual practices outside of marriage.” South Carolina Considers Banning Gay Adoption, GayWired.com (Aug. 11, 2003) at
Appellate courts in twelve states and the District of Columbia have addressed the question whether existing adoption laws allow gay couples to adopt. Courts in seven states and the District of Columbia have interpreted the adoption laws to allow gay partners to adopt, while appellate courts in at least five other states have rejected claims for same-sex partner or couple adoptions.


115Matter of Adoption of T.K.J., 931 P.2d 488 (Colo.App.,1996) (statutes do not allow lesbian partner adoption; no violation of equal protection); Lofton v. Kearney, 157 F. Supp.2d 1372 (S.D. Fla. 2001) (two of three intervener couple with group home); State, Dept. of Health and Rehabil. Servs. v. Cox, 627 So. 2d 1210, 1217 (Fla. Dist. Ct. App. 1993), aff’d in part and quashed in part on other grounds sub nom. Cox v. Fla. Dep’t of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995); In re Adoption of Luke, 640 N.W.2d 374 (Neb. 2002); In re Adoption of Doe, 719 N.E.2d 1071 (Ohio App. 1998) (lesbian partner may not adopt without termination of biological parent’s rights); In re Bonfield, 773 N.E.2d 507 (Ohio, 2002) (ruling that lesbian partner is not a parent but can file for shared custody; dicta notes that “second parent adoption is not available in Ohio.”); In re Angel Lace M., 516 N.W.2d 679 (Wis. 1999) (second-parent adoption not permitted under stepparent adoption statutes). See also S.B. v. L.W. 793 So.2d 656 (Miss. App.,2001) (Payne, J., concurring notes Mississippi does not allow same-sex partner to adopt);In re Adoption of Baby Z., 724 A.2d 1035 (Conn.,1999) (adoption review board has no authority to waive statutes requiring termination of biological same-sex parent’s parental
D.  The August 2003 Decision of the California Supreme Court in Sharon S.

Many of the cases interpreting adoption laws to permit gay adoptions are very strange and have flimsy analysis. The recent California Supreme Court decision, *Sharon S. v. Superior Court*, \(^{116}\) is an example. The facts of this case are rather complicated (as many of these cases are). Sharon and Annette lived together in a lesbian relationship for eleven years. Sharon had one child (Zachary) by artificial insemination and Annette adopted that child with Sharon’s consent. Then Sharon conceived again by artificial insemination and gave birth to a second child, Joshua. Again, Annette filed a petition to adopt Joshua, Sharon signed a consent to that adoption, and the local Department of Health and Human Services performed a home study and recommended approval of the adoption. However, before any action was taken on the petition for adoption, Sharon and Annette’s relationship became volatile. Sharon asked Annette to move out, and later Sharon obtained a domestic violence restraining order against Annette.

Annette filed a motion asking the court to grant her petition to adopt Joshua, and Sharon moved to withdraw her consent to the adoption asserting that the adoption was not permitted under California adoption laws as well as claiming that her consent had been obtained by fraud or duress and that withdrawal of her consent was in Joshua’s best interest. A mediator recommended shared custody, the Department of Health and Human Services recommending the petition be granted because Annette had shared paying for Joshua’s medical expenses, had been a part of his daily care since birth, and had a close loving relationship with Joshua similar to her relationship with Zachary, but the court-appointed lawyer for Joshua filed a motion to dismiss the

\(^{116}\)73 P.3d 554 (Cal. 2002).

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adoption proceeding. The trial court denied the motions to dismiss. Sharon and the lawyer for Joshua then filed a petition for writ of mandate with the California Court of Appeals, which granted the writ, and held that under California law adoption by unmarried partners was not allowed. On appeal review, the California Supreme Court reversed and remanded.

California adoption law specifically provides that “[t]he birth parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child.” Another provision, however, specifically allows a stepparent to adopt his or her spouse’s child without the termination of the natural parents’ rights, and, a third provision, recently enacted, now also allow registered same-sex domestic partners to adopt the children of each other without terminating the parental rights of the partner who is the child’s biological parent. This case did not involved a married couple (California law does not allow same-sex marriage) or a registered domestic partnership (Sharon and Annette were not registered domestic partners, either). Thus, the principal legal question was interpretation of these adoption provisions.

There were three opinions filed in the California Supreme Court. The majority opinion of Justice Werdegar, for himself and three other justices, held that the adoption statutes should be interpreted to allow a biological parent to waive the termination of parental rights provision and to allow another person or persons to become co-parents by adoption. They found that the

\[117\] 73 P.3d at 559.

\[118\] 73 P.3d at 559.

\[119\] Cal. Fam. Code § 8617 (*).

\[120\] Cal. Fam. Code §§ 8548 306(b).

\[121\] Cal. Fam. Code § 297.
number of parents was not germane to adoption, and held that a biological parent may allow her child to be adopted by any number of co-parents, not limited to just two adults. The majority opinion construed the termination of rights provision as being designed for the personal benefit of the parents relinquishing and adopting the child, and so waivable, rather than to protect the public interest, which could not be waived. While California courts may not award visitation to a de facto parent, the majority did not see any inconsistency between that well-established rule and its ruling allowing California courts to award adoption to de facto partners.

Two additional justices, Baxter and Chin, filed a separate opinion concurring in part and dissenting in part. They agreed that two parents is better than one, so the statutes should be interpreted to allow “second-parent” adoption by informal same-sex and heterosexual nonmarital cohabiting partners. However, they argued that only two parents, not more, is best for children, and argued that California statutes and cases show that parenting in California contemplates a child having not more than two parents. They construed the termination of rights statute as being designed to protect the public interest, not for the personal benefit of the parents relinquishing or adopting, and found “second-parent” adoption by cohabiting same-sex partners to be in the public interest.

Justice Janice Roberts Brown filed a separate opinion concurring in part and dissenting in part, for herself alone. After effectively refuting the majority’s statutory interpretation, she criticized the majority for “trivializ[ing] family bonds” and “import[ing] the principles of the

122 73 P.3d at 561.

123 73 P.3d at 573. However, the court agreed that if fraud or duress had been shown Sharon could revoke her consent to adoption, and remanded that issue to the Court of Appeals. Id. at 574.
marketplace into the realm of home and family.” She read the adoption statues specifically authorizing adoption by partners of biological parents in cases of marriage and registered domestic partnership as manifesting legislative intent to require “a legal relationship between the birth and second parent,” and “to not allow a partner to adopt unless the birth parent and adopting parent are formally joined together to forge a common future.” She identified the controlling principle as: “If the two adults are uncertain whether the second parent will be a permanent resident of the household, the adoption ought to wait until they are ready for that commitment.” She rejected the majority’s “stunted view of parenthood as purely ministerial and economic – signing consent slips and providing health insurance.” She reminded the majority that all “[s]ociety has a considerable stake in the health and stability of families . . . [which] provide the seed beds of civic virtue required for citizenship in a self-governing community.” She ridiculed the majority’s “the-more-the-merrier view of parenthood,” and noted: “The law permits single individuals to adopt a child on their own because one parent is better than none. It does not follow, however, that two unrelated parents are better than one.” Single parent adoption presents a “choice . . . between adoption and foster care” whereas “if the

124 73 P.3d at 586.
125 73 P.3d at 582.
126 73 P.3d at 585.
127 73 P.3d at 587.
128 73 P.3d at 586.
129 73 P.3d at 586.
130 73 P.3d at 587.
131 73 P.3d at 587.
birth parent has a relationship with a second parent, and then a third, and then a fourth, the child may be worse off than if the birth parent had simply raised the child alone.”¹³² She concluded that the decision to allow adoption by partners who lack the legal commitment to each other of marriage or domestic partnership registration “maximizes the self-interest and personal convenience of parents, but poorly serves the state’s children who deserve as much stability and security as legal process can provide.”¹³³

The majority opinion is quite disappointing as a matter of legal analysis, long on shallow rhetoric, but short on logic, legislative and case history and legal analysis. It also embodies the most radical policy position. Justice Brown’s solo dissenting opinion contains the more rigorous legal analysis and the most consistent and prudent policy analysis. It was a very courageous act for Justice Brown to file her solo opinion, because just a few weeks earlier she had been nominated by President Bush for a seat on the most prestigious federal Court of Appeals in the nation. But her nomination has been opposed and held up by several Senators of the Democratic Party because of her conservative, pro-family (and pro-life) principles; under those circumstances, it showed remarkable integrity for her to write the dissenting opinion she did because gays and lesbians, who have considerable influence in the Democratic Party, are sure to be displeased with her opinion, and may continue to delay or block her nomination.

* [Insert from Sharon S. Long notes]

V. Considerations and Care Needed When Same-Sex Couples Seek to Adopt

¹³² 73 P.3d at 587.

¹³³ 73 P.3d at 587.
A. The Value of Child-rearing by a Married Father and a Mother

The Supreme Court of the United States has long-recognized that [t]he institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.”

One state supreme court expressed it this way: “While much study, and even more controversy, continue to center upon the effects of homosexual parenting, the inestimable developmental benefit of a loving home environment that is anchored by a successful marriage is undisputed.”

Another state court of appeals agreed that a stable, marital family is best for children because it is an “environment in which [the child] will most likely receive not only love, warmth, support, care and concern, but also consistency, stability and physical and spiritual nurture.”

An impressive body of social research shows that children raised by married, traditional, father-and-mother parents do better educationally, financially, socially, emotionally and in most significant behavioral measures; they are healthier, more responsible and more successful in life. For example, children who grow up without fathers in their home are at the greatest risk

\[\text{134} \text{Lehr v. Robertson, 463 U.S. 248, 256-57 (1983).} \]

\[\text{135} \text{Ex Parte J.M.F., 730 So.2d 1190, 1196 (Ala. 1998) (upholding the modification of child custody due to the custodial mother’s open lesbian relationship and the father’s remarriage forming a stable traditional family).} \]

\[\text{136} \text{Collins v. Collins, 1988 WL 30173 (Tenn. App. 1988) (affirming custody modification decree where father was granted custody after establishing a successful nine-year marriage while mother with custody had gone through four lesbian relationships).} \]

\[\text{137} \text{Linda J. Waite and Maggie Gallagher, The Case for Marriage (2000).} \]
of crime, child abuse, premarital sex, premarital pregnancy, poverty, lower education and get poorer performance in school and less career success.\textsuperscript{138} Marriage is not just one of multiple good alternative forms of family relationships. From the perspective of child-rearing, it has unique potential to provide significant, unparalleled advantages to children. When society as a whole consistently supports marriage as an institution, children are all better off.\textsuperscript{139} As Dr. David Popenoe put it:

The complementary aspects of parenting that mothers and fathers contribute to the rearing of children are rooted in the innate differences of the two sexes, and can no more be arbitrarily substituted than can the very nature of male and female. Accusations of sexism and homophobia notwithstanding, along with attempts to deny the importance of both mothers and fathers to the rearing of children, the oldest family structure of all turns out the be the best.\textsuperscript{140}

Children in need of adoption often have additional need for the stability, moderation, and other benefits of mother-father childraising because of the instability, traumas and deprivations that led to their being available for adoption.

The definition and structure and meaning of families in America are being changed by same-sex couples, especially by those who are raising children.\textsuperscript{141} In these times of significant

\textsuperscript{138} \textit{Id.} at 124-134.

\textsuperscript{139} \textit{Id.} at 184.

\textsuperscript{140} David Popenoe, \textit{Life Without Father} 146 (1996).

social change, it is important to avoid perpetuation of invalid negative stereotypes. Sexual caricatures that reflect erroneous and derogatory misconceptions and that disparage without reasonable basis in fact or reason certainly should not be used to qualify or disqualify couples or individuals from adopting children. At the same time, valid concerns about sexual practices, relationships, social patterns and individual characteristics that pose potential risk of harm to children cannot ethically (or legally) be ignored even if they make us uncomfortable.

To avoid the appearance of “homophobia,” many professional groups and scholars have made great efforts to distance themselves from standards that might be misused or misapplied. While well-intentioned, sometimes these pronouncements or statements overcompensate and make overbroad generalizations, to throw the baby out with the bath water. Unfortunately, they may discourage adoption professionals and agencies from giving careful attention to some risk indicators that could prevent tragedies in the lives of the children whose welfare they are charged to protect. Given the importance of “professional standard” of care that is so frequently used in liability cases for negligence in placement and investigation, the potential impact of overbroad “blindfold” or “see-no-evil” positions by professional organizations is no small concern.

Potential risks to children from adoption by same-sex couples must not be exaggerated or overstated, but by the same token they should be honestly recognized and considered before any such placement is made or approved. Carefully distinguishing the wheat from the chaff in the context of evaluating fitness for adoption generally, or in a particular case, will not always be easy, but it is extremely important. Reasonably ignoring false stereotypes while responsibly identifying, investigating, and thoroughly evaluating other awkward factors requires no small measure of professional integrity and skill.

What are some areas of responsible concern associated with adoption by same-sex
couples of partners? That is a difficult questions to answer with precision in terms of social science data because (1) this parenting form is so new, and (2) most of the social science studies have been done by advocates of same-sex parenting and are seriously flawed in design (bias), methodology (advocated, not scientific), and theory (every theory of childrearing leads prediction of some outcomes of potential concern). Notwithstanding these disadvantages, five penumbras can be noted.

First, both theory and empirical studies suggest that children raised by homosexual parents may be more likely to develop homosexual interests and behaviors. There is a chance of “parent-to-child transmission of sexual orientation.” There appears to be some significant differences between children raised by lesbian mothers versus heterosexual mothers in their family relationships, gender identity and gender behavior. One flawed study that endorsed gay parenting admitted that 23.5 percent of the post-adolescent children it studied who were raised by gay or lesbian parents were homosexual, a much higher rate of homosexuality than is found in the population generally. Another review of the literature found that a significantly greater number of young adults raised by lesbians report participation in homoerotic behavior than children raised by heterosexual mothers. On matters relating to gender and sexuality even


143Stacey & Biblarz, *supra* note __, at 170.


145Belcastro, *supra* note __, at 119.

146Stacey & Biblarz, *supra* note __, at 170.
supporters of “lesbi-gay parenting” admit that “the sexual orientation of these parents matter somewhat more for the children than researchers [claiming there is “no difference” between children raised by gay and traditional parents] claimed.”

Likewise, daughter of lesbians are more sexually active than daughters raised by heterosexual mothers.

Second, an increasingly visible minority in the gay community advocates intergenerational homosexual relations. Any association with or sympathy for that community by a prospective adoptive parent or partner or roommate or friend should be an automatic “third rail” disqualifying factor in any adoption scenario. The scandal in California involving Gay and Lesbian Adolescent Social Services (GLASS) should not be ignored.

Third, nonmarital couples (both heterosexual and homosexual) are more likely to experience instability, serious conflict including domestic violence, and other relational stresses that can impair parenting, threaten the home security for children, and create loyalty conflicts for children. Likewise, drug use, alcohol abuse, and other environmental dangers are more likely in

\[\text{Footnotes:}\]

147 Stacey & Biblarz, supra note __, at 167.

148 Stace & Biblarz, supra note __, at 171.


150 “GLASS’s own website should have been warning enough. GLASS believes that some children are born gay (a view not backed by any science) and announced that they target ‘youth who are confused about their sexual identities.’ The website links to a myriad of gay sites targeting the youth, including one promoting a book that promotes sex with children. GLASS’s founder and former executive director, Teresa DeCrescenzo, edited a book that helps youth discover their homosexuality.” Baldwin, supra note __, at 268. Thus, “[i]t came as no surprise that the California Department of Social Services found ‘on numerous occasions beginning at least as early as 1994, adults affiliated with GLASS, including staff members, members of the GLASS board of directors and volunteers, sexually abused or molested children who were placed with GLASS.’ The Department of Social Services found that DeCrescenzo, aware of the allegations of molestation, determined staff conduct not to be inappropriate.” Id. at 269. GLASS was put on probation but allowed to continue to operate. Id.
cohabiting heterosexual and homosexual couples.

Fourth, the health of the person or persons adopting can affect child-rearing in many ways. Heavy medical expenses for the parents may reduce resources available for children. Disability due to illness may impair childrearing. Death of a parent is a traumatic event for children, and if the child has experienced prior separation and loss of parents (due to termination of parental rights, for instance) it may be especially difficult for the child. Behaviors that entail significant risk of health impairment (including some homosexual practices) must be considered in this light.

Fifth, certainly some sexual practices in which children would be exposed to premature sexualization or immersed in an environment of inappropriate sexual stimulation must be considered. Likewise, the sexual interests and practices of the friends of prospective adoptive parents who are likely to spend time in the home with the child must be considered. This applies to both heterosexual and homosexual prospective adoptive parents, and cannot be ignored in either case.

VI. Conclusion

The advice of William L. Pierce, Founder and for 20 years President of the National Council For Adoption, is worth considering.

5. The best place for a child in need of placement, all things being equal, is a private family with parents whose health and lifestyles are such that they are likely to provide the child appropriate care and modeling at least until the child is 18.

6. The data suggest that a family headed by one male and one female who are married to
each other have beneficial outcomes for children they adopt, taking into account proper screening, preparation, and support for the family.

7. Other family constellations, including unmarried, long-term cohabiting heterosexuals, or single-parent heterosexual households, are less optimal for children. The data . . . do not tell us anything about same-sex parenting. There is a basic rule of prudence that should apply as a result: When in doubt, don’t.\textsuperscript{151}

\textsuperscript{151}William L. Pierce, Adoption Principles, NRO (National Review Online), May 10, 2002, available at <http://www.nationalreview.com/comment/comment-pierce051002.asp> (seen May 20, 2003). Pierce adds an additional categorical axiom: “8. There should be \textit{no placement} of children, whether for foster care or adoption, with same-sex couples or with individuals who may in the future team up with a partner of the same-sex. . . .” \textit{Id.} (emphasis added).