In U.S. law, biological parents are presumed to be fit custodians of their children, and have a natural right to the custody, care and control of their children. Only if there is family disruption, for example, divorce, or a substantiated report of neglect or abuse, will the state intervene in the privacy of the family. It is after custody is disrupted or disputed, “challenged,” as it were, by the incident or situation leading to state intervention that the best interests of the child test will be applied. In adoption, some incident such as the death or disability of parents, termination of or relinquishment of parental rights and duties, triggers the need for a custody decision, with the operative presumption that it is in the best interests of the child to place him or her with a stable family, a replacement for the biological family from whence the child originated.

In contrast, to the status of biological parents, however, there is no presumptive fitness for the category of persons desiring to be foster parents, or adoptive parents. To a significant extent, prospective foster or adoptive parents are required to prove parental fitness before being considered for the placement of a child, and to be monitored for some period after placement to assure that the placement is safe for the child.

While the practices of private and state agencies vary to some extent, the conjugal family has been the preferred site for the placement of children in adoptive homes, because this family form, although imperfect in particular instances, has been the most successful form of the family in this country both historically and currently. Adoptive placement preferences for married

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couples, with unmarried individuals as a secondary preference, have been a legal presumption, de facto or de jure, because the married couple has been the norm for stable child rearing. The conjugal family, therefore, has been the marker signifying a household structure and process that is most likely to allow an adopted child to thrive. This might be called “imitative adoption,” in that the adoptive parents are replacements\(^2\) for the child’s own biological parents. The approval of an unmarried individual might be considered part of the conjugal family norm, simply with one of the parents not yet “replaced.” In some sense, then, the regulated adoption is attempting to replicate something akin to the institution which predates it: the biological or conjugal family.

This standard family norm for adoptive families has been challenged as too restrictive, discriminatory toward adults in other relationships, and insofar as it limits the number of prospective adoptive parents, failing to provide for the best interests of the children who cannot be cared for by their biological parents and who may be caught in the foster care system.\(^3\) With over 523,000 children in the foster care system, with emphasis on permanency placement in the Adoption and Safe Families Act of 1997, some have wondered whether keeping that familial norm is truly helpful.

Given the fact that there are significant differences in the structure and processes of married heterosexual couples in comparison to the structure and processes in same-sex couple households, polygamous or polyamorous households, to have a married-couple or an unmarried individual norm as a threshold for adoption, is not invidious discrimination, but a rational means

\(^2\) I use the term “replace” with caution, since no person can truly take the place of another in family relationships: each individual is unique, nonfungible.

of legislating requirements most likely to yield the legitimate state goal of providing a loving, stable home for adoptive children. To place children in household forms that are arguably suboptimal may place the child at risk and may expose the state to liability for such placement.\footnote{See Lynn D. Wardle, Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies, 6 J. L. FAM. STUD. 59 (2004).}

In other words, a suboptimal placement may not be better than no placement at all. As one former foster youth expressed it: “All kids deserve families. They need a family to have someone, this is father, this is mother—they need a family so they can believe in themselves and grow up to be somebody. This is a big deal that people don’t realize. I wish everyone could understand.”\footnote{The Pew Commission on Children in Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care, Executive Summary, at 7 (2004).}

Because a host of negative circumstances or outcomes correlate with alternative household structures and alternative sexualities,\footnote{Some of the potentially negative outcomes are suggested by George A. Rekers and Mark Kilgus, Studies of Homosexual Parenting: A Critical Review, 14 REGENT U. L. REV. 343 (2002); but see Judith Stacy and Timothy Biblarz, (How) Does the Sexual Orientation of Parents Matter? 66 AMERICAN SOCIOLOGICAL REVIEW 159 (2001)(attributes positive differences in child outcome to parental gender and sexual identities, and negative differences to a homophobic society.} lowering the high standard for adoptive parents that has been the hallmark of best adoption practices in the U.S. may not be the best option for addressing the needs of children whose biological parents cannot care for them.

\textit{Same-sex couple households are outside the family norm structurally.} The 2000 census identified about 594,000 same-sex couple households in the United States, about 1 percent of all coupled households.\footnote{U.S. Census Bureau, Married-Couple and Unmarried-Partner Households: 2000 at} That suggests that 99 percent of coupled households are heterosexual, a significant numerical norm.

\textit{Same-sex couple household processes are outside the family norm.} Judith Stacey and
Timothy Biblarz, advocates of alternative family structures, review the literature on “lesbigay” parenting, which is primarily about the parenting of post-divorce lesbians, and conclude that there are differences from children raised by opposite-sex parents: they appear to be less traditionally gender-typed and are more likely to be open to homoerotic relationships. “In addition, evidence suggests that parental gender and sexual identities interact “to create distinctive family processes whose consequences for children have yet to be studied.”

Placement of children for adoption in same-sex couple households may make evaluation of placement much more difficult. Any evaluation is conducted with an eye to what is normal or functional or dysfunctional. Currently, same-sex couples are not the norm, and while Stacey and Biblarz complain about heterosexual parenting remaining the “gold standard” against which evaluations of same-sex parenting are conducted, numerically and historically, opposite-sex parenting has been the norm and insufficient research has been conducted on alternative parental coupling to have established a norm for same-sex household parenting, if indeed, one exists.

Placement of children for adoption in same-sex couple households could impair the social functioning of those children. If the adopted child is one of the 99 percent that will live in heterosexual coupling, rather than part of the one percent that will alternatively couple, that child will not have the influence of the interaction of opposite sex parents to help him and her in the developing the skills later needed to enter into a positive heterosexual relationship.

Placement of children for adoption in same-sex couple households may exacerbate the underfunding of support for the conjugal family struggling to care for children. The Adoption and Safe Families Act of 1997 (ASFA) gives a very short time frame for family reunification.

8 Stacey & Biblarz, at 166.
9 Judith Stacey Timothy Biblarz, at 176.
before permanency planning, i.e., adoption, is set. Richard Wexler characterizes the requirements of ASFA as equivalent to “Take the child and run.”\textsuperscript{10} For biological parents with serious problems, 15-24 months may not be long enough for the parent to rehabilitate, or develop parental and job skills, or acquire the economic means to consistently care of the child or children that are in foster care. Legal scholars have cautioned that biological families are being needlessly harmed by a bureaucracy anxious to find permanency for children and some extra federal dollars for child welfare. Amy Wilkinson-Hagen notes that

ASFA takes social concerns from the late 1990s about the harms children suffer in foster care (and at the hands of abusive biological parents) and frames its goals in a rhetoric about permanency at any cost--even the cost of unnecessary state termination proceedings for increasing numbers of families. ASFA states that the "paramount consideration" for child welfare programs must be the "health and safety of the child." Virtually no one would disagree with this aim, but what makes ASFA distinct from its legislative predecessors is that it places the goal of permanency above any other goals concerning the child's place as part of a family group--a group that has typically found protection from intrusion by the government under the auspices of the Fourteenth Amendment of the Constitution.\textsuperscript{11}

\textsuperscript{10} Richard Wexler, \textit{Take the Child and Run: Tales from the Age of ASFA}, 36 NEW ENG. L. REV. 129 (2001).