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Keywords

Gay adoption, Homosexual adoption, Florida's adoption law, Dept. of Health & Rehab. v. Cox, Lofton v. Dep't of Children and Family Servs

“HUMAN GARBAGE” OR TRASH-WORTHY LAW? FLORIDA’S BAN ON GAY ADOPTION IN THE INTERNATIONAL LIGHT

By Cecilia Isaacs-Blundin*

Florida law currently provides, “No person eligible to adopt... may adopt if that person is a homosexual.”¹ Legislation to change this provision died recently in the Florida senate.² Although several other U.S. states’ common law discourage adoption by homosexuals,³ no other state has a statute categorically excluding homosexuals, as a class, from adopting. Florida’s uncompromising current statutory ban on adoption by homosexuals is not only unique domestically,⁴ it also bucks the larger Western world’s trend towards expansion of adoption rights for gays and lesbians.⁵

This article will detail the Floridian approach to homosexual adoption, looking at the various justifications for the existence of Florida’s ban on gay adoption, while also identifying approaches taken by selected foreign jurisdictions. It will then put forth domestic and international critiques of the Floridian justifications for preventing gay and lesbian adoption, and will promote a different interpretation of the best interest of the child standard to allow for gay adoption. Finally, this article concludes with the assertion that, in light of international precedent, the Florida senate should have eliminated the categorical ban on adoption by homosexuals.

FLORIDA’S LAW ON ADOPTION BY HOMOSEXUALS

Florida’s adoption law allows “any person, a minor or an adult, [to] be adopted” by “a husband and wife jointly... an unmarried adult; or... a married person without the other spouse...”⁶ Since 1977, however, the statute has also contained a provision reading, “no person eligible to adopt under this statute may adopt if that person is a homosexual.”⁷ At least five congressional bills attempting to repeal the provision have been introduced since its enactment,⁸ two of which were introduced in the 2005 Florida senate session, but both died in committee.⁹

The first 2005 bill, introduced by Senator Rich, would have maintained a general ban on gay adoption. However, it would have allowed an exception in cases where, by clear and convincing evidence, the court finds “that the adoptee resides with the person proposing to adopt the adoptee, the adoptee recognizes the person as the adoptee’s parent, and granting the adoptee permanency in that home is more important to the adoptee’s developmental and psychological needs than maintaining the adoptee in a temporary placement.”¹⁰ The second bill, proposed by Senator Dawson, aimed to replace Florida’s current provision that “no homosexual may adopt under this statute if that person is a homosexual,” with a case-by-case evaluation of the best interest of the child.¹¹ The new section would state: “A prospective adoptive parent of a minor must undergo an individual assessment of

his or her capacity to understand and meet the needs of the particular child.” Because none of the proposed bills passed, Florida statutory law continues to categorically prohibit adoption by homosexuals.

The constitutionality of Florida’s provision banning adoption by homosexuals was challenged in state and federal court. Over ten years ago, in *Dept. of Health & Rehab. v. Cox*, a Florida appeals court heard one such challenge.¹² It upheld the provision as constitutional against challenges of vagueness, privacy, and equal protection brought by two gay men seeking to adopt a special needs child.¹³ Although the Florida Supreme Court affirmed the rulings, it remanded the case for further development of the factual record.¹⁴ The case, however, was never heard on remand because the plaintiffs withdrew the claim.¹⁵ Even so, *Cox* established a working definition of “homosexual,” which courts consider when evaluating the Florida statute.¹⁶ *Cox* defined that a “homosexual [is] limited to applicants who are known to engage in current, voluntary homosexual activity,” thereby making “a distinction between homosexual orientation and homosexual activity.”¹⁷

More recently, the constitutionality of Florida’s statutory ban on adoption by homosexuals has been upheld by the Eleventh Circuit Court of Appeals in *Lofton v. Dep’t of Children and Family Servs.*¹⁸ The *Lofton* case has been widely publicized¹⁹ and involved several plaintiffs, each of whose application for adoption was denied under the Florida statute based on his homosexuality.²⁰ At the district court level, in *Lofton v. Kearney*, the defendants Secretary and District Administrator of Florida’s Department of Children and Families asserted that the Florida statute served two legitimate purposes.²¹ First, it “reflects the State’s moral disapproval of homosexuality consistent with the legislature’s right to legislate public morality.”²² Second, the Department of Children and Families claimed that the best interests of the child are served when he or she is “raised in a home stabilized by marriage, in a family consisting of both a father and a mother” because “married heterosexual family units [will] provide adopted children with proper gender role modeling” and will minimize social stigmatization.²³ Like most other states, Florida uses the “best interest of the child” standard to make adoption determinations.²⁴ In *Lofton*, summary judgment was granted based on the Department’s arguments.²⁵ The court accepted that even if the rationales underlying the assumptions are flawed, “the very fact that they are ‘arguable’ is sufficient, on a rational basis review, to ‘immunize’ the congressional choice from constitutional challenge.”²⁶ Pointing to the federal and Floridian Defense of Marriage Act, the court added that:

[H]omosexuals are not similar in all relevant aspects to other nonmarried adults with respect to [the]... best interest of the child. Nonmarried adults, unlike homosexuals, can get married. On the other hand, homosexuals cannot marry or be recognized as a marital unit and, thus, cannot meet the state's asserted interest underlying the homosexual adoption provision.²⁷

The United States Court of Appeals for the Eleventh Circuit upheld the lower court decision.²⁸ The opinion expounded several of the rational bases upon which the statute could indeed be based.²⁹ The court noted that Florida has a legitimate state interest in furthering public morality³⁰ and that the statute is part of a "broader adoption policy, designed to create adoptive homes that resemble the nuclear family as closely as possible."³¹ Citing "the accumulated wisdom of several millennia of human experience" to confirmed "marital family structure" as a "superior model," the court reasoned that "it is rational for Florida to conclude that it is in the best interest of adoptive children . . . to be placed in a home anchored by both a father and a mother."³² The statute, therefore, furthers the best interest of children by placing them in families with adoptive mothers and fathers, who offer both male and female authority figures, which is "critical to optimal childhood development and socialization."³³ Because homosexual homes are "necessarily motherless or fatherless, [they] lack the stability that comes with marriage."³⁴

In response to the petitioners' argument that Florida's ban on homosexual adoption does not promote the nuclear family model inasmuch as it allows unmarried heterosexuals to adopt, the court reasoned that the legislature could have rationally acted on a theory that heterosexual singles are not only more likely to marry eventually, but are also "better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence," because the "children will need education and guidance after puberty concerning relationships with the opposite sex."³⁵ Ultimately, the Eleventh Circuit declined to rehear *en banc* the *Lofton* case, affirming the constitutionality of the Florida statute.³⁶ The American Civil Liberties Union subsequently petitioned the U.S. Supreme Court for review of the *Lofton* case on October 1, 2004,³⁷ but the Court denied certiorari in mid-January, 2005.³⁸

TREATMENT OF ADOPTION BY HOMOSEXUALS IN EUROPEAN COUNTRIES

No European nation categorically denies homosexuals the opportunity to adopt children. Instead, the current discussion throughout Europe is not whether homosexuals can adopt, but rather whether gay and lesbian *couples* should be able to adopt *jointly*. Like Florida, many European nations also employ the "best interest of the child" standard in adoption determinations. The outcomes, however, of a "best interest of the child" analysis in Europe often yield a very different result in same sex adoption cases.

In 2001, The Netherlands legalized same-sex marriage, extending to same-sex couples identical rights, benefits, and burdens associated with marriage. This also included the right to adopt children.³⁹ Joint adoptions by homosexuals are permitted under the 2000 amendments to the Dutch Act on Adoption by Persons of the Same Sex, so long as the requesting individuals "have been living together during at least three continuous years immediately before the submission of the request. The request can be an adopter who is the . . . registered partner or other life partner of the parent . . ."⁴⁰ As in Florida, section 1:227(3) of the Act explicitly requires that the adoption be *in the child's best interest*.⁴¹ Even so, one in every thirteen Dutch same-sex couples has adopted children.⁴²

DENMARK

Denmark currently allows joint adoption by same-sex couples.⁴³ Before 1999, however, homosexual couples were not allowed to adopt children together, regardless of whether it was the partner's child or an unrelated child.⁴⁴ The legislature's rationale for denying joint adoption was based on a belief that the child's best interest required having both a "father" and a "mother"⁴⁵ and a fear that least developed countries may be deterred from sending adoptable children to Denmark if same-sex couples may potentially be the adoptive parents.⁴⁶

In 1999, however, Denmark lifted its categorical ban on same-sex couple adoption, realizing a "new understanding of the phrase *the child's best interest*" (emphasis added).⁴⁷ The Danish legislature noted that the children affected by the ban had "inferior legal status compared to that of children in marriage regarding inheritance rights and in cases in which the partnership dissolved."⁴⁸ Moreover, the children had not been safeguarded against the possibility that the parental figure who had not been legally allowed to adopt could avoid certain legal obligations connected with the child if the partnership ended or the parent died.⁴⁹

Because foreign born children represent the large majority of adoptable children throughout Europe⁵⁰ and homosexuality is considered immoral or illegal in their countries of birth,⁵¹ it is no surprise that Denmark still prohibits gays and lesbians from jointly adopting unrelated children from abroad.⁵² Same-sex couples are limited to adoption of their partner's biological children.⁵³

SPAIN

Spanish law is among the most liberal because both gay and straight couples can marry and adopt children.⁵⁴ Until very recently, each of the country's autonomous communities (regional groupings of provinces) used its wide executive and legislative autonomy⁵⁵ to legislate varying types of adoption law.⁵⁶ On June 30, 2005 Spanish Parliament approved⁵⁷ a bill which extends the Spanish constitutional right to marry to couples of the same sex, thereby insuring them all the rights previously afforded only heterosexuals.⁵⁸ The bill cites an increasing social

acceptance of homosexuality alongside the Constitutional guarantees of nondiscrimination and free personality development in support of the modifications.⁵⁹ Among other changes, it amended the second paragraph of Article 44 of the Spanish Civil Code to read, "marriage is to have the same requirements and effects whether both contracting parties be of the same or different sex,"⁶⁰ including the right to adoption.⁶¹

FLORIDA'S TRASH-WORTHY LAW

Florida's current law is ill-advised for several reasons, all of which could be remedied by the passage of a bill similar to those proposed in the Florida senate during the 2005 session.⁶² Florida's current statutory law stands alone as the only United States' jurisdiction to categorically deny gays and lesbians the opportunity to adopt, and Florida's law looks regressive and discriminatory by other Western nations' standards. This article's survey of the current status of same-sex adoption law in other countries demonstrates that a large number of Western nations have moved well beyond the question of whether gays and lesbians should be able to adopt. The contemporary Western world's question is whether homosexual couples should be able to adopt *jointly*. Moreover, the rationales employed by Florida in the *Lofton* case are pre-textual, at best.⁶³ It is not in the best interest of any Floridian child for homosexuals to be categorically prohibited from adopting.

ORIGINS OF ADOPTED CHILDREN

While "international adoptions comprised approximately 21% of unrelated adoptions in the United States, they comprised a staggering 96% of unrelated adoptions in Sweden. Statistics from the Netherlands show an almost identical contrast. Similarly, in Denmark, only 7% of the total adopted children were born in Denmark."⁶⁴ Moreover, European nations fear that allowing gay and lesbian couples to adopt jointly will discourage least developed countries from sending foreign born children to Europe, thus severely diminishing the number of adoptions annually.⁶⁵ This fear is hardly irrational, as the China Center for Adoption Affairs (CCAA) "recently advised that 'adoption applications from homosexual families are not acceptable.'"⁶⁶ Florida, however, does not suffer a native-born-children shortage like Europe does. In 2001 "there were over 3,400 children in Florida eligible for adoption for whom there were no adoptive parents available."⁶⁷ By putting a categorical ban on adoption by homosexuals, Florida automatically decreases the number of its children who will be adopted each year.

THE BEST INTERESTS OF THE CHILD

It may in fact be in the best interest of Floridian children if homosexuals were not categorically excluded from adopting them. By changing the standard to a case by case analysis, the legislation currently pending before Florida's Senate wisely recognizes that the best interest of the child should be paramount to prejudice against homosexuals.⁶⁸ As noted above, Florida is home to 3,400⁶⁹ of the approximately 117,000 U.S. children

legally free and adoptable.⁷⁰ Rather than statutorily excluding homosexuals from the potential pool of available parents,⁷¹ Florida should be taking steps to remove the barriers that keep waiting children from adoption. This is especially true because no conclusive evidence establishes that homosexuals are less competent parents.⁷² "Children raised by parents with a same-sex orientation are thriving."⁷³ In fact, the alternative of allowing children to remain not adopted may have negative developmental impact on children.⁷⁴ The propriety of removing said barriers becomes especially important in light of the fact that childrearing by homosexuals is widespread throughout Florida⁷⁵ and is on the rise nationwide.⁷⁶ In 1976, an estimated 300,000 and 500,000 gay and lesbian biological parents had children.⁷⁷ By 1990, there were between six million to fourteen million children with a gay or lesbian parent, and between eight million to ten million children being raised in a gay or lesbian household.⁷⁸ According to the 2000 census, every county in Florida reported at least one same-sex couple with children under age eighteen in the household,⁷⁹ and over 40% of Florida counties have a higher proportion of same-sex couples with children than the national average.⁸⁰

Whether or not these numbers can be extrapolated to other geographical locations is unimportant. What is significant is that the European response to modern homosexual parenting trends, though not perfect, seems more concerned with determining the *actual* best interests of the child than the Florida approach by allowing homosexuals to adopt children either alone or jointly.⁸¹ For example, one motivation Denmark had in extending joint adoption rights to homosexuals was precisely to avoid situations in which children raised by gays and lesbians would be disadvantaged by *an inferior legal status* because of the parent's sexual orientation.⁸²

DISCRIMINATION

Florida's law is not supported by the state's purported rationales, and it is discriminatory in such a way that would be impermissible under foreign and international law. The legislative history of Florida's ban on homosexual adoption would be fatal for the bill if it were being proposed before the legislative body of one of the countries discussed above. Judge Barkett details the legislative history of § 63.042 in his *Lofton* dissent, calling the statute's enactment a "witch-hunting hysteria more appropriate to the 17th century than the 20th," during which Anita Bryant, one of the law's biggest advocates, referred to homosexuals as "human garbage," among other things.⁸³

DOMESTIC TRENDS

Despite the burgeoning number of European countries that allow same-sex couples to adopt jointly, as well as the growing judicial and legislative mandate internationally that gays and lesbians should at least be allowed to adopt individually, it is unlikely that an increased number of jurisdictions in the United States⁸⁴ will feel compelled to extend similar adoption opportunities anytime soon. In 2004, eleven American states amended

their state constitutions to exclude same sex couples from ever realizing marriage.⁸⁵ Those states include Kentucky, Oklahoma, Michigan, Mississippi, Oregon, Ohio, Georgia, Utah, Arkansas, Montana, and North Dakota.⁸⁶ In addition, since the federal Defense of Marriage Act (“DOMA”) became federal law in 1996,⁸⁷ over thirty-seven states have enacted state versions of the DOMA,⁸⁸ which preclude recognition of same sex marriages performed by another state.⁸⁹ If anything, these anti-gay marriage provisions create a climate of animus against homosexuals, which fosters rather than discourages legislation akin to Florida’s statutory ban on homosexual adoption.

Given the fact that the United States Supreme Court has denied certiorari in the *Lofton* case,⁹⁰ and the Florida Supreme Court has upheld equal protection, due process, and privacy challenges to the adoption statute,⁹¹ few legal alternatives are left to homosexual Floridians seeking to adopt children. There is the possibility of amending the Florida Constitution in such a way as to effectively repeal the anti-gay adoption law or an amendment as a citizen’s initiative process.⁹² Given that Floridians have used their initiative process to protect health and welfare before,⁹³ it is not beyond the realm of possibility to think that Florida citizens may one day amend their constitution to protect the best interests of adoptable children by removing barriers to gay adoption.

Florida’s statute is inconsistent with the developed world’s treatment of homosexual adoption. This article exposes the fact that Florida lags behind other U.S. states, as well as many foreign jurisdictions inasmuch as it remains the only state with a statute categorically banning homosexuals from adopting. Given the persuasive case made by the past legislative proposals in the Florida senate and foreign jurisdictions, the Florida legislature should reconsider shutting down future bills attempting to revise the categorical ban on gay adoption. Instead, it should revise or eliminate the statutory ban on homosexual adoption, using the European perspective on the best interest of the child. Though trends in other Western nations proved of little influence on the final disposition for the *Lofton* plaintiffs, the Loftons will hardly be the last gay Floridians seeking to adopt. Florida would be well advised to pay attention to the best interest of the child analysis utilized by other countries so that more eligible Floridian children can be adopted. Instead of allowing the homophobic rhetoric of “human garbage” to permeate Florida law, lawmakers should strongly consider allowing gays and lesbians access to adoption.

ENDNOTES

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¹ FLA. STAT. § 63.042(3) (2003).

² See S.B. 986, Reg. Sess. (Fla. 2005) (amending the Florida statute to change standard to clear and convincing evidence to allow for possible adoption by a gay parent).

³ See, e.g., CONN. GEN. STAT. § 45a-726a (stating that, “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”); MISS. CODE § 93-17-3(2) (2002) (providing that “[A]doption by couples of the same gender is prohibited”); UTAH CODE § 78-30-1(3)(b) (2002) (stating that, “A child may not be adopted by a person who is cohabiting in a relationship that is not legally valid and binding marriage under the laws of this state”); Act 98-439, HJR35 (Ala.) (stating that, “[W]e hereby express our intent to prohibit child adoption by homosexual couples”); see also Adoption Laws: State by State, Human Rights Campaign, http://www.hrc.org/Template.cfm?Section=Laws_Legal_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19984 (stating that Arkansas, Missouri, Nebraska, and North Dakota are the only states where it is unclear whether or not the law allows gay adoption).

⁴ See, e.g. National Adoption Information Clearinghouse, *Gay and Lesbian Adoptive Parents: Resources for Professionals and Parents* [hereinafter NAIC], http://naic.acf.hhs.gov/pubs/f_gay/index.cfm (April 2000).

⁵ See Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INT’L LAW 437, 459 (Robert Wintemute & Mads Andenaes, eds., Hart Publishing 2001) (providing English translation of statute).

⁶ FLA. STAT. § 63.042(1)-(2) (2002).

⁷ FLA. STAT. § 63.042(3) (2002).

⁸ See S.B. 1534, Reg. Sess. (Fla. 2005); S.B. 986, Reg. Sess. (Fla. 2005); S.B. 752, Reg. Sess. (Fla. 1995); H.B. 349, Reg. Sess. (Fla. 1995); H.B. 1461, Reg. Sess. (Fla. 1993).

⁹ Fla. S.B. 1534; Fla. S.B. 986. Fla. S.B. 1534 was proposed in February 2005 by Senator Rich while Fla. S.B. 986 was proposed in January 2005 by Senator Dawson.

¹⁰ Fla. S.B. 1534

¹¹ Fla. S.B. 986.

¹² *Cox v. Dept. of Health & Rehab*, 656 So. 2d 902, 902 (Fla. 1995).

¹³ *Id.*

¹⁴ *Id.* at 903.

¹⁵ *Gay Men Give Up on Adoption*, ST. PETERSBURG TIMES, Dec. 15, 1995, at 6B.

¹⁶ See, e.g., *Lofton v. Dep’t of Children & Fam. Servs.*, 377 F.3d 1275, 1290 n.1 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005) (Barkett, J. dissenting) (citing *Cox*’s definition of the term “homosexual”).

¹⁷ *Cox*, 627 So.2d 1210, 1215 (Fla. Dist. Ct. App. 1993), *aff’d in part*, 656 So.2d 902, 903 (Fla. 1995).

¹⁸ 358 F.3d 804, 818 (11th Cir. 2004).

¹⁹ *Id.* at 808 n.4.

²⁰ *Id.* at 807-809.

²¹ 157 F. Supp. 2d 1372, 1382 (S.D. Fla. 2001).

²² *Id.*

²³ *Id.* at 1383.

²⁴ See FLA. STAT. § 39.01(41) (2005) (proscribing placement that is not in a child’s best interest). See also William C. Duncan, *In Whose Best Interests: Sexual Orientation and Adoption Law*, 31 CAP. U. L. REV. 787, 788 (2003) (noting that all U.S. states use the best interest of the child standard).

²⁵ *Kearney*, 157 F. Supp. 2d at 1385.

²⁶ *Id.* at 1384 (citing *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993)).

²⁷ *Id.* at 1385.

²⁸ *Lofton*, 377 F.3d 1275.

²⁹ *Id.*

³⁰ *Id.* at 819 n.17.

³¹ *Id.* at 818.

³² *Id.* at 820.

³³ *Lofton*, 377 F.3d. at 818.

³⁴ *Id.*

³⁵ *Id.* at 820.

³⁶ *Lofton*, 377 F.3d at 1275-76.

³⁷ *Phil LaPadula, Supreme Court Gets Adoption Case*, WASHINGTON BLADE at 1 (Oct. 8, 2004); see also Press Release, ACLU, *ACLU Asks U.S. Supreme Court to Hear Appeal in Challenge to Florida Gay Adoption Ban*, Oct. 1, 2004, <http://www.aclu.org/court/court.cfm?ID=16627&c=286>.

³⁸ *Lofton*, 377 F.3d 1275, *cert. denied*, 543 U.S. 1081 (2005); See also Joe Crea,

ENDNOTES CONTINUED

Supreme Court Declines to Hear Fla. Adoption Case, WASH. BLADE, Jan. 14, 2005, at 12.

³⁹ *Inching Down the Isle: Differing Paths Towards the Legalization of Same Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2008 (2003).

⁴⁰ See Waaldijk, *supra* note 5.

⁴¹ See Machteld Vonk, *One, Two or Three Parents? Lesbian Co-Mothers and a Known Donor With 'Family Life' Under Dutch Law*, 18 INT'L J. L. POL'Y & FAM. 103, 106 (2004) (citing Adoption by Same-Sex Couples Act).

⁴² *Belgium Votes to Recognize Gay Marriages*, CHI. TRIB., Jan. 31, 2003, at 6 (hereinafter *Belgium Votes*).

⁴³ YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES at 74-75 (The University of Chicago Press 2002).

⁴⁴ *Id.* at 74.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ingrid Lund-Andersen, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 421 (Robert Wintemute & Mads Andenaes, eds., Hart Publishing 2001) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Nancy Polikoff, *Recognizing Partners but Not Parents/ Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 717-18 (2000).

⁵¹ See, e.g., *Ahmadis Warn Against Gay Marriages*, GHANAIAN CHRONICLE, Jul. 22, 2004, http://www.mask.org.za/SECTIONS/mind%20body%20spirit/islam_4.htm (calling on religious elders of Ghana to prevent the spread of the "moral virus from which God destroyed Sodom and Gomorrah" after homosexual marriages began in two U.S. states); see also THE THIRD PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION, 252-342 (Aart Hendriks, et al. eds., Prometheus Books 1993) (detailing "Official Attitudes and the Law" as well as societal attitudes towards gays worldwide).

⁵² Lund-Andersen, *supra* note 47, at 42; see also MERIN, *supra* note 43, at 75.

⁵³ See *Belgium backs gay adoption plans*, BBC NEWS, Dec. 2, 2005, <http://news.bbc.co.uk/1/hi/world/europe/4491688.stm>.

⁵⁴ Renwick McLean, *Spain Legalizes Gay Marriage*, N.Y. TIMES, July 1, 2005, at A9.

⁵⁵ C.E. Art. 149 (1978). An English translation of Spain's Constitution is available at http://www.senado.es/constitu_i/articulos/arts_old.html.

⁵⁶ *Matrimonio y ley de parejas: situación actual* [Marriage and partnership law: current situation], Fundación Triángulo, <http://www.fundaciontriangulo.es/Derechos/Familia/InicioParejas.htm>.

⁵⁷ See McLean, *supra* note 54.

⁵⁸ See Anteproyecto de ley por la que se modifica el código civil en materia de derecho a contraer matrimonio (Draft bill to modify the civil code regarding marriage rights) [hereinafter Anteproyecto], at 1-2, <http://www.juecesdemocracia.es/pdf/ProyectoLeyreformaMatrimoniopersonasmisosexo.pdf>.

⁵⁹ *Id.*; see also C.E. Arts. 9.2, 10.1, & 14.

⁶⁰ Anteproyecto, *supra* note 58, at 3 ("Tendrá los mismos requisitos y efectos el matrimonio cuando ambos contrayentes sean del mismo o de diferente sexo") (author translation).

⁶¹ See *Spain approves gay bill*, BBC NEWS, Oct. 1, 2004, <http://news.bbc.co.uk/2/hi/europe/3706414.stm>.

⁶² Fla. S.B. 986.

⁶³ Lofton, 377 F.3d 1275.

⁶⁴ *Id.*

⁶⁵ MERIN, *supra* note 43, at 75.

⁶⁶ Barbra Stark, *Baby Girls From China in New York: A Thrice Told Tale*, 2003 UTAH L. REV. 1231, 1275 n.300 (2003).

⁶⁷ Petition for Certiorari, *Lofton v. Dep't of Children & Family Serv.*, 377 F.3d 1275 (Oct. 1, 2004), available at <http://www.lethimstay.com/resources/CertPet.pdf>.

⁶⁸ Fla. S.B. 986; Fla. S.B. 1534.

⁶⁹ Petition for Certiorari, *supra* note 67.

⁷⁰ See NAIC, *supra* note 4, at 1.

⁷¹ FLA. STAT. § 63.042(3).

⁷² Compare ERIC FERRERO, ET. AL., TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 42-47 (2005), http://www.lethimstay.com/resources_publications.html (summarizing twenty two leading studies which

show "no...evidence to support the claim that lesbians and gay men are unfit to be parents"), with NAIC, *supra* note 4, at 2 ("the effects on children of being raised by gay and lesbian adoptive parents cannot be known"), and Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 833 (1997) (suggesting there are "significant potential [negative] effects of gay childrearing on children").

⁷³ Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 631 (2004).

⁷⁴ *Id.* (citing Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam. L.Q. 121, 133 (1995)) (noting that having no legal parent for a substantial time affects "a child's perception of self, especially in the context of the lifeline to the biological family, is difficult to assess).

⁷⁵ See The Urban Institute, *Gay and Lesbian Families in the Census: Couples With Children*, at http://www.urban.org/UploadedPDF/900626_Checkpoints_Couples.pdf (2003).

⁷⁶ See NAIC, *supra* note 4, at 1.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ The Urban Institute, *supra* note 75.

⁸⁰ *Id.* (identifying the national average of same-sex couples with children as two per thousand).

⁸¹ See, e.g., Lund-Anderson, *supra* note 47.

⁸² *Id.*

⁸³ Lofton, 377 F.3d at 1301-03 (Barkett, J., dissenting)

The Florida statute was enacted after an organized and relentless anti-homosexual campaign led by Anita Bryant, a pop singer who sought to repeal a January 1977 ordinance of... Dade County... prohibiting discrimination against homosexuals in the areas of housing, public accommodations, and employment... In the course of her campaign, which the Miami Herald described as creating a "witch-hunting hysteria more appropriate to the 17th century than the 20th," Bryant referred to homosexuals as "human garbage..." In response to Bryant's efforts, Senator Curtis Peterson introduced legislation in the Florida Senate banning both adoptions by and marriage between homosexuals...

[It was t]he Florida legislature's intention to stigmatize and demean homosexuals...

Throughout all of these proceedings, it could hardly be said that there was any discussion of the "best interests of the child" standard... Senator Peterson stated that his bills were a message to homosexuals that "we're really tired of you. We wish you would go back into the closet..." In short, the legislative history shows that anti-gay animus was the major factor—indeed the sole factor—behind the law's promulgation.

⁸⁴ See *supra* note 4 for list of some states that have allowed homosexual individuals and/or couples to adopt.

⁸⁵ See Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39 (noting that all eleven states that proposed anti same-sex marriage bans passed those bans.)

⁸⁶ See Press Release, National Gay and Lesbian Task Force, *Anti-Gay Marriage Amendments Pass in 11 States*, Nov. 3, 2004, <http://www.thetaskforce.org/media/release.cfm?releaseID=756>; see also Virginia F. Coleman, *Married in Massachusetts: Now What? Status of Same-Sex Couples Under Federal Law, Laws of Other States, and a Few Planning Thoughts*, SK020 ALI-ABA 279, 298 (2004) (listing the states that have passed such laws).

⁸⁷ 28 U.S.C. 1738C.

⁸⁸ See *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 ("At least thirty-seven states have already adopted 'mini-DOMAs'"); see also Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569, 622 n.20 (2004).

⁸⁹ *Id.*

⁹⁰ Lofton, 377 F.3d 1275.

⁹¹ See Cox, 656 So. 2d at 902 (Fla. 1995).

⁹² *Id.*

⁹³ See FLA. CONST. art. X, § 21 (2002) (amendment to the Florida Constitution using the citizen initiative process to protect health and welfare, specifically to protect pregnant pigs from cruelty).