

TRANSVESTISM AND FOSTER PARENTING: A CHILD PROTECTION CONCERN?*

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“[I]n serving the best interests of children, we will serve the best interests of all humanity.”

— Carol Bellamy¹

The adage that “the hand that rocks the cradle rules the world” hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children. It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating,

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¹ Carol Bellamy, Executive Director, UNICEF, Address to the 3rd World Summit on Media for Children (Mar. 22, 2001), http://www.unicef.org/media/media_10731.html. Carol Bellamy is a former executive director of the United Nations Children’s Fund, director of the Peace Corps, and president and CEO of World Learning. *About UNICEF: Who We Are—Carol Bellamy Biography*, UNICEF, http://www.unicef.org/about/who/index_bio_bellamy.html (last visited Nov. 15, 2013).

*socializing, and preparing its future citizens to become productive participants in civil society—particularly when those future citizens are displaced children for whom the state is standing in loco parentis.*²

I. FOSTER CARE OVERVIEW

Children, especially those in foster care, are inherently vulnerable to sexual abuse and exploitation.³ The particular vulnerability of foster children may stem from a variety of factors, including their dependence on others, sexual naïveté and immaturity, limited verbal skills, and damaged social status.⁴ In light of this vulnerability, the screening and application process for prospective foster parents is critical.⁵ When placing a child in the custody of a foster parent, courts and social service agencies must engage in a careful screening and review process, selecting a placement that is in the child's best interest.⁶

The estimated number of foster children in the United States currently ranges from approximately 400,000 to more than 500,000.⁷ Given such estimates, state legislatures and child welfare professionals prefer that no capable, prospective foster parent be summarily

² *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

³ Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204-05 (1988).

⁴ See John A. Landsverk et al., *Psychosocial Interventions for Children and Adolescents in Foster Care: Review of Research Literature*, 88 CHILD WELFARE 49, 54-55 (2009) (discussing the various factors that may contribute to the heightened vulnerability of foster children); Gerald P. Mallon, *Introduction for Staff: You Can Make a Difference*, in IN THE SYSTEM AND IN THE LIFE: A GUIDE FOR TEENS AND STAFF TO THE GAY EXPERIENCE IN FOSTER CARE (Al Desetta ed., 2003).

⁵ JAMES L. DICKERSON ET AL., HOW TO SCREEN ADOPTIVE AND FOSTER PARENTS: A WORKBOOK FOR PROFESSIONALS AND STUDENTS 5 (Lisa M. O'Hearn ed., 2011).

⁶ See *id.* at 6-7; Mushlin, *supra* note 3, at 209-10.

⁷ CHILD WELFARE INFO. GATEWAY, FOSTER CARE STATISTICS 2011 (2013), available at <https://www.childwelfare.gov/pubs/factsheets/foster.pdf>; *Pew Commission on Children in Foster Care*, THE PEW CHARITABLE TRUSTS, <http://www.pewhealth.org/projects/pew-commission-on-children-in-foster-care-85899367236> (last visited Sept. 10, 2013).

overlooked.⁸ Although states traditionally placed children in households consisting of a mother and a father, states are increasingly placing children in nontraditional settings, and society is growing increasingly comfortable with placing children into the homes of individuals who are gay or lesbian, in a domestic partnership, or in a civil union.⁹ In fact, the vast majority of states currently allow people who are gay or lesbian to serve as foster parents.¹⁰ This trend seems to suggest that contemporary America has generally rejected the belief that the sexual orientation of a foster parent alone, without consideration of that parent's other characteristics and qualities, poses an increased risk to the children placed in the home.¹¹

Although sexual orientation no longer poses a significant obstacle to fostering or adopting a child, pursuant to operation of law in most states, it is unclear whether the same is true, or should be true, for someone with a recognized sexual fetish.¹² This Article addresses the question of whether states should allow known transvestites to be foster parents. In attempting to address this issue, one must first clearly define the term "transvestism." This Article discusses definitional issues surrounding transvestic fetishism, including a review of the literature regarding whether transvestism should be considered a pathological or

⁸ See DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., OEI-07-00-00600, RECRUITING FOSTER PARENTS 1 (2002), available at <http://oig.hhs.gov/oei/reports/oei-07-00-00600.pdf> (discussing the shortage of foster parents and the need to recruit and retain foster parents).

⁹ See *Overview of Lesbian and Gay Parenting, Adoption and Foster Care*, ACLU (Apr. 6, 1999), https://www.aclu.org/lgbt-rights_hiv-aids/overview-lesbian-and-gay-parenting-adoption-and-foster-care ("The last decade has seen a sharp rise in the number of lesbians and gay men forming their own families through adoption, foster care, artificial insemination and other means.").

¹⁰ See Lori A. Selke, *States That Allow Gay Foster Parenting*, DEMAND MEDIA, <http://everydaylife.globalpost.com/states-allow-gay-foster-parenting-6351.html> (last visited Aug. 10, 2013, 8:25 PM) (noting that six states protect the right of gay partners to be foster parents and forty-two states do not prohibit gay partners from becoming foster parents).

¹¹ See *id.* (noting that only two of the fifty states prohibit gay couples from becoming foster parents).

¹² See DEP'T OF HEALTH & HUMAN SERVS., *supra* note 8, at 6 (recognizing that the current system for recruiting foster parents has failed to evolve and set new standards for the changing needs of foster children).

behavioral characteristic, in the context of considering the transvestic population as foster parents.

II. DEFINING TRANSVESTISM

“Transvestism” refers to wearing clothing of the opposite sex.¹³ The classic diagnosis from the *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”) of transvestic fetishism applies to a heterosexual male who experiences sexual arousal associated with wearing women’s clothing.¹⁴ The *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition, text revision, (“DSM-IV-TR”) notes that “[t]ransvestic [f]etishism involves cross-dressing by a male in women’s attire.”¹⁵ “In many or most cases, sexual arousal is produced by the accompanying thought or image of the person as a female (referred to as ‘autogynephilia’).”¹⁶ “Transvestic phenomena range from occasional solitary wearing of female clothes to extensive involvement in a transvestic subculture.”¹⁷

Distinguishing between transvestic behavior and transvestic fetishism is important.¹⁸ Transvestic behavior, or cross-dressing, need not be automatically associated with sexual arousal; it can take place in any number of nonerotic contexts.¹⁹ Transvestic fetishism, in contrast, specifically refers to the experience of feeling sexually aroused by the appearance and feel of clothing usually worn by the opposite sex.²⁰

¹³ *Transvestism*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/603314/transvestism> (last visited Aug. 10, 2013, 8:19 PM) (defining transvestism as the “practice of wearing the clothes of the opposite sex,” which can be mistakenly confused with homosexuality).

¹⁴ Ray Blanchard, *The DSM Diagnostic Criteria for Transvestic Fetishism*, 39 ARCHIVES OF SEXUAL BEHAV. 363, 363 (2010).

¹⁵ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV 574 (4th ed. 2000).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Gwen Adshead, *Transvestic Fetishism: Assessment and Treatment*, in SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 280, 280 (D. Richard Laws & William O’Donohue eds., 1997).

¹⁹ *Id.*

²⁰ *Id.*

The term “transvestism” has often been used too broadly or vaguely, in ways that obscure the diversity of motives and contexts influencing the behavior.²¹ Some have recommended that “transvestism” be reserved for fetishistic cross-dressing only, i.e., intermittently donning “the clothes of the opposite sex for the purpose of sexual arousal.”²² Female impersonators and transsexuals, in contrast, might not be considered transvestic fetishists.²³

Researchers have identified two distinct subcategories of transvestic fetishists.²⁴ “Nuclear” transvestites appear to be decidedly heterosexual with no desire to become female, while “marginal” transvestites appear to cross-dress as a manifestation of a desire to be female.²⁵ Marginal transvestites may even take hormone treatments or seek sex-reassignment surgery to achieve a state of femininity.²⁶

Unlike periodic cross-dressers, marginal transvestites have a tendency to view themselves as having core personality traits and self-perceived gender characteristics opposite their biological sex.²⁷ This phenomenon is called “cross-gender identity”²⁸ or possibly “gender-identity dysphoria,” defined as discomfort about one’s status as a biological male or female.²⁹

²¹ Thomas J. Ryan, *Clothes Maketh the Man: Transvestism, Masculinity and Homosexuality*, 22 BRIT. J. OF PSYCHOTHERAPY 57, 57 (2005).

²² *Id.*

²³ *Id.*

²⁴ See Adshead, *supra* note 18, at 281; Neil Buhrich & Neil McConaghy, *Three Clinically Discrete Categories of Fetishistic Behavior*, 8 ARCHIVES OF SEXUAL BEHAV. 151, 152 (1979); Richard F. Docter & Virginia Prince, *Transvestism: A Survey of 1032 Cross-Dressers*, 26 ARCHIVES OF SEXUAL BEHAV. 589, 590 (1997); Richard L. Schott, *The Childhood and Family Dynamics of Transvestites*, 24 ARCHIVES OF SEXUAL BEHAV. 309, 311 (1995).

²⁵ See sources cited *supra* note 24.

²⁶ See sources cited *supra* note 24.

²⁷ See Docter & Prince, *supra* note 24, at 590.

²⁸ See *id.*

²⁹ Kenneth J. Zucker & Susan J. Bradley, *Gender Identity and Psychosexual Disorders*, in THE AMERICAN PSYCHIATRIC PUBLISHING TEXTBOOK OF CHILD AND ADOLESCENT PSYCHIATRY 813, 813 (Jerry M. Wiener & Mina K. Dulcan eds., 3d ed. 2004).

One researcher argues that nuclear and marginal transvestites and transsexuals (individuals who have undergone sex-reassignment surgery) are not discrete syndromes but rather are points on a continuum from normal gender identity development at one pole to transsexualism at the other.³⁰ In fact, “roughly fifteen to twenty percent of the so-called periodic cross-dressers active in transvestite clubs eventually come to live as full-time” marginal transvestites or transsexuals.³¹

III. TRANSVESTISM: PATHOLOGY OR BEHAVIOR?

Transvestic fetishism is classified as a paraphilia, a powerful and persistent sexual interest in an object other than normative copulatory or precopulatory behavior with consenting adult, human partners.³² When a paraphilia causes functional impairment or subjective distress, it is labeled a paraphilic disorder, or something a clinician might diagnose as negatively impacting the client’s socioemotional functioning.³³ According to some mental-health clinicians, persons with paraphilia do not necessarily have a paraphilic disorder.³⁴ Additionally, a transvestite who is comfortable with his lifestyle choice and experiences no cognitive dissonance can be classified as a transvestite for research or descriptive purposes even though he may not meet full criteria for the disorder.³⁵

Transvestic behavior has been documented over a long period of history,³⁶ and it remains unclear whether, and to what extent, this behavior may be viewed as pathological.³⁷ Researchers and clinicians grapple with the question of when to label a behavioral phenomenon as

³⁰ See Schott, *supra* note 24, at 318.

³¹ Docter & Prince, *supra* note 24, at 603.

³² Blanchard, *supra* note 14, at 367.

³³ See *id.*

³⁴ See *id.*

³⁵ *Id.* at 368.

³⁶ See PETER ACKROYD, DRESSING UP: TRANSVESTISM AND DRAG: THE HISTORY OF AN OBSESSION (1979).

³⁷ Adshead, *supra* note 18, at 280.

a disorder, and, over the past few years, a debate has existed as to whether transvestic fetishism should be considered a mental disorder.³⁸

Classically, statistical deviation from the norm has been used as one criterion for classifying a behavior as a disorder.³⁹ In this regard, transvestic fetishism would clearly qualify as a mental disorder.⁴⁰ It is well known, however, that such a definition is problematic,⁴¹ and some have argued that distress, disability, and disadvantage should be present for a behavioral syndrome to qualify as a disorder.⁴² “Distress,” in this context, has been defined as a subjective complaint, either articulated by the subject or inferred from the subject’s manifest behavior, such as the anxiety experienced during panic attacks.⁴³ “Disability” has been defined as functional impairment across a wide range of activities, such as the inability to concentrate when depressed.⁴⁴ And, “disadvantage” has been defined as the negative sequelae occurring when the individual interacts with aspects of the physical or social environment, or anorgasmia.⁴⁵ In order for transvestic fetishism to qualify as a disorder according to this definition, it would need to meet these criteria.⁴⁶

Many adults experience common psychiatric disorders as stressful only as a function of their conflict with accepted social norms (e.g., antisocial personality).⁴⁷ In such cases, one may question whether the subjective distress is inherent to the person.⁴⁸ For men who engage

³⁸ See, e.g., DAVE KING, *THE TRANSVESITITE AND THE TRANSSEXUAL: PUBLIC CATEGORIES AND PRIVATE IDENTITIES* 1-31 (1993); ANNIE WOODHOUSE, *FANTASTIC WOMEN: SEX, GENDER, AND TRANSVESTISM* 58-76 (1989).

³⁹ See William A. Scott, *Research Definitions of Mental Health and Illness*, 55 *PSYCHOL. BULL.* 29, 31 (1958).

⁴⁰ See Zucker & Bradley, *supra* note 29, at 815-16.

⁴¹ See *id.*

⁴² See Robert L. Spitzer & Jean Endicott, *Medical and Mental Disorder: Proposed Definition and Criteria*, in *CRITICAL ISSUES IN PSYCHIATRIC DIAGNOSIS* 15-39 (Robert L. Spitzer & Donald F. Klein eds., 1978).

⁴³ See *id.* at 18-23.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ Kenneth J. Zucker & Ray Blanchard, *Transvestic Fetishism: Psychopathology and Theory*, in *SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT* 260 (D. Richard Laws & William O’Donohue eds., 1997).

⁴⁸ *Id.*

in transvestic fetishism, two questions arise: “Are they distressed by their condition, and if so, what are the reasons for the distress?”⁴⁹ There seem to be two opposing positions on this issue.⁵⁰ One perspective is that men with transvestic fetishism experience their condition as stressful only after it becomes a problem for them socially.⁵¹ The other perspective is that cognitive dissonance and stress are part and parcel of the condition and that actual or imagined cross-dressing behaviors are an attempt to relieve this stress.⁵² Proponents of the latter perspective would naturally view compulsive cross-dressing behavior as symptomatic of psychological disturbance.⁵³

Transvestic fetishists are a heterogeneous group when it comes to personality and pathology, and there is repeated evidence that some transvestite subjects are far less disordered and deviant than others.⁵⁴ One early study of transvestites found that the overwhelming majority were heterosexual, often married, and had children.⁵⁵ Another study found that most were married with families, were educated, were employed in middle-class jobs or higher, and, overall, led normative lives (although, the authors acknowledge some possible sampling biases).⁵⁶ The transvestites in a third study, for the most part, were employed in respected occupations, were generally successful, and seemed comfortable in their masculine roles.⁵⁷ It is noteworthy that over three-quarters of this sample of transvestites had never sought psychiatric consultation regarding their condition and were, therefore, not represented in the literature.⁵⁸

⁴⁹ *Id.*

⁵⁰ *Id.* at 261.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Adshead, *supra* note 18, at 280-88; Uwe Wolfradt & Kerstin Neumann, *Depersonalization, Self-Esteem and Body Image in Male-to-Female Transsexuals Compared to Male and Female Controls*, 30 ARCHIVES OF SEXUAL BEHAV. 301, 302 (2001).

⁵⁵ Virginia Prince, & P. M. Bentler, *Survey of 504 Cases of Transvestism*, 31 PSYCHOL. REP. 903, 912 (1972).

⁵⁶ Docter & Prince, *supra* note 24, at 599-600.

⁵⁷ Schott, *supra* note 24, at 312.

⁵⁸ *Id.* at 310.

In contrast, other findings suggest that transvestites reported more psychological maladjustment and showed more neuroticism and distress, as measured by clinical inventories.⁵⁹ A subgroup of transvestites that experiences gender dysphoria reported troubled emotional lives and relationships.⁶⁰ Paraphilias in general, including transvestic fetishism, may correlate with psychopathology, especially in clinical samples.⁶¹ In attempting to explain transvestic fetishism, one researcher posited that transvestites may identify with distorted fantasies of what it is like to be female—a type of stereotyping that actually mimics what is presented in most heterosexual pornography.⁶² The question is whether this assumption, if true, renders transvestites dangerous to others.⁶³

Classically, transvestic fetishism has not been viewed as a harmful or destructive paraphilia.⁶⁴ However, transvestic fetishism can sometimes be part of a wider paraphilic disturbance, which may well involve practices that are dangerous to others.⁶⁵ Several studies have suggested that transvestic fetishism often coexists with other paraphilias, particularly in clinical samples.⁶⁶ Specifically, there appears to be considerable overlap between sadomasochistic behaviors, general fetishism, and transvestic fetishism.⁶⁷ Transvestic fetishism has

⁵⁹ See Neil Buhrich, *Motivation for Cross-Dressing in Heterosexual Transvestism*, 57 ACTA PSYCHIATRICA SCANDINAVICA 145, 145 (1978); Adshead, *supra* note 18, at 284-85.

⁶⁰ Schott, *supra* note 24, at 323-24.

⁶¹ Adshead, *supra* note 18, at 284-85.

⁶² See *id.* at 283-84.

⁶³ See *id.* at 286-88.

⁶⁴ *Id.* at 286; see Robert A. Prentky et. al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 366 (2006) (“The DSM-IV-TR includes, as examples, a number of the more commonly observed paraphilias: exhibitionism, voyeurism, fetishism, transvestic fetishism, frotteurism, pedophilia, sexual masochism, and sexual sadism. Of these paraphilias, there are only three—pedophilia, sadism, and possibly frotteurism—that potentially satisfy the dangerousness nexus requirement.”).

⁶⁵ See Adshead, *supra* note 19, at 286-88.

⁶⁶ See *id.*

⁶⁷ Chris Gosselin & Glenn Wilson, *Fetishism, Sadomasochism and Related Behaviours*, in THE PSYCHOLOGY OF SEXUAL DIVERSITY 99 (Kevin Howells ed. 1984).

also been reported in connection with other types of sexual offenses, such as exhibitionism⁶⁸ and rape.⁶⁹

IV. IMPLICATIONS FOR FOSTER CARE

A. *In Loco Parentis*

The Supreme Court of the United States has long recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.⁷⁰ This recognition has also extended into the realm of family life, into which the state cannot enter, and to which the Court has afforded both substantive and procedural constitutional protections.⁷¹

Unlike biological parentage, however, with its origins in procreation, foster parenting and adoption are creations of contractual agreements and state law.⁷² In this context, states and their affiliated child welfare agencies stand in the role of parents, termed *in loco parentis*, to children removed from the care of their biological parents or caregivers.⁷³ Just as biological parents scrutinize the selection of persons by whom their children are cared for, so too must the state scrutinize the homes and private lives of those electing to serve as foster and adoptive parents.⁷⁴ Placements of wards with persons not their biological parents are state-sanctioned, court-ordered placements.⁷⁵ By virtue of this status, courts afford such placement decisions the highest level of constitutional insulation from subsequent state interference.⁷⁶

⁶⁸ See Ron Langevin & Reuben A. Lang, *The Courtship Disorders*, in VARIANT SEXUALITY: RESEARCH AND THEORY 222-25 (Glenn D. Wilson ed., 1987).

⁶⁹ Ron Langevin, Daniel Paitich & Anne E. Russon, *Are Rapists Sexually Anomalous, Aggressive, or Both?*, in EROTIC PREFERENCE, GENDER IDENTITY, AND AGGRESSION IN MEN: NEW RESEARCH STUDIES 31-32 (Ron Langevin ed., 1985).

⁷⁰ See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

⁷¹ See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 (1977).

⁷² See *id.* at 845; *Lindley v. Sullivan*, 889 F.2d 124, 130 (7th Cir. 1989).

⁷³ See *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004).

⁷⁴ See *id.* at 810-11.

⁷⁵ See *id.* at 809-10.

⁷⁶ See *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

Thus, placement decisions should be made only after selective and thoughtful determination.⁷⁷

When placing a child in the custody of a foster parent, or with a preadoptive parent for subsequent adoption, the paramount focus is not upon the individual liberty interest of the prospective parent, as it would be in the context of placement with a biological parent, but, rather, it is upon the best interests of the child.⁷⁸ State courts and their respective social service agencies owe the child the highest duty of care when determining which environment will be most beneficial across all facets of that child's growth and development.⁷⁹ Because the focus in the foster-care setting is primarily that of the child's well-being, a state may make classifications that would ordinarily be constitutionally suspect if made in other contexts.⁸⁰

B. The Best Interests of the Child

Like biological parents, foster parents are responsible for providing care and supervision for children placed in their custody.⁸¹ Regardless of the state, foster parents are uniformly expected to provide a foster child with physical care, nurturance, and the opportunity for individual, emotional, social, and intellectual development.⁸² Foster parents are also expected to actively participate in the delivery of services to the child, including participation in the child's schooling and maintenance of medical and dental appointments.⁸³

Beyond simply finding a foster parent to assume these daily responsibilities in a child's life, determining the appropriate placement

⁷⁷ See *Lofton*, 358 F.3d at 810-11.

⁷⁸ See *In re Adoption of H.Y.T.*, 458 So. 2d 1127, 1128 (Fla. 1984).

⁷⁹ See *Lofton*, 358 F.3d at 810.

⁸⁰ See *id.*; *Troxel*, 530 U.S. at 68-69 (recognizing that, absent neglect or abuse, the state may not "inject itself into the private realm of family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children").

⁸¹ See *Foster Parent Responsibilities*, FOSTER CARE & ADOPTIVE CMTY., <http://www.fosterparents.com/articles/index55fpresp.html> (last visited Aug. 18, 2013, 6:35 PM).

⁸² See *id.*

⁸³ See *id.*

for a foster child is of unique importance because, as previously noted, children in foster care are particularly vulnerable after having already experienced some form of abuse, abandonment, or neglect by their caregivers.⁸⁴ Finding placements that offer safety and stability is thusly critical to ensuring their overall health and well-being because placement in unstable homes increases the likelihood of the initial development or intensification of emotional, intellectual, and behavioral problems.⁸⁵

Persons seeking to become foster parents must submit to a screening and approval process consisting of several parts.⁸⁶ This typically involves completion of an application soliciting information regarding the applicant's individual and family background, childhood history, and overall emotional, physical, and mental well-being.⁸⁷ By operation of federal law, interested persons in all states must submit to an FBI criminal fingerprint background check.⁸⁸ Additionally, a state representative, usually a social worker associated with a child welfare or social service agency, will also conduct an interview with the applicant and may solicit and complete interviews with that applicant's family, friends, and neighbors.⁸⁹

Once a foster parent becomes licensed, the foster parent undergoes a matching process that determines whether a specific child should be placed with a specific parent.⁹⁰ When making placement

⁸⁴ Landsverk, *supra* note 4, at 54-55.

⁸⁵ DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 444-45 (2d ed. 2003).

⁸⁶ See CHILD WELFARE INFO. GATEWAY, HOME STUDY REQUIREMENTS FOR PROSPECTIVE FOSTER PARENTS 1-7 (2011) [hereinafter CHILD WELFARE, HOME STUDY REQUIREMENTS], available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/homestudyreqs.pdf.

⁸⁷ See *id.*

⁸⁸ See CHILD WELFARE INFORMATION GATEWAY, CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS 2-3 (2011) [hereinafter CHILD WELFARE, CRIMINAL BACKGROUND CHECKS], available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/background.pdf (citing 42 U.S.C. § 671(a)(20) (2006 & Supp. V 2011)).

⁸⁹ See CHILD WELFARE, HOME STUDY REQUIREMENTS, *supra* note 86, at 5-6.

⁹⁰ See CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2013) [hereinafter CHILD WELFARE, BEST INTERESTS], available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

determinations, social welfare agencies and courts must act in the best interests of the child, and all states, as well as the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, have now codified laws specifically requiring that such a determination be made when making decisions involving child custody and placement.⁹¹

Determining what constitutes a child's "best interests" in the context of placement varies on a case-by-case basis.⁹² Such determinations are usually made after considering a host of factors unique to each child's particular circumstances as well as the circumstances and capacity of the child's proposed caregiver.⁹³ Notwithstanding each child's unique circumstances, however, is the fundamental principle that a placement selected for a child serves to maximize that child's sense of safety and well-being.⁹⁴

Several state statutes contain overarching goals, purposes, and objectives that serve to guide those making a best-interest determination.⁹⁵ The most commonly stated principles include the importance of family integrity,⁹⁶ protection of the health and safety of the child,⁹⁷ and the assurance that the child will be provided with "care, treatment, and guidance that will assist the child in developing into a self-sufficient adult."⁹⁸

⁹¹ *See id.* at 1.

⁹² *See id.* at 2.

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *Id.* As of 2012, the following states maintained statutes containing such consideration: "Alabama, Alaska, California, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming." *Id.* at n.1.

⁹⁷ *Id.* at 2. As of 2012, the following states maintained statutes containing such consideration: "Arizona, Arkansas, Colorado, Hawaii, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Washington, West Virginia, and Wyoming." *Id.* at n.2.

⁹⁸ *Id.* at 2. As of 2012, the following states maintained statutes containing such consideration: "Alabama, Colorado, Georgia, Hawaii, Idaho, Kansas, Mississippi,

In addition to such general overarching principles, several state statutes also contain specific factors for each state's respective courts to consider when making best-interest determinations.⁹⁹ These factors vary from state to state, but certain commonalities exist, such as a consideration of the emotional ties and relationships between children and caregivers and the child's and proposed caregivers' mental and physical needs.¹⁰⁰

C. Foster Homes: Moving Away from Tradition

While the historical preference for the placement of foster children in America has been to place children into traditional homes, consisting of both a mother and father typically of a race or ethnicity matching that of the foster child, such preference continues to erode over time.¹⁰¹ In the 1960s and 1970s, increasing numbers of white families chose to adopt nonwhite children, and in 1972, the National Association of Black Social Workers issued a public statement opposing such a practice.¹⁰² In response, the National Council for Adoption and the National Committee to End Racism published studies

Oklahoma, Pennsylvania, Rhode Island, South Carolina, and West Virginia.” *Id.* at n.4.

⁹⁹ *Id.* at 3. As of 2012, the following states maintained statutes containing such factors: “Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin.” *Id.* at n.5.

¹⁰⁰ *Id.* at 3. As of 2012, the following states maintained statutes containing factors such as emotional ties and relationships between children and caregivers: “Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, North Dakota, Ohio, Oregon, Tennessee, Vermont, and Virginia.” *Id.* at n.6. As of 2012, the following states maintained statutes containing considerations of the child's mental and physical health: “Connecticut, Delaware, Florida, Kansas, Maine, Michigan, Nevada, and Virginia.” *Id.* at n.8. As of 2012, the following states maintained statutes containing considerations of the parents' mental and physical health: “Delaware, Kentucky, Michigan, North Dakota, South Dakota, Tennessee, Texas, and Virginia.” *Id.* at n.9.

¹⁰¹ See, e.g., Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 552(a)(4), 103 Stat. 3518, 4056 (1994) (“[C]hild welfare agencies should work to eliminate racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement procedures.”).

¹⁰² *Preserving Families of African Ancestry*, NAT'L ASS'N OF BLACK SOC. WORKERS (Jan. 10, 2003), <http://www.nabsw.org/mserver/PreservingFamilies.aspx>.

and advocated in the courts, with state legislatures, and before Congress to end discrimination in adoption.¹⁰³ After years of such advocacy, the Multiethnic Placement Act and subsequent legislation required those placement agencies receiving federal funds to not delay or deny the placement of a child in adoption or foster care due to considerations of race and ethnicity.¹⁰⁴

In recent years, there have been significant changes in society in the area of publicly recognizing differences in sexual orientation of individual persons, much of which has inevitably affected the child welfare community.¹⁰⁵ Increasing governmental attention and protections afforded to the gay and lesbian community have highlighted, in many ways, the issue of sexual orientation in the context of parenting and family.¹⁰⁶ Proposed as a solution to finding homes for the large number of foster children awaiting placements, there has been a movement within social service and legal communities to expand foster care and adoptive placement options for children by ending

¹⁰³ Christine Adamec & William Pierce, *Multiethnic Placement Act (MEPA)*, in *THE ENCYCLOPEDIA OF ADOPTION* 233 (2d ed. 2000).

¹⁰⁴ See Howard M. Metzenbaum Multiethnic Placement Act of 1994, § 553, 108 Stat. at 4056. The only exception to this Act is the Indian Child Welfare Act, commonly referred to as ICWA, which is federal legislation passed in 1978 that requires the placement of American Indian children with American Indian families. § 553(f), 108 Stat. at 4057.

¹⁰⁵ See *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NAT'L CTR. FOR LESBIAN RTS. 1 (2013), <http://www.nclrights.org/wp-content/uploads/2013/07/adptn0204.pdf> ("In recent years . . . progress in combating antigay discrimination among private and public adoption agencies has resulted in a dramatic increase in the number of lesbian, gay, and bisexual couples who are planning families and parenting children.").

¹⁰⁶ Lori Abbott, *Gay Adoptions Still Face Resistance*, KRBC RADIO (July 22, 2013), <http://radio.krcb.org/post/gay-adoptions-still-face-resistance> (streaming an audio clip of a National Public Radio story with streaming audio); Rosemary Winters, *LGBT FYI: Congressman Hopes to End Discrimination in Adoption*, THE SALT LAKE TRIBUNE, Aug. 1, 2011, <http://www.sltrib.com/sltrib/blogslgbt/51767730-61/adopting-child-couples-utah.html.csp>; David Perry, *New Study: No Difference Between Gay and Straight Adoptive Parents*, EDGE BOSTON, July 29, 2013, http://www.edgeboston.com/news/family/news/147523/new_study:_no_difference_between_gay_&_straight_adoptive_parents (presenting a short radio clip from National Public Radio).

discrimination against lesbian, gay, bisexual, and transgendered (“LGBT”) prospective foster parents.¹⁰⁷

D. Nontraditional Foster Homes: Effect upon Child Development?

Professional organizations and the U.S. Department of Health and Human Services have concluded that there is no valid reason to exclude LGBT individuals from fostering children.¹⁰⁸ Consequently, several states currently allow LGBT persons to serve as foster and adoptive parents and have either struck down exclusionary statutory provisions or have enacted new legislation affirmatively allowing the practice.¹⁰⁹ For example, in California, the state with the highest number of adoptions by gay and lesbian persons, AB 458, the state’s Foster Care Non-Discrimination Act, prohibits discrimination in the foster care system on the basis of sexual orientation or gender identity.¹¹⁰

¹⁰⁷ Gary J. Gates et al., *Adoption and Foster Care by Lesbian and Gay Parents*, URBAN INST. 3 (Mar. 2007), available at http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf. This 2007 report published by the Urban Institute noted that an estimated 14,100 foster children, and 65,500 adopted children, were living with a lesbian or gay parent. *Id.* at 7, 15. Of the adopted children, more than 16,000 were living in California, the highest population of all states. *Id.* at 7. The report also indicated that three percent of all foster children, and four percent of all adopted children, in the United States were being raised by gay and lesbian parents. *Id.* at 11.

¹⁰⁸ CHILD WELFARE INFO. GATEWAY, WORKING WITH LESBIAN, GAY, BISEXUAL & TRANSGENDER (LGBT) FAMILIES IN ADOPTION 1-2 (2011) [hereinafter CHILD WELFARE INFO. GATEWAY, LGBT ADOPTION], available at https://www.childwelfare.gov/pubs/f_profbulletin/f_profbulletin.pdf.

¹⁰⁹ See *id.* at 8 (noting that most states’ laws are silent regarding homosexual adoptions). Utah bans individuals who are cohabiting, but not married, from adopting, essentially barring homosexual couples from adopting. *Id.* Florida previously statutorily banned all adoptions by homosexual individuals. LESLIE COOPER & PAUL CATES, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY PARENTING 6, 10-11 (2d ed. 2006), available at http://aclu.org/files/images/asset_upload_file480_27496.pdf. However, in 2010 Florida’s Third District Court of Appeal upheld a trial court’s ruling, declaring this ban unconstitutional. Fla. Dep’t of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 81, 92 (Fla. Dist. Ct. App. 2010).

¹¹⁰ THE NAT’L CTR. FOR LESBIAN RTS., AB 458 FACT SHEET: THE CALIFORNIA FOSTER CARE NON-DISCRIMINATION ACT (2011), available at http://www.nclrights.org/site/DocServer/ab458_fact_sheet.pdf?docID=1321.

Apart from an increasingly tolerant social context and a growing need for capable foster parents, these legal and social conclusions appear to be driven by research claiming that children raised by LGBT parents do not differ in any key areas of adjustment or functioning.¹¹¹ This research should, therefore, be examined critically.¹¹² For example, in the area of determining the suitability of homosexual individuals to serve as prospective parents, a defensive agenda appears to have influenced the reporting and interpretation of research findings.¹¹³ Scholars appear afraid to acknowledge almost any differences—even apparently neutral ones—in parenting and child outcomes between homosexual and heterosexual parents, and many studies tend to downplay findings in this area.¹¹⁴

It is reasonable to suppose that the same could be true for research regarding the households of transgendered or transsexual parents.¹¹⁵ Much of the research on homosexual parenting “rel[ies] on small-scale, snowball and convenience samples drawn primarily from personal and community networks or agencies.”¹¹⁶ As such, conclusions drawn from these studies are necessarily limited.¹¹⁷ Since the population of marginal transvestite foster parents is likely even smaller and less studied, conclusions may not be definitive.¹¹⁸

¹¹¹ See ABBIE E. GOLDBERG, LESBIAN & GAY PARENTS & THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE 125-41 (2010) (discussing society’s changing views towards homosexuality and providing an analysis of how lesbian and gay parenting affects a child’s sexual identity, social functioning, and psychological adjustment). Goldberg’s analysis found no remarkable difference in the sexual identity, social functioning, or psychological adjustment between children raised in heterosexual households and those raised in lesbian or gay households. *Id.*

¹¹² See Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, AM. SOC. REV., Apr. 2001, at 159-61.

¹¹³ *Id.* at 160.

¹¹⁴ *Id.* at 162-63.

¹¹⁵ See *infra* note 118 and accompanying text.

¹¹⁶ Stacey & Biblarz, *supra* note 112, at 166.

¹¹⁷ See *id.*

¹¹⁸ See *infra* notes 126-27, 131 and accompanying text. In 2005, the first population-based study regarding transvestic fetishism reported that three percent of males experienced sexual arousal from cross-dressing. Niklas Långström & Kenneth J. Zucker, *Transvestic Fetishism in the General Population: Prevalence and Correlates*, 31 J. OF SEX & MARITAL THERAPY 87, 93 (2005). The corresponding amount of

E. Prospective Foster Parent: The Transvestic Profile

When a prospective foster parent identifies as a transvestite, some hard-nosed practice questions arise.¹¹⁹ If a transvestite applies to be a foster parent, should a state consider his sexual identity as a factor in approving or denying his or her application at all?¹²⁰ In order for the state to deny a transvestite the opportunity to be a foster parent, must the state show some justification for the exclusion?¹²¹ Does a heightened connection between transvestism and increased criminal sexual activity with children result from any acts uniquely characteristic of being transvestic?¹²² Does transvestism indicate at least a minimal level of gender confusion, or is there an assumed indication of a deeper level of psychological or social ambivalence?¹²³ Is there an objective standard that can be devised to identify a transvestite whose behavior is indicative of posing a heightened risk of abusing a foster child?¹²⁴ Should the burden of proof be on the state to indicate why it will not allow a transvestite to be a foster parent, or should the burden of proof

females was less than one percent, which led the researchers to exclude the female data from further analysis. *Id.*

¹¹⁹ See *infra* notes 120-25 and accompanying text; see also CHILD WELFARE INFO. GATEWAY, LGBT ADOPTION, *supra* note 108, at 11 (noting biases towards transgendered applicants).

¹²⁰ See *infra* note 136 and accompanying text; see also CHILD WELFARE INFO. GATEWAY, LGBT ADOPTION, *supra* note 108, at 11 (stating that social workers' biases may cause different standards to apply to homosexual couples than the standards applied to heterosexual couples).

¹²¹ See *infra* notes 133-34 and accompanying text; see also CHILD WELFARE INFO. GATEWAY, LGBT ADOPTION, *supra* note 108, at 11.

¹²² See *infra* notes 140-41 and accompanying text. While studying the cycle of child abuse, researchers found that nearly thirty-three percent of males who were not transvestites were perpetrators of sexual crimes on children, while only seven percent of male transvestites were perpetrators of sexual crimes on children. M. Glasser, I. Kolvin, D. Campbell, A. Glasser, I. Leitch & S. Farrelly, *Cycle of Child Sexual Abuse: Links Between Being a Victim and Becoming a Perpetrator*, 179 BRIT. J. OF PSYCHIATRY 482, 485 (2001). The researchers note that these "differences proved highly significant." *Id.*

¹²³ See *infra* note 139 and accompanying text.

¹²⁴ See *supra* note 122 and accompanying text.

be on the transvestite to show why he should be allowed to be a foster parent?¹²⁵

The body of relevant literature pertaining to transvestites as parents is relatively small, but there has been a focus in past studies on transgendered individuals.¹²⁶ Any conclusions one could draw from those studies, then, would be more relevant to the marginal, rather than to the nuclear, population of transvestites.¹²⁷ News media coverage, highlighting transvestites as parents, is mixed; while one transsexual foster parent pled guilty to sexually abusing the children in his care,¹²⁸ another transsexual individual recently gained custody of his children.¹²⁹

This Article does not comment on the validity of any particular studies regarding the placement of children into nontraditional foster and adoptive homes.¹³⁰ In fact, the lack of studies in the area of transvestites serving as parents further complicates this discussion as there are no specific indicators regarding parental success or child

¹²⁵ See CHILD WELFARE INFO. GATEWAY, LGBT ADOPTION, *supra* note 108, at 8 (noting that state laws are subject to individual interpretation, which may lead to varying decisions not only among states but even among neighboring counties).

¹²⁶ See Marika E. Kitamura, *Once a Woman, Always a Man? What Happens to the Children of Transsexual Marriages and Divorces?: The Effects of a Transsexual Marriage on Child Custody and Support Proceedings*, 5 WHITTIER J. CHILD & FAM. ADVOC. 227, 229 (2005) (discussing the effects of transsexual marriages on child custody); see also Shannon Shafron Perez, *Is it a Boy or a Girl? Not the Baby, the Parent: Transgender Parties in Custody Battles and the Benefit of Promoting a Truer Understanding of Gender*, 9 WHITTIER J. CHILD & FAM. ADVOC. 367, 370 (2006) (discussing the custody issues that arise when parents are transgendered and the confusion that courts face in applying the best-interests-of-the-child standard). *But see* Timothy F. Murphy, *The Ethics of Helping Transgender Men and Women Have Children*, 53 PERSP. IN BIOLOGY AND MED. 46, 53 (2010) (discussing the lack of research providing evidence of the effects on children of transgendered parents).

¹²⁷ See Docter & Prince, *supra* note 24, at 590.

¹²⁸ *Transsexual Posing as Foster Care Mother Pleads Guilty to Sexual Offenses*, JET, June 4, 2001, at 26.

¹²⁹ *Transsexual Dad Wins Landmark Custody Case*, ABC NEWS, Feb. 24, 2003, <http://abcnews.go.com/GMA/story?id=125332&page=1>.

¹³⁰ *Overview of Lesbian and Gay Parenting, Adoption and Foster Care*, *supra* note 9 (recognizing the placement of children into nontraditional homes in increasing numbers across the United States).

safety upon which to base significant discourse.¹³¹ This Article does, however, raise the important issue of risk. Risk is an inevitable part of life; *unreasonable* risk affirmatively placed upon others is not.¹³²

Society cannot condone placing children into a home that is more dangerous than the one from which he or she was removed.¹³³ Political correctness aside, to whatever extent, if any, there is an enhanced risk to foster children by placing them with a transvestite caregiver, the doctrine of best interests of the child obligates child welfare professionals and state legislatures to consider that risk and respond appropriately.¹³⁴

V. PROTECTING THE CHILD: FINAL CONSIDERATIONS

The placement of a foster child with an appropriate caregiver presents an issue of unique delicacy, necessitating careful consideration of many aspects of the human condition.¹³⁵

Although overarching guidelines and principles for selecting a foster placement exist, every state's statutory and regulatory scheme offers wide discretion to the child welfare and social service agencies

¹³¹ Instead, the focus of the question is on the effect transvestism has on a marriage and whether it should be grounds for a divorce. *See, e.g.*, *L.P. v. S.P.*, 297 A.2d 202, 202 (N.J. Super. Ct. Ch. Div. 1972) (holding that established transvestism is extreme cruelty and, therefore, grounds for divorce).

¹³² *Cf. Martinello v. B & P USA, Inc.*, 566 So. 2d 761, 763 (Fla. 1990) (reiterating the standard for establishing the existence of an attractive nuisance, which requires that the risk to children be unreasonable).

¹³³ *See supra* notes 64-69, 84.

¹³⁴ *See discussion supra* Part IV.A-B.

¹³⁵ *See, e.g., In re J.A.*, 42 P.3d 215, 221-22 (Kan. Ct. App. 2002) (finding that the applicable statute's primary goal is placement of a child into a permanent family setting, and that courts must consider nine separate factors when determining the appropriate custody placement, including: "1. [t]he child's attachment to the parties; 2. whether there has been any history of sexual, physical, emotional, or substance abuse on the part of any family member; 3. age and health of the parties; 4. whether the child would have siblings close to his age; 5. motivation of the parties for wanting to adopt; 6. potential permanence of the relationship between the child and adopting parents; 7. emotional needs of the child; 8. parenting skills, strengths, and weaknesses; and 9. special needs of the child").

selecting such placements.¹³⁶ Some findings made by such professional screeners that will presumptively disqualify a person from serving as a foster parent include an applicant's unstable finances, unresolved experiences of sexual abuse in the applicant's own past, possible propensity for pedophilia, substance addiction, experience of suffering or perpetrating spousal abuse, antagonistic statements or views toward a prospective foster child's country of origin, a criminal record of selling or abusing substances or physical assault, or poor physical health.¹³⁷

If social prejudice were a legitimate basis for restricting rights to serve as a foster parent, only a limited pool of adults would qualify.¹³⁸ The existing research on transvestite persons suggests that the group is heterogeneous in psychopathological matters and most live normal, functional lives.¹³⁹ While there does appear to be an association between transvestic fetishism and other criminal sex acts, this finding appears to be true for clinical, rather than normative, samples.¹⁴⁰ In recognition of the policy concern for child safety, transvestic fetishism, as defined above, arguably offers a valid reason to scrutinize a prospective transvestic foster parent more closely, including obtaining psychiatric evaluation—without the transvestic behavior necessarily serving as an automatic presumption for disqualification.¹⁴¹

The protection of the emotional, mental, physical, and moral well-being of a minor child is a well-recognized interest among individual persons and the government.¹⁴² Children primarily learn

¹³⁶ See *id.* at 221; *In re C.J.R.*, 782 A.2d 568, 570-72 (Pa. Super. Ct. 2001) (determining proper placement for the child by noting the applicable statute's goals for placing a child and then analyzing the totality of the facts and circumstances).

¹³⁷ JAMES L. DICKERSON, MARDI ALLEN & DANIEL POLLACK, *HOW TO SCREEN ADOPTIVE AND FOSTER PARENTS* 174-75 (Lisa O'Hearn ed. 2011).

¹³⁸ See Stacey & Biblarz, *supra* note 112, at 164.

¹³⁹ See *supra* text accompanying notes 50-53.

¹⁴⁰ See Långström & Zucker, *supra* note 118, at 88 (detailing a study of 561 male subjects, who voluntarily sought help for paraphilic behavior, which found that “[u]p to 20% of individuals with transvestic fetishism also had been involved in the sexual molestation of children, and 36% had committed exhibitionist acts”).

¹⁴¹ See *supra* text accompanying notes 64-69.

¹⁴² See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2767 (2011) (noting the government's interest in the “well-being of its youth”); *FCC v. Pacifica Found.*, 438

about the world (i.e., how the world works and how they fit into it) from their parental figures.¹⁴³ It is in the home of a parent that a child's character, sense of self, psychology, and personality are formed, and a parent's influence into the life of a child extends well beyond the age of majority.¹⁴⁴

U.S. 726, 749 (1978) (same); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968) (same).

¹⁴³ See Susan Revermann, *Why are Parents Role Models for Children?*, GLOBAL POST, <http://everydaylife.globalpost.com/parents-role-models-children-5128.html> (last visited Aug. 12, 2013) (examining the crucial role that parents have in the upbringing of their children).

¹⁴⁴ See *id.*