PERPETUATING AGEISM VIA ADOPTION STANDARDS AND PRACTICES

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INTRODUCTION

"Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."[1]

According to polls, more than a third of Americans have considered adoption at some point.[2] Adoption is a particularly age-related issue: the

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1. Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977).

2. BARBARA MOE, ADOPTION 171-72 (2d. ed. 2007) (citing data from Child Welfare Information Gateway: while 26% of those polled said they had considered adoption, 16% of those actually took concrete steps to adopt, and 31% of those who took concrete steps actually completed an adoption). *See also id*. at 177-92 (displaying tables of statistics gleaned from the Statewide Automated Child Welfare Information System (SACWIS) and the Adoption and Foster Care Analysis and Reporting Systems (AFCARS). Neither of these databases is comprehensive, however. SACWIS can only provide a snapshot of adoption in the U.S., because its data is based solely on case management of children involved in the child welfare system).

majority of people adopting in the United States are age forty or older.[3] And while the population of prospective adoptive parents is primarily comprised of "older" Americans, many adoption agencies set age limits for applicants and some courts have denied placement due to an adoptive parent's age.[4] Some parental screening during the adoption process is undoubtedly necessary for the protection of the children involved; however, the pervasive age limitations placed upon older prospective parents do not always serve children's best interests. "Of all the stereotypes to which prospective adoptive parents have been subjected, that based on age is the most conspicuous."[5] And as one writer noted, "the moral views of every society have influenced its practice of adoption more heavily than have pragmatic considerations."[6] The systematic discrimination against older adoptive parents only preserves existing ageist stereotypes and propagates a narrow and unrealistic definition of what it means to be a family in the United States.

Although this topic has wide-reaching consequences for the thousands of Americans who consider adoption each year, there is a dearth of scholarly literature addressing the hurdles older adoptive parents face when navigating the process. Indeed, this article is the first in legal academic literature to examine the problem of age discrimination in adoptions. Additionally, it is also the first to suggest possible constitutional and statutory remedies. This is not to say that the issue has completely escaped notice; a small handful of authors have addressed age discrimination in adoption from a variety of other perspectives.[7] Some statutes and case law demonstrate that there has been at least minimal legislative and judicial recognition of the problem.[8] Still, the issue of age discrimination in adoption has received far less attention than has discrimination based on race or sexual orientation. Discrimination in adoption has been widely addressed by both opponents and proponents of same-sex adoption, and controversy in the early 1990s about mixed race adoptions also

3. Jo Jones, *Who Adopts? Characteristics of Women and Men Who Have Adopted Children*, 12 NCHS DATA BRIEF, Jan. 2009, at 2, *available at* http://www.cdc.gov/nchs/data/databriefs/db12.pdf.

4. *See e.g.*, *ADOPTION CRITERIA*, AN OPEN DOOR ADOPTION AGENCY, INC., http://www.opendooradoption.org/Content/Default/3/45/44/domestic-adoption/caucasian-and-hispanic-adoption/adoption-criteria.html (prohibiting adoptive parents who are over the age of 45) (last visited April 15, 2011); Roman v. Dorado (*In re* Berth), 179 P.2d 572, 574 (Cal. Dist. Ct. App. 1947).

5. HAL AIGNER, ADOPTION IN AMERICA COMING OF AGE 178 (2d ed. 1992).

6. L. ANNE BABB, ETHICS IN AMERICAN ADOPTION 27 (1999) (quoting MARY BENET, THE POLITICS OF ADOPTION 13 (1976)).

7. *See* AIGNER, *supra* note 5, at 176-78; ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION & THE POLITICS OF PARENTING 72 (1993).

8. *See, e.g.*, Madsen v. Chasten, 286 N.E.2d 505, 506 (Ill. App. Ct. 1972) (holding that age may not be the controlling factor in adoption petitions). *See also* Williams v. Neumann, 405 S.W.2d 556, 558-559 (Ky. 1966) (holding that, in the absence of statutory standards, age may not be controlling); *In re* Adoption of Brown, 85 So. 2d 617 (Fla. 1956) (holding that age should not be controlling, especially where future proceedings would result).

generated discussion.[9] In fact, Congress passed the Multiethnic Placement Act in 1994 to prohibit discrimination on the basis of race, color, or national origin in the placement of children.[10] The debates over these other forms of discrimination centered largely on the moral dimensions of restricting adoptions. In particular, many of the arguments made in the debate over adoption by same-sex couples are also relevant to the age-discrimination issue; however, this is the first article to consider the extent to which those arguments may be extended to age discrimination.

The policy arguments in favor of allowing older adults to adopt are intrinsically related to the determination of a child's best interests. As a society, we use the "best interest" standard to define the values and goals we most respect. In 1998, the Joint Council on International Children's Services Ethics Committee (JCICS) issued recommended standards of practice to its member agencies regarding the proper values upon which to focus in adoption proceedings. Often reproduced, this study on the values underlying American adoptions reflects the importance of recognizing the innate worth and dignity in all human beings.[11] But when an older applicant is denied the right to adopt, the agency, the court, and ultimately, society, are saying that a child's best interests cannot be properly served by an adult over a certain age. The decision implicitly rejects the worth and dignity of older individuals.

Yet, it is difficult to quantify the exact reasons upon which each adoption decision is based; because so few contested cases reach the courts, there is a scant record from which to draw conclusions.[12] Nationally, one study found that only 0.1% of adoption cases are litigated, and even fewer involve contested adoptive parents (0.001%).[13] It is unclear how many of these contested cases are based on the age of the applicants. Similarly, many private agencies simply impose an absolute age limit for applicants above which no one is allowed to adopt.[14] But generally speaking, it is the perceived decrease in the health and

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9. *See, e.g.*, Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381 (2006); John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1 (2009); Joan Heifetz Hollinger & Naomi Cahn, *Forming Families by Law: Adoption in American Today*, 36 HUMAN RIGHTS 16 (2009); Suzanne Brannen Campbell, *Taking Race Out of the Equation: Transracial Adoption in 2000*, 53 SMU L. REV. 1599 (2000); Kathryn Beer, *An Unnecessary Gray Area: Why Courts Should Never Consider Race in Child Custody Determinations*, 25 J. CIV. RTS. & ECON. DEV. 271, 289 (2011).

10. *See* JOAN HEIFETZ HOLLINGER & AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 (1998).

11. *See generally* The National Council for Adoption Ad Hoc Committee on Ethical Standards in Adoption, 1991, *available in* VICTOR GROZA & KAREN F. ROSENBERG, CLINICAL AND PRACTICE ISSUES IN ADOPTION: BRIDGING THE GAP BETWEEN ADOPTEES PLACED AS INFANTS AND AS OLDER CHILDREN 111 (1998).

12. It is also difficult to gain perspective given the lack of published case law.

13. GROZA & ROSENBERG, *supra* note 11, at 159.

14. *See ADOPTION CRITERIA*, AN OPEN DOOR ADOPTION AGENCY, INC., http://www.opendooradoption.org/Content/Default/3/45/44/domestic-adoption/caucasian-and-hispanic-adoption/adoption-criteria.html (prohibiting adoptive parents who are over the

quality of life lived by older adults, and therefore the quality of life of the potential adoptive children, that leads to the denial of placement.

I begin with an overview of the adoption process and how age factors into adoption petitions. Adoption occurs in the United States through many methods; the most common are public agency adoptions, private agency adoptions, independent adoptions, foster adoptions, intercountry adoptions, and kinship adoptions. As one scholar has explained, "for many prospective adoptive parents, independent and intercountry adoption[s] are attractive because of the lengthy waiting periods and application restrictions that characterize domestic agency adoption."[15] However, given the breadth of the topic, I will focus on non-relative adoptions occurring within the United States in this article. While it is impossible to say how widespread the problem is, age discrimination in adoption proceedings undoubtedly exists. The lack of case law and scholarly writing on the topic should not be read as an indication that there isn't a problem. Rather, courts and legislators should examine the factors perpetuating ageist discrimination in adoption. This perpetuation of discrimination, and the hurdles it creates, will deter older Americans from adopting children in need of homes.

Next, I explore policy reasons that favor adoptions by older applicants. Numerous articles and studies exist that analyze other types of discrimination in adoption proceedings, particularly placements that raise racial, single parent, or same-sex placement issues.[16] Treating the aged as a homogenous collection of disabled or soon-to-be-disabled individuals does not reflect reality. Yet, stereotypes persist. "At the least ageism is a tendency to stereotype old people as rigid, meddlesome, sexless, conservative, unhealthy, inactive, lonely, forgetful, and not very bright."[17] Additionally, medical and technological advances have fundamentally altered not only what it means to be "old," but also what it means to be a "family" in the 21st century.

Consequently, I argue, given the societal realities and policy factors, age should not be a consideration in adoption proceedings. However, even though I argue that considerations of age are discriminatory, the path to remedying this discrimination is unclear. After an examination of constitutional protections

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age of 45) (last visited April 15, 2011); *Older Parent Adoption*, ADOPTION.COM, http://adopting.adoption.com/child/older-parent-adoption.html (last visited April 14, 2011).

15. HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 369 (6th ed. 2007).

16. *See, e.g*., *Developments in the Law – The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2065-74 (2003); Nancy D. 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 (2000); Candi Cushman, *Adoption Workers Are Wrongly Biased in Favor of Gays and Lesbians*, *in* ISSUES IN ADOPTION 188-196 (William Dudley ed., 2004); NAOMI MILLER, SINGLE PARENTS BY CHOICE: A GROWING TREND IN FAMILY LIFE (1992); Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844 (2009); Ruth-Arlene W. Howe, *Race Matters in Adoption*, 42 FAM. L.Q. 465 (2008).

17. LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, ELDER LAW: CASES AND MATERIALS 37 (4th ed. LexisNexis 2007).

and an analysis of state action, I follow with some possible reconfigurations of our current paradigm. I finish with a conclusion and suggestions for the future.

I. ADOPTION OVERVIEW AND STATE LAWS

Adoption is a creature of state law, with federal laws supplementing to dictate the direction of funding. Although Model Acts and Uniform Laws exist, only eight states have adopted the 1971 version of the Uniform Adoption Act; therefore, there is very little uniformity across the nation in adoption law.[18] One thing, however, is consistent: those affected by these laws are generally 40 or older. Whereas the mean average age for first time parenthood in the United States is 25, the majority of those adopting in the U.S. are 40 or older.[19] Centers for Disease Control statistics on adoptive parents only categorize the age of adoptive parents up to 44 years. This research shows that about half of adoptive mothers fall into the 40-44 year old category, whereas only 3% of adoptive mothers are between 18-29 years of age.[20] However, in this same age group of 18-29 year olds, 27% of women are biological mothers.[21] Therefore, the current legislation governing adoptive parenthood affects older parents disproportionately.[22]

Adoptions can be accomplished through many different routes, but a judge must approve every adoption.[23] Some adoptive children are foster children in a state welfare system, others are adopted by grandparents or step-parents, and still others are adopted from other countries. Some of these routes, such as open adoptions, are beyond the scope of this article.[24] Additionally, although many older adoptive parents choose international adoptions because of the relaxed age limits,[25] international adoptions are also beyond the scope of this article.[26]

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18. The ABA overwhelmingly endorsed the 1994 version of the UAA in 1995 and The National Council for Adoption also endorsed it. *See* Joel Tenenbaum, *Introducing the Uniform Adoption Act*, 30 FAM. L. Q. 333, 333-34 (1996).

19. Joyce A. Martin et al., *Births: Final Data for 2006*, 57 NATIONAL VITAL STATISTICS REPORT NO. 7 (2009), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf; Jones, *supra* note 3.

20. Jones, *supra* note 3.

21. *Id*.

22. *See* Cheryl Wetzstein, *Census Reports on Adoptions: Adoptive Parents More Likely to be Married, Older, Wealthier*, WASH. TIMES, August 22, 2003.

23. For example, in Wisconsin, a licensed child welfare agency or county or state department must be involved in all Wisconsin adoptions. *See* LYNN J. BODI ET AL., ADOPTION LAW: START TO FINISH 10 (2008).

24. *See* 2 AM. JUR. 2D *Adoption* § 2 (2004) (describing open adoptions "as adoptions in which the court supplements an order of adoption with a provision directing that the adopted child have continuing contacts and visitation with members of his or her biological family"); 2 AM. JUR. 2D *Adoption* § 46 (2004) (explaining that "Congress has recognized that 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and to that end enacted a federal law governing adoptions and prospective adoptions subject to the Convention involving United States residents").

25. Even these limits are changing, however. *See* Edward Cody & Jason Ukman, *China to Tighten Adoption Rules: Foreign Parents Must be Younger, Healthy, Married*,

Aside from those methods of adoption, the main differences in the types of adoption addressed by this article relate to the method by which prospective adoptive parents locate a child. Adoptions can generally be grouped into two categories: independent adoptions and agency adoptions. However, agency adoptions can also be further categorized as public agency adoptions or private agency adoptions. In independent adoptions, prospective adoptive parents usually contact the biological parent without the aid of an agency or service. This might be accomplished through friends, colleagues, church groups, or even the Internet.[27] In these situations, the adoptive child is relinquished directly to the adoptive parents; however, a court must still approve of the adoption for legal custody to transfer to the adoptive parents.[28] Some evidence suggests that biological parents prefer independent adoptions because it offers them an opportunity to have a degree of control over the process and placement.[29]

A. Private Agency Adoptions and the "Baby Market"

In the case of agency adoptions, the biological parent's parental rights are terminated and custody of the child is relinquished directly to the agency. The agency then matches the child with prospective adoptive parents and conducts the requisite home studies and paperwork. If for any reason the agency, the court, or the prospective parents do not approve of the adoption, the legal custody of the child will remain with the agency.[30] Public agency adoptions, on the other hand, usually occur through the state's Department of Health and Family Services. In these situations, many adoptive children are considered less "desirable" because of special mental, emotional, or physical needs or because they are older than the typical child available via a private agency.[31] One recent

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WASH. POST, Dec. 20, 2006, at A20 (stating that China's adoption regulations give last priority to adoptive parents over 50).

26. *See Parental Age Limits in International Adoption*, ADOPTION.COM, http://older-parent.adoptionblogs.com/weblogs/parental-age-limits-in-international-ado (list of various countries and their age limitations for prospective adoptive parents) (last visited April 15, 2011).

27. *See, e.g.*, *I am pregnant*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/pregnant/ (last visited April 15, 2011).

28. *See, e.g.*, Andreas W. v. Stephanie M. (*In re* Baby Boy M.), 272 Cal. Rptr. 27, 28 (Cal. Ct. App. 1990); A.L. v. P.A., 517 A.2d 494, 497-98 (N.J. Super. Ct. App. Div. 1986).

29. Mark T. McDermott, *Agency versus Independent Adoption: The Case for Independent Adoption*, 3 FUTURE OF CHILDREN: ADOPTION 146, 147 (1993).

30. *See, e.g.*, Gomez v. Savage, 580 N.W.2d 523, 531 (Neb. 1998).

31. *What Are Special Needs?*, ADOPTION.COM http://special-needs.adoption.com/children/what-are-special-needs.html (last visited April 15, 2011); *see also* Mary Boo, North American Council on Adoptable Children, *Successful Older Child Adoption: Lessons Learned from the Field*, http://www.nacac.org/adoptalk/OlderChAdoptions.html (last visited April 18, 2011); Wisconsin Department of Children & Families, *Reimbursable Expenses when Adopting Children with Special Care Needs*, *available at* http://dcf.wisconsin.gov/publications/pdf/dcf_p_pfs0747.pdf and *Adoption Assistance Information*, *available at* http://dcf.wisconsin.gov/publications/pdf/dcf_p_pfs0105.pdf; Colorado Department of Human Services, *Waiting Children*,

study found that of children exiting state foster care programs through adoption in 2004, only 24% were ages three or younger.[32] And although many adoptive parents desire to adopt infants, only 2% of children adopted from foster care were under one year of age.[33] In fact, age can be such a negative factor for a child awaiting adoption, social workers often categorize children over the age of seven as "special needs."[34] Additionally, of all children leaving foster care in 2004, only 18% exited the system via adoption.[35] And there is also a disparity between the racial and ethnic make-up of children who are adopted from foster care: of those children in foster care waiting for adoption, 38% were white; however, of the children who exited foster care, 45% were white.[36] For black children, the statistics showed the opposite trend: while 38% of children waiting for adoption were black, only 29% of those who exited the system via adoption were black.[37] Like older children, children of color are also often categorized as "special needs" because of these divergent adoption trends.[38] This data shows that public agency adoptions are demographically different from many private agency adoptions. This may be a contributing factor to adoptive parents' preference for private adoptions. Although numbers can vary significantly from year to year, in 2000, only 18% of adoptions were completed through public agencies.[39]

The methods by which adoptions are accomplished are fundamentally related to the perpetuation of discrimination in the adoption process. Because adoptions are stressful on both the child and the parents, home visits, placement studies, and interviews usually preface the formalization of the adoption. In the case of private agency adoptions, the case managers and social workers conduct

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http://www.changealifeforever.org/waiting.htm (lists African American and Hispanic children as "special needs") (last visited April 18, 2011); Minnesota Department of Human Services, *Definitions of Common Special Needs Terminology*, http://www.mnadopt.org/definitions.html (explaining common terms used by public agencies when dealing with special needs children) (last visited April 18, 2011).

32. MOE, *supra* note 2, at 182.

33. *Id*. at 190.

34. *Id*. at 5 (based on a review of sources classifying children as "special needs" based on their age, race, or disability does not necessarily appear to alter adoption patterns. However, it may be useful when matching foster parents or more experience adoptive parents with children. *See, e.g.*, Arizona Department of Economic Security, *Child Welfare Reporting Requirements Semi-Annual Report for the Period of April 1, 2010 through Sep. 30, 2010*, *available at* https://www.azdes.gov/InternetFiles/Reports/pdf/action_24215_semi_annual_child_welfare_report_apr_sep_2010.pdf at 62, indicating that the rate of placement based on the ethnicity of children is roughly the same for each listed ethnicity; *but see id.* at 61, indicating that of all children in the public welfare system available for adoption, a much higher percentage of those aged one and younger are listed as "placed" than the percentage of those listed as "placed" in all other age categories.).

35. *Id*. at 183.

36. *Id*. at 184-85; note that the statistics do not distinguish between the method of exiting foster care, e.g., adoption and another form of exiting such as reunification with parents or runaway.

37. *Id*.

38. *Id*. at 5.

39. *Id*. at 171. However, in 2001, public agency adoptions rose to 39%. *Id*.

these preliminary matters according to agency standards and criteria as well as state guidelines. For example, in Wisconsin, at a minimum, the following areas must be assessed: "motivation and commitment to adoption, physical and mental health, coping and problem solving, social and relationship history, criminal and caretaker background checks, parenting history and future plans, attitudes toward adoption and open adoptions, and safety of the home to be licensed for foster care."[40] Other states require physical exams of prospective parents, letters of reference, proof of marriage, and examinations of employment and financial history.[41] All of these steps required for approval are imposed in addition to agency-set limits such as marital status and age. A cursory search of private agency websites shows a strong preference for married couples, those who attend a Christian church, and prohibitions of applicants who are anywhere from 40 to 50 years old.[42] However, private agencies do exist that promote non-discriminatory policies regarding age, race,

40. *See* BODI, *supra* note 23.

41. MOE, *supra* note 2, at 3.

42. *See, e.g.*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/adopt/adoption_program (stating that to be eligible couples must be married and not over the age of 50) (last visited April 15, 2011); *How to Become a Foster Parent*, CATHOLIC CHARITIES DIOCESE OF FORT WORTH, INC., http://www.catholiccharitiesfortworth.org/programs/child-welfare-services/international-foster-care/how-to-become-a-foster-parent/ (click on "Requirements" link) (Stating that no one over the age of 65 is eligible to be a foster parent) (last visited April 15, 2011); *Domestic Adoption: Adoptive Parents Intake*, ADOPTION NETWORK LAW CENTER, http://www.adoptionnetwork.com/adoptiveparents/parentsintake.shtml (stating that preference is given to those under 50) (last visited April 15, 2011); *Hoping to Adopt a Baby*, ANGEL ADOPTION, INC., http://www.angeladoptioninc.com/hoping-to-adopt.html (stating that there is no age limit, but the final decision is given to the birth mother) (last visited April 15, 2011); *FAQ*, SPENCE-CHAPIN ADOPTION AGENCY, http://www.spence-chapin.org/adoption-programs/b4_faqA.php (click on "Are there age or health restrictions? What about past history?" link) (stating that preference is given to those under 50) (last visited April 15, 2011); *Options for Adoption*, ADOPTION SUPPORT CENTER, http://www.adoptionsupportcenter.com/options_adoptive.html (stating that for those "older than 40, [it] may take as long as 18 months for a successful placement") (last visited April 15, 2011); *Adoptive Parent FAQ's*, ADOPTION ANGELS, http://www.adoptionangels.com/adoption-faqs.htm (stating that eligible couples are between the ages of 25 and 50) (last visited April 15, 2011); *Adoptive Family Information*, ADOPTION PLANNING, INC., http://www.adoptionplanning.org/adoptivefamily.html (stating that eligible applicants should be not be over the age of 45) (last visited April 15, 2011); *Center for Adoptive Services: Forms*, CATHOLIC CHARITIES DIOCESE OF ARLINGTON, http://www.centerforadoptionservices.org/forms.html (click on "Eligibility Requirements for domestic adoption" link) (stating that applicants over the age of 48 are not eligible) (last visited April 15, 2011); *Adoptive Services*, CHILD PLACE, http://www.childplace.org/ProgramServices/AdoptionServices/AdoptiveParents.aspx (stating that applicants one over the age of 45 are not eligible) (last visited April 15, 2011); DEACONESS PREGNANCY & ADOPTION SERVICES, http://www.deaconessadoption.org/adoptive_parents/index.cfm?page=adoptiveparentfaqs (stating that applicants over the age of 45 are not eligible) (last visited on April 15, 2011); *Domestic Adoption Eligibility*, NIGHTLIGHT CHRISTIAN ADOPTIONS, http://www.nightlight.org/adoption-services/domestic/eligibility.aspx (last visited April 15, 2011) (stating that preference will be given for those in their 30s or very early 40s).

sexuality, and marital status.[43] When an agency's values and beliefs are part of the rubric for measuring appropriate placement, discrimination is more likely to occur.

Additionally, many private agency adoptions are, in their simplest form, for-profit business transactions.[44] Public agencies receive tax money to help fund their operations, but most private agencies' main source of income are the fees charged for their services.[45] Thirty-two percent of people who used private agencies reported spending over $10,000 on the adoption process.[46] In contrast, only 15% of those who used public agencies reported spending over $5,000 on the adoption process.[47] While no one likes to imagine adoption as a for-profit enterprise,[48] and despite laws prohibiting the exchange of money during adoptions, many services are "selling" prospective adoptive parents to biological parents who are planning to give up their child. For example, on one website, an agency touts its fast turnaround time as a result of its "aggressive" and "results driven" marketing.[49] In one instance, a site separates "categories" of prospective adoptions into Caucasian/Hispanic and African American adoptions, and another site offers incentives for families looking to adopt African American children.[50] Another site states, "[b]ecause there is such a need for adoptive families for Black American, Biracial and special needs

43. *See IAC's Adoption Fees*, INDEP. ADOPTION CENTER, http://www.adoptionhelp.org/adoption/fees.html (last visited April 15, 2011) ("IAC is one of the only adoption agencies in the country that has never had any exclusionary policies for adoptive parents, including age, sexual orientation, marital status, religion, ethnic background, color, or race").

44. *See, e.g.*, Alan Judd, *Nonprofit Adoption Agencies Often Profit Someone Other than Children, Families*, ATLANTA J.-CONST. (Apr. 26, 2010, 4:53am), http://www.ajc.com/news/nonprofit-adoption-agencies-often-493623.html (last visited April 15, 2011).

45. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat 504 (1980).

46. SHARON VANDIVERE ET AL., US DEP'T OF HEALTH AND HUMAN SERV., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NAT'L SURVEY OF ADOPTIVE PARENTS 43 (2009), *available at* http://aspe.hhs.gov/hsp/09/NSAP/chartbook/.

47. *Id*.

48. This statement should be qualified with a mention of Judge Richard Posner's traditionally economist bent on the topic. He advocated a "legal baby market" with fellow economist Elizabeth M. Landes, arguing that the cost of adoption would probably decrease if a "free market" were established. *See* Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

49. *How to Adopt a Beautiful Newborn Baby*, ADOPTION NETWORK LAW CENTER, http://www.adoptionnetwork.com/adoptiveparents/domestic-adoption.shtml (last visited April 15, 2011).

50. *African-American Adoption*, OPEN DOOR ADOPTION AGENCY, INC., http://www.opendooradoption.org/Content/Default/3/46/0/domestic-adoption/african-american-adoption.html; *Transracial Adoption*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/adopt/transracial_adoption (last visited April 15, 2011). (The agency offers subsidies to adopt African American children.).

children, our hearts are in these placements and it is where we place special focus."[51]

Regrettably, certain ethnicities appear to have less "value" than others: one private agency "subsidizes" $5,500 of adoption fees for African American and biracial children.[52] When women who were actively seeking to adopt were polled, definite preferences for certain types of children emerged. Girls were preferred by 34.6% of respondents, whereas boys were preferred by only 28.9% of respondents.[53] Younger children are overwhelmingly favored: 49.2% of respondents preferred a child under the age of two.[54] The adoption process can be particularly difficult for older children, because they are hardest to place.[55] Only 30.9% of respondents said they "would accept" a child age 13 or older.[56] But the widest disparity between supply and demand was based on race: *no* prospective adoptive white women responded that they would "prefer" an African American child; additionally, when they were asked if they "would accept" an African American child, 83.6% said they would.[57] Prospective African American adoptive women showed the same preference in reverse: while 75% "would accept" a white child, *none* preferred a white child.[58] These preferences support the supply and demand discussions that often permeate the adoption discourse. The economics of "market demand" show that certain children are more likely to be adopted than others, and certain adoptive children are more "desired" than others.

Thus, older adoptive parents are faced with fewer agencies with which they can work to find a child because of age limits. Additionally, these private agencies are often the primary source for "desirable" children, as most older children and those with physical or mental impairments enter the adoption process through state foster programs. As one writer noted, the "state-run domestic market—comprised nearly entirely of older, minority, and special needs children—is one of the few sectors of the domestic baby trade not lacking in supply: In 2004, 118,000 foster children were available for adoption, more than double the 52,000 children actually adopted from the system that

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51. HEAVEN SENT ADOPTION SERVICES, http://www.heavensentadopt.com/ (last visited April 15, 2011).

52. *Transracial Adoption*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/adopt/transracial_adoption (last visited April 15, 2011). (The agency does not appear to offer the same incentive for adoptions of Hispanic, Asian, or Native American children)

53. Centers for Disease Control and Prevention, *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, VITAL AND HEALTH STAT., August 2008, at 33, *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_027.pdf.

54. *Id*. (The percentage of those asked who would prefer a child aged 13 or older was reported as a figure that "does not meet standards of reliability or precision.")

55. *See, e.g*., IND. CODE ANN. § 31-9-2-51(LexisNexis 2007) (codifying "hard to place children" by ethnic background, race, color, language, physical, mental, or medical disability, and age).

56. Centers for Disease Control and Prevention, *supra* note 53.

57. *Id*.

58. *Id*.

year."[59] Furthermore, because the private agencies traditionally place more "desirable" infants and children for adoption than public agencies, older adoptive parents are also often at a disadvantage when trying to be matched with a traditionally "desired" child via a private agency. These limitations are even further compounded, because most private agencies allow biological parents to play an integral role in the selection process.

While the exact amount of control that a biological parent has over the adoption process varies, many private adoption agencies proactively advertise expanded involvement to biological mothers as a "selling point."[60] Many go so far as to advertise that the biological mother can have complete control over the choice of adoptive parents.[61] Most websites feature adoptive parent "profiles" so that incoming biological parents can get a sense of the types of families served. These profiles almost uniformly include pictures of young, attractive, white couples.[62] The websites also often have separate sections that advise biological mothers about how they should select adoptive parents. Websites regularly recommend that biological mothers consider the age of prospective adoptive parents when making their choice.[63] Because most private agencies screen adoptive parents before biological parents can see their profiles, most biological parents will never even consider older prospective parents. And even where older couples or individuals are not filtered out, the biological parents can still make their ultimate determination based on the age of the adoptive parents. This sort of "double filtering process" means that older adoptive parents face an even greater risk of being rejected during the private agency adoption process.

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59. Kimberly D. Krawiec, *Altruism and the Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 230 (2009).

60. *See, e.g.*, *The Choice is Yours*, ACADIA ADOPTION CENTER, http://birthmothersjourney.iarbiz.com/6WKmy%7Ct4NxE= (last visited April 15, 2011) ("we'll support and empower you"); *What Choices Do I Have In Adoption*, FRIENDS IN ADOPTION, http://www.friendsinadoption.org/if_you_are_pregnant/adoption_choices_pregnant_woman.asp (last visited April 15, 2011) ("The plan will be defined as yours by the choices you make.").

61. *See Are You Pregnant?: Frequently Asked Questions*, ADOPTHELP, http://www.adopthelp.com/pregnant/birthmother-faqs.html (last visited April 15, 2011) ("Can I choose my adoptive parents? Yes! You may choose your adoptive parents. You tell us what is important to you in a family (i.e., race, religion, age, other children, etc.) and we will present profiles of families that match what you are looking for."); *Frequently Asked Questions for Birthmothers*, ANGEL ADOPTION, INC., http://www.angeladoptioninc.com/birthmothers/adoption-questions.html#faq6 (last visited April 15, 2011) ("Can I be involved in choosing the family for my baby? Yes! We would encourage you to choose your adoptive family from the pool of families that Adoption Links Worldwide has approved.").

62. *See, e.g.*, *Unplanned Pregnancy, Need Help?*, NIGHTLIGHT CHRISTIAN ADOPTION SERVICES, http://www.nightlight.org/adoption-services/domestic/pregnant/default.aspx (last visited April 15, 2011); *Waiting Families*, DEACONESS PREGNANCY AND ADOPTION SERVICES, http://www.deaconessadoption.org/pregnant/index.cfm?page=waitingfamilies (last visited April 15, 2011); *Waiting Families*, EVERLASTING ADOPTIONS, http://www.everlastingadoptions.com/waitfamilies.php (last visited April 15, 2011).

63. *See, e.g.*, NIGHTLIGHT CHRISTIAN ADOPTION SERVICES, *supra* note 62.

So what incentive does a private agency have to discriminate against an older adoptive parent? It is nearly impossible to identify an agency's motives with any certainty, but the reality of the "baby market" is undeniable.[64] Simply put, the number of children available for adoption has decreased dramatically over the last several decades,[65] but the demand for adoptive children does not appear to have followed suit.[66] It is possible, that when setting their age limits, some agencies may simply adhere to outmoded stereotypes that promote the idea of older adults' diminished capacities and abilities.[67] However, given the high costs associated with adoption, and biological parents' general preference for younger couples, it is in the adoption agencies' financial interests to maintain a pool of "desirable" adoptive parents. "It is a seller's market."[68] The more desirable the adoptive parents, the more likely the biological parent will choose to relinquish her "desirable" child to that specific agency. Hence, the cycle perpetuates itself: the more desirable children an agency has to offer, the more likely potential "customers" are to select that agency for their adoption.

B. Legal Framework for Adoptions

Federal laws, while silent on age, prohibit denial or delay of the opportunity to become an adoptive or foster parent on the basis of race, color, or national origin.[69] And while no state statute allows age to be the sole determining factor in the disapproval of an adoption petition, many statutes explicitly or implicitly allow age to be considered.[70] For example, in Wisconsin, the statutes prohibit the denial of an adoption petition to an otherwise fit person because of religious belief, physical handicap, race, color, ancestry, or national origin.[71] Because age is omitted from the statute, it is a permissible consideration in adoption proceedings.[72] Further, some states that prohibit the denial of adoptions for racial, ethnic, and religious reasons have carved out exceptions that allow the biological parent to discriminate for those reasons.[73] Additionally, even in those states where legal precedent has

64. *See* Landes & Posner, *supra* note 48; Krawiec, *supra* note 59, at 247-49.

65. Centers for Disease Control and Prevention, *supra* note 53, at 2.

66. *See id*. at 2-3.

67. *See, e.g*, LOUISE RAYMOND, ADOPTION AND AFTER 7-8 (Collette Taube Dywasuk ed., 1955).

68. Krawiec, *supra* note 59, at 231.

69. *See* 42 U.S.C. § 671(a) (18) (2006) (preconditioning receipt of federal funding).

70. For examples of cases interpreting state laws, see David B. Harrison, Annotation, *Age of Prospective Adoptive Parent as Factor in Adoption Proceedings*, 84 A.L.R.3d 665 (1978).

71. WIS. STAT. § 48.82(4)-(6) (2007-08).

72. *But see* Shehow v. Plier (*In re* Adoption of Tachick), 210 N.W.2d 865, 870 (Wis. 1973) (noting that although agencies often set disqualifying age limits, the age of the applicant must not be conclusive).

73. *See, e.g*., KY. REV. STAT. ANN. § 199.471 (LexisNexis 2007) ("Petitions for adoption of children placed for adoption by the cabinet or a licensed child-placing institution or agency shall not be denied on the basis of the religious, ethnic, racial, or interfaith

established that age must not be the sole determining factor in the denial of an adoption petition, case law often exists to illustrate that decisions have been made on this basis regardless of precedent.[74] In examining the age of petitioners, courts have made reference to the relationship between an adoptive parent's advanced age and the likelihood that the child will suffer the loss of the parent during the child's growth period, the ability of an older adoptive parent to supply the material needs of the child, the psychological burden a child might bear in having an adoptive parent old enough to be a grandparent, the circumstance that as people grow old they tend to become more fixed and inflexible in their mental attitudes, the (in)ability of the adoptive parent to participate in various social and school activities with the child as they advance in age, and that an older adoptive parent may find it more difficult to muster the physical effort required to control a young child.[75]

Courts have held that a great age difference between a prospective adoptive parent and the child will preclude the adoption, usually in addition to other negative factors. For example, in *H v. Children's Service Division*, an Oregon court called the petitioners' ages, 57 and 31 respectively, "evidence unfavorable" to the adoption petition.[76] Not only did the court note that the father would be 70 when the child reached the age of 13, but the court looked negatively upon the age disparity between the husband and wife.[77] In another case, prospective adoptive parents who were in their 50s were denied an adoption where other negative factors included the fact that another couple wished to adopt the child in which both the man and woman were in their 20s.[78] Additionally, in *Adoption of Driscoll*, despite the fact that the California State Department of Social Welfare recommended approval of the adoption petition, the court remanded to the trial court, which ultimately denied placement to a couple of "advanced age" who were 61 and 58 years old.[79] In that case, the prospective adoptive father's health was also considered; although at the time of the petition he was in perfectly good health, the fact that he had previously suffered from cerebral arteriosclerosis was considered a negative factor related to his age.[80] And in *In re Adoption of Brown*, the court denied the adoption

background of the adoptive applicant, unless contrary to the expressed wishes of the biological parent(s)").

74. *See, e.g.*, Madsen v. Chasten, 286 N.E.2d 505 (Ill. App. Ct. 1972) (holding that age may not be the controlling factor in adoption petitions); *see also* Williams v. Neumann, 405 S.W.2d 556 (Ky. 1966) (holding that, in the absence of statutory standards, age may not be controlling); *In re* Adoption of Brown, 85 So.2d 617 (Fla. 1956) (holding that age should not be controlling, especially where future proceedings would result).

75. *See* Harrison, *supra* note 70.

76. H. v. Children's Service Division, 522 P.2d 225, 228 n. 1 (Or. Ct. App. 1974).

77. *Id*.

78. Roman v. Dorado (*In re* Berth), 179 P.2d 572, 573 (Cal. Dist. Ct. App. 1947); *but see* Matter of Infant S., 48 A.D.2d 425 (N.Y. App. Div. 1975) (allowing adoption despite similar factors).

79. Adoption of Driscoll, 75 Cal. Rptr. 382 (Cal. Ct. App. 1969).

80. *Id*. at 384.

petition of a couple who had been capably caring for a child for two years.[81] The husband was 42 and the wife was 50, and the court held that the department of public welfare, as guardian of child, was not arbitrary or capricious in denying their petition because of their ages.[82]

Even where the language of statutes appears flexible and pragmatic with respect to the age of petitioners, courts and agencies can and have applied the standards improperly. For example, the guidelines of the California State Department of Health in effect in 1975 stated the age of petitioners:

> should be evaluated in relation to other factors, recognizing that the ability of a person of a given age to care for a child will vary according to his physical and emotional health as well as his flexibility and general outlook on life. In the total evaluation, the age of the adopting parent should be considered only as it relates to all the study factors, including the length of time that the child has been in the home and the relationships that have been established.[83]

However, that language was improperly read to deny the prospective adoptive parents' petition because of their ages (70 and 54).[84] Their ages were the only factors considered by the California Department of Health in denying the adoption. In overruling the Department, the court held that age alone cannot be used to automatically exclude a prospective adoptive parent.[85] However, the language in that guideline was not included in the California Civil Code, and the current California Family Code only provides that an adoptive parent must be ten years older than the prospective adoptive child.[86] Given that even "age-neutral" guidelines are inappropriately applied, it is likely that agencies and courts deny adoptions to otherwise fit parents solely because of their age. In addition, it is just as likely that analysis of these decisions will be hampered due to the lack of litigation.

Additionally, in those cases where prospective adoptive parents of "advanced age" succeed in their adoption petitions, the court often looks to other factors to justify the adoption. Rather than being irrelevant to the determination, the petitioners' ages are still seen as an impediment to be overcome or as a negative influence that must be balanced by other beneficial factors. For example, in *Adoption of Michelle Lee T.*, the court granted the

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81. Peebles v. Milwaukee County Dep't of Public Welfare (*In re* Adoption of Brown), 92 N.W.2d 749 (Wis. 1958).

82. *Id.*

83. Ralph Edward B. v. State Dep't of Health (*In re* Adoption of Michelle Lee T.), 117 Cal. Rptr. 3d 856, 858 (Cal. Ct. App. 1975) (quoting Dep't Guideline No. AD-322.1(L)).

84. *Id.*

85. *Id.* at 862; *see also In re* Haun, 286 N.E.2d 478 (Ohio Ct. App. 1972) (finding that an agency's denial of adoption petition to couple solely because they were aged 68 and 55 was arbitrary and capricious). *See* AIGNER, *supra* note 5, at 176-78 for a discussion and analysis of the case.

86. CAL. FAM. CODE § 8601 (West 1994); *see also* N.J. STAT. ANN. § 9:3-43 (West 2002).

petition of a prospective adoptive couple who were 54 and 71.[87] The court felt that other factors militated against the petitioners' ages, including that the child had lived with the couple since its birth, the mother had a life expectancy that was sufficient to guide the child to adulthood, and because of the excellent health of both petitioners.[88] Despite the fact that the couple was otherwise fit, had a stable marriage, and was financially secure, the court still focused on "overcoming" the impediment of age.

States also determine a child's best interest in varying ways, which adds to the complexity of the adoption process. States generally provide a flexible statutory basis by which they can measure how a child's best interests will be affected by adoption. As a general rule, courts required to make a child custody determination must be guided by the "best interest" and welfare of the child.[89] While the "best interests" standard is well recognized, it is often difficult to apply because it requires consideration on a case-by-case basis of numerous factors. The Wisconsin Statutes provide a typical example of factors that courts must consider during custody and placement determinations. They include the wishes of the parent(s), the wishes of the child, the age and development of the child, the existence of criminal records, reports from experts, and a broad catch-all: "such other factors as the court may in each individual case determine to be relevant."[90] And while courts may apply these factors inconsistently, private adoption agencies, which often play the primary role of intermediary and broker, also often use these factors in divergent ways.[91]

II. POLICY CONSIDERATIONS

Many commentators believe that, on a very basic level and without considering motivations behind such practices, denial of adoption petitions because of age is discriminatory and unacceptable. Even without examining factors such as longevity, health, and finances, there is an inherent unfairness in denying a willing and fit party the right to adopt a child who needs a home. As Elizabeth Bartholet, herself an adoptive mother over 40, opined, "Why would anyone think that those who consciously plan to adopt someone else's child pose more of a risk than those who fall unwittingly into pregnancy? What real threat do adoptive parents pose to children who cannot in any event be raised by their biologic parents—to children who are being raised by foster families or in institutions or on the streets?"[92] When faced with placing a child into a prospective adoptive family, private agencies rank the potential parents in ways that often favor those applicants who most closely resemble a "socially

87. *Ralph Edward B.*, 117 Cal. Rptr. 3d.

88. *Id*. at 857, 861.

89. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1115 (2010).

90. WIS. STAT. § 767.41(5) (2007-08).

91. MOE, *supra* note 2, at 2-3, 74-75, 223.

92. BARTHOLET, *supra* note 7, at 69.

traditional family model."[93] Those who do not fit this model, including single people, older people, gay people, and disabled people, are either placed lower on the list or excluded altogether.[94] This system led Bartholet to conclude, "Discrimination is the name of the game in adoptive parenting. Those who procreate live in a world of near-absolute parenting rights . . . increasingly the law forbids discrimination . . . It is only in the area of adoption that our system proclaims not simply the right to discriminate but the importance of doing so."[95]

Further, even the "traditional" concept of family upon which adoption agencies and state courts base their decisions is rapidly becoming a fallacy. The intact, nuclear family is in many ways an illusion, yet it is one that we as a society seem particularly reluctant to part with. The "family" is evolving in countless ways: single parents head a major portion of households, grandparents increasingly raise their grandchildren, gay couples have begun to both adopt and use fertility treatments, and divorce has continued to shape the concept of family.[96] Particularly, as more women delay pregnancy in favor of pursuing a career, many women become first-time mothers after the age of 40 even without the help of fertility treatments.[97] These first-time parents often take additional steps to ensure that their quality of life and longevity will be sufficient to see their children into adulthood; simply because they become parents later in life does not mean they fail to take proactive steps to ensure a loving and stable home for their children.[98] And given the advancement of Assisted Reproductive Technology (ART), women are able to become biological parents far later in life than ever before.[99]

Assisted Reproductive Technology is mooting many of the arguments advanced by those who do not support older parenthood. Infertility affects about 7.3 million women and their partners in the U.S., which is about 12% of

93. *Id*. at 70.

94. *Id*. at 70-71; *see also* Benjamin C. Morgan, *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 EMORY L.J. 1491, 1503 (2004) (not all agencies abide by this placement hierarchy).

95. Elizabeth Bartholet, *What's Wrong with Adoption Law?*, 4 INT'L J. OF CHILDREN'S RTS. 263, 265-266 (1996).

96. *See, e.g*., Susan F. Paikin & William L. Reynolds, *Parentage and Child Support: Interstate Litigation and Same-Sex Parents*, DELAWARE LAWYER, Spring 2006, at 26.

97. *See* Joan Raymond, *Modern Maternity – Risks and Rewards of Becoming a Mother after 40*, NEWSWEEK, September 15, 2008 (web exclusive), http://www.seniorsworldchronicle.com/2008/09/usa-modern-maternity-risks-and-rewards.html.

98. *See, e.g*., Linda Carroll, *Staying Power: Older Moms Aim to Live Longer*, MSNBC, January 5, 2010, *available at* http://www.msnbc.msn.com/id/34646356/ns/health-womens_health/.

99. "The average age of women using ART services in 2005 was 36." CENTERS FOR DISEASE CONTROL, 2005 ASSISTED REPRODUCTIVE TECHNOLOGY (ART) REPORT 15 (2005), *available at* http://cdc.gov/art/PDF/508PDF/2005ART508.pdf. 10% of ART cycles performed in 2005 were among women aged 41–42, and 9% were among women older than 42. Id.

the reproductive-age population.[100] Many couples whose ages surpass those in the traditional reproductive-age category are also turning to ART in order to build a family. In 2003, "there were 1,512 first-time mothers between the ages of 45 and 54" in the United States.[101] This growth trend is also present in other countries, such as the United Kingdom, where birth rates for every age group above 30 have risen while birth rates for those under 30 have dropped.[102] These new methods of procreation allow older couples to conceive who wouldn't be able to before, and there are virtually no established and enforced age limitations on these procedures. Medical and legal ethicists have commented on the potential for abuse, and highly publicized examples of the downsides of ART are everywhere. Not only do we see stories about those in their 20s and 30s making perhaps unwise reproductive decisions (the "Octo-Mom" being a ripe example), those in their 50s, 60s, and beyond have come under similar scrutiny.[103]

Who regulates these decisions? In some European countries, the State has enmeshed itself in the process by establishing some regulations. In Denmark, "the State pays for three rounds of fertility treatment for any woman needing them—but only three rounds, and only if the woman is under the age of forty."[104] Also, in Italy, the Italian Parliament passed the Medically Assisted Reproduction Law that does not allow certain classes of people—including women past child-rearing age—to reproduce if they cannot do so naturally.[105] The Italian law applies regardless of the person's stability or level of commitment to parenthood.[106] But in the United States, there certainly is no third party examining the best interests of the children in each case involving ART.[107] Procreation is a fundamental right in the U.S., and so any state

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100. National Center for Health Statistics, *FastStats*, CENTER FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nchs/fastats/fertile.htm (last visited April 18, 2011).

101. *More Older Women Having Babies, Study Says*, MSNBC, Nov. 23, 2004, *available at* http://www.msnbc.msn.com/id/6567698/ns/health-womens_health/.

102. Daniel Martin, *Britain's Legion of 45-Year Old First-Time Mothers*, DAILY MAIL, February 27, 2007 (Mail Online), *available at* http://www.dailymail.co.uk/health/article-438757/Britains-legion-45-year-old-time-mothers.html.

103. For example, one woman made headlines when she died at the age of 69, leaving her 3 year-old twin sons parentless. Graham Keeley, *Oldest mother, Maria Carmen del Bousada, dies at 69, leaving baby orphans*, TIMES, July 16, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/europe/article6714820.ece. She conceived the boys at the age of 66 using ART. *Id*. However, other news stories chronicle the lives of first-time mothers in their mid- to late-fifties who live seemingly healthy and happy lives with their biological children. *See, e.g., More older women reveling in motherhood*, MSNBC, Dec. 3, 2004, *available at* http://www.msnbc.msn.com/id/6593933.

104. Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 489 (2009).

105. Erica DiMarco, *The Tides of Vatican Influence in Italian Reproductive Matters: From Abortion to Assisted Reproduction*, 10 RUTGERS J. L. & RELIGION 1, 16 (2009).

106. *Id*.

107. *See, e.g*., Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1, *available at* http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=1&_r=1.

regulation of ART and its consequences will be difficult given the required strict scrutiny analysis.[108] Indeed, even the ABA Model Act Governing Assisted Reproductive Technology makes no mention of the age of prospective parents at all.[109] Ultimately, this process allows older adults, who would otherwise be denied the opportunity to adopt, an alternative avenue to becoming parents.

Now that older adults are able to become biological parents, and now that substantial numbers of older adults are embracing these opportunities, adoption agencies and courts need to rethink how they select appropriate applicants. If an older adult is determined to become a parent, he or she has multiple options to do so; foreclosing adoption completely is not an appropriate response. When an agency turns away an older applicant, not only is it possible that the person will find other ways to become a parent, it is also very possible that a child has been denied a loving home. These misguided ideologies should not take precedent over the best interests of the child. According to the Adoption and Foster Care Analysis and Reporting Systems (AFCARS), in 2004 there were 118,000 children in foster care with an identified goal of adoption and/or whose parents' parental rights had been terminated.[110] Forty-five percent of those "waiting" children had been in continuous foster care for three or more years.[111] Clearly, there is a glut of children in need of adoptive homes, and older Americans are finding ways other than adoption to become parents. However, given the balancing of interests involved in adoption proceedings—those of the child, the biological parents, the adoptive parents, and even the state itself—simply eliminating any and all bars to adoption may not be a tenable goal. Instead, rebutting the pre-existing presumptions that color society's perceptions of older adults may lead to increased access and success for those older adoptive parents in an inherently discriminatory process.

Certainly as medicine and technology have progressed, older Americans are able to live longer and enjoy a greater quality of life as they age. The life expectancy of the average American in 2010 was estimated at 78.24 years.[112] In the CDC's Health-Related Quality of Life study, completed in 2007, researchers found that in addition to age, factors such as income and education

108. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

109. MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (American Bar Ass'n 2008), *available at* http://www.abanet.org/family/committees/artmodelact.pdf.

110. MOE, *supra* note 2, at 184, T. 6.13.

111. *Id*. at 185, T. 6.14.

112. *Country Comparison: Life Expectancy at Birth*, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2102rank.html (last visited April 15, 2011). For life expectancy trends, see Melonie Heron et al., *Deaths: Final Data for 2006*, 57 NATIONAL VITAL STATISTICS REPORT NO. 14, 27 (2009), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf (showing that life expectancy has increased nearly 8 years in the last half-century).

affected quality of life perceptions.[113] Research also showed that younger Americans aged 18-24 suffered the most mental health stress.[114] However, older adults still reported having the most poor physical health days and the most activity limitations.[115] Although it is certain that as we age, we will decline in health and suffer from physical and mental limitations, these types of limitations do not necessarily reduce or eliminate those skills necessary to raise children. Legislatures have seen fit to exclude physical handicap from consideration in adoption proceedings; it is unclear why physical limitations that accompany advanced age should be treated differently. And yet, adoption guides are blunt about the perceived lack of ability and capacity of older adults. "Anyone nearing middle age who is considering adoption of a very young child should remember: . . . if you're pushing forty-five. . .daily chores that a toddler creates may so deplete your energy and frazzle your nerves that you just can't be the warm, sunny, unruffled mother he is entitled to have."[116] That statement, from a book published 35 years ago, may strike even the most prejudiced of ears as being, at best, trite; as technology, medicine, and lifestyles have evolved, the amount of "middle-agers" who both conceive children and successfully manage their upbringing is becoming a common occurrence. Moreover, plenty of "young" parents can only charitably be called "frazzled" or "ruffled" during the worst toddler meltdowns. But the fact remains that a large portion of society, particularly those whose business is adoption, still believes that older people simply can't succeed as parents.[117]

Additionally, the concept of a "traditional" adoptive child is disappearing. Infants do not make up the majority of children adopted in the United States, and it is estimated that 11.8% of adopted children had at least one disability as of the year 2000 (compared with 5.2% of biological children).[118] As the make-up of the pool of adoptive children changes to include older children, those with varied racial and ethnic backgrounds, and children with traumatic upbringings, the complexity and importance of the child's best interests are magnified. Despite the possibility of physical limitation, older adults with established marriages, jobs, finances, and lives may often be best suited to guide these children into adulthood. Whereas twenty-somethings may be dealing with stresses related to establishing their careers, finances, and marriages, "older" adults who have already encountered and conquered these life issues may be able to devote more time to a needy child.[119] Considering

113. *Health-Related Quality of Life: Findings*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hrqol/key_findings.htm (last visited April 15, 2011).

114. *Id*.

115. *Id*.

116. RAYMOND, *supra* note 67. For more current advice for older adoptive parents, see *16 Steps to Older Parent Adoption*, ADOPTING.ORG, http://www.adopting.org/adoptions/16-steps-to-older-parent-adoption.html (last visited April 15, 2011).

117. *See supra* note 42.

118. ROSE M. KREIDER, ADOPTED CHILDREN AND STEPCHILDREN: 2000, CENSUS 2000 SPECIAL REPORTS, October 2003, *available at* http://www.census.gov/prod/2003pubs/censr-6.pdf.

119. *See* Wetzstein, *supra* note 22.

that the adoption process is contingent upon "matching" prospective adoptive parents with "appropriate" children, capable older adults may often present the best possible fit in any given adoption case.

III. SEARCHING FOR A REMEDY: CONSTITUTIONAL RIGHTS AND PROTECTIONS

While courts and legislatures have addressed age discrimination in many areas of daily life, they have yet to prohibit or even acknowledge age discrimination in adoption. Admittedly, the issue presents a very complicated and controversial conundrum, but it is a practice that should no longer be condoned. Federal laws exist that prevent age discrimination in employment,[120] but there are currently no federal laws that serve to protect older Americans who want to expand their families. Additionally, Titles III and IV of the Civil Rights Act only protect against classifications based on race, color, religion, and national origin;[121] there is no mention of age. So how is someone who is discriminated against to proceed? At first glance, this type of discrimination may appear to be a violation of the U.S. Constitution. The Supreme Court long ago held that the Constitution protects an individual's right "to marry, establish a home, and bring up children."[122] However, current Due Process and Equal Protection jurisprudence does not provide convincing support for age discrimination claims. Additionally, cases in which homosexuals have challenged adoption denials using similar Constitutional arguments have also failed.[123] Absent legislation, in order for older adoptive parents to be granted the highest level of protection, adoption must either be classified as a fundamental right, or age must be considered a suspect classification. Neither avenue has proved successful, as the Constitution has failed to provide a solution for other age-related and adoption discrimination claims. Nevertheless, courts should become more receptive to Equal Protection claims, while legislatures should proactively work to end the problem.

A. Adoption as a Fundamental Right

The first of the two constitutional arguments is that adoption is a fundamental right protected by the Due Process Clause, though it is the less explored and developed of the two. This assertion may seem at odds with the established fact that procreation *is* considered a fundamental right.[124] However,

120. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2000); Age Discrimination Act of 1975, 42 U.S.C. § 6101 (2001).

121. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 246 (1964).

122. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

123. *See, e.g.*, Lofton v. Sec'y of Dep't of Children and Family Services, 377 F.3d 1275 (11th Cir. 2004), *cert. denied* 543 U.S. 1081 (2005); Ann M. Reding, *Lofton v. Kearney: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1300 (2003).

124. Even this right is limited: the right to "procreate" does not survive incarceration. Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002). The *Gerber* case raises an interesting question, but one that is beyond the scope of this paper: does the fundamental right of procreation survive physical incapacity?

procreation is not treated as the equivalent of adoption,[125] even though, for a significant portion of the population, adoption is the sole path to family status.

Merriam-Webster's Medical Dictionary defines "procreate" as "to beget or bring forth offspring,"[126] and The American Heritage Dictionary defines "procreate" as "[t]o produce or create; originate."[127] Adoption allows a couple or individual to "produce" or "create" a family; "the idea that each individual has the right to experience the gift of parenthood has been increasingly acknowledged in the broader culture and has led to a greater acceptance and respect for various forms of nontraditional families."[128] And while some scholars have argued that adoptive "procreation" should entail similar rights as biological procreation,[129] courts have recognized a difference. While biological families have their "origins entirely apart from the power of the State," foster families and adoptive families have, as their source, "state law and contractual arrangements."[130] Courts have called the difference between adoption and procreation "striking," and have explained, "Adoption always involves the weighing and balancing of many competing interests. The rights of a couple to adopt must be reconciled with the state's interest in protecting the existing rights of the natural parents, as well as in securing ultimately the welfare of the child."[131]

The requirements of the Due Process Clause of the Fourteenth Amendment only apply to deprivations of property or liberty interests.[132] For substantive Due Process purposes, "[a]n interest will . . . qualify as a liberty interest if it is both fundamental and traditionally protected by our society."[133] In adoption proceedings, courts have generally looked at the best interests of the child. Thus, the child's interest has been the interest upon which the "traditionally protected" analysis has focused.[134] However, these interests are not tantamount to either property or liberty interests. "The right to have a child's best interests be *the paramount* consideration in the adoption

125. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816 (1977).

126. *Merriam-Webster's Medical Dictionary*, *Procreation*, dictionary.reference.com, http://dictionary.reference.com/browse/procreation (last visited April 15, 2011).

127. *American Heritage Dictionary of the English Language*, *Procreation*, dictionary.reference.com, http://dictionary.reference.com/browse/procreation (last visited April 15, 2011).

128. VIVIAN SHAPIRO ET AL., COMPLEX ADOPTION & ASSISTED REPRODUCTIVE TECHNOLOGY 10 (2001).

129. *See* Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1037-40 (1996).

130. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 845 (1977).

131. Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (*citing* Smith, 431 U.S. 816, 846-47).

132. Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972).

133. *In the interest of* Angel Lace M., 516 N.W.2d 678, 685, (Wis. 1994) (citing Michael H. v Gerald D., 491 U.S. 110, 122 (1989)).

134. *See, e.g.*, Thomas M.P. v. Kimberly J.L., 558 N.W.2d 897, 901 (Wis. Ct. App.1996).

proceedings is neither fundamental nor traditionally protected by our society."[135] And courts have also held that adoption has not traditionally been protected by our society.[136] Therefore, not only is adoption not a fundamental right currently, but the deprivation of the right to adopt is not considered synonymous with the deprivation of a liberty interest.[137] In order to change this outcome, courts should recognize the traditionally protected interest of intimate association[138] within the adoption framework in addition to the child's interests, and courts should endorse the longstanding value of adoption in this country.

It is not the province of courts to "create" fundamental rights; rather, fundamental rights are only those implicitly or explicitly guaranteed by the Federal Constitution. For a right to be characterized as fundamental the right must be deeply rooted in the nation's history and tradition and be so implicit in the concept of ordered liberty that neither liberty nor justice would exist if it were sacrificed.[139] Therefore, courts do not consider adoption, even if traditionally-protected, the type of liberty interest that the Fourteenth Amendment was intended to protect.[140]

While courts consider the interests of the children involved in adoption proceedings, they must also examine the interests of adoptive parents in their analyses. While a child's best interests may not be considered fundamental,[141] the adoptive parent's right to adopt should be. Courts must reexamine the contradictory nature of their holdings and recognize that adoption is an integral part of the fundamental right of intimate association. The Supreme Court has recognized "that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[142] This includes the most intimate forms of association provided by the relationships created within families. "[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State."[143] And as the Supreme Court recognized, "cutting off any protection of family rights at the first convenient, if arbitrary boundary[,]

135. In the interest of *Angel Lace M.*, 516 N.W.2d at 685 (emphasis added).

136. *Id*.

137. For a discussion of the possible procedural Due Process rights available to prospective adoptive parents, see Hal Aigner, *The Rights of Adoptive Parents Must Be Protected*, *in* ADOPTION: OPPOSING VIEWPOINTS 85, 94-96 (Andrew Harnack ed., 1995).

138. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-20 (1984).

139. Doe v. Department of Public Safety and Correctional Services, 971 A.2d 975 (Md. Ct. Spec. App. 2009) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) and Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

140. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 839-41 (1977).

141. *In the interest of* Angel Lace M., 516 N.W.2d 678, 685 (Wis. 1994).

142. *Roberts*, 468 U.S. at 617-18.

143. *Id*. at 618-19.

the boundary of the nuclear family," is antithetical to the Constitution's guarantees in the Bill of Rights.[144]

The Supreme Court has also indirectly recognized the right to familial privacy in the integrity of a family unit for families consisting of foster parents and foster children.[145] Those courts that have deemed adoptive families to be strikingly different than biological families have neglected to follow established precedent: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[146] While we may quibble over the exact definition of a term such as "procreate," there is far less uncertainty about the definition of a "family." "[B]iological relationships are not [the] exclusive determination of the existence of a family."[147] That the bonds created between a parent and her child were not fostered in the womb does not make them any less deserving of recognition and protection. As Justice Harlan explained in his dissent in *Poe v. Ullman*, the liberty interest protected by the Due Process Clause "is not a series of isolated points pricked out. . .[i]t is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[148] The right to adopt without reference to the age of the petitioners is merely part of that continuum of liberty interests protected by the Constitution.

Furthermore, accepting adoption as a fundamental right will not jeopardize the best interests of the children involved; the misconception that fundamental rights may not be abridged in any way is too often assumed where two competing interests meet. Fundamental rights are not absolute. Instead, fundamental rights are those rights most stringently protected from infringement.[149] The fundamental right of adoption need not be framed in an overly-broad or overly-narrow manner, though "[t]he selection of a level of generality necessarily involves value choices."[150] The competing interests and values inherent in the adoption process could shape its contours; for example, it might be recognized simply as the right of any individual to adopt any other individual. This broad interpretation of the right would allow for a person of any age to adopt a child, but it could also allow an unfit person to adopt. Conversely, it could be stated as the right of an otherwise fit adult to adopt a minor child. If the right is described in very specific terms, there exists a risk that it will be disconnected from previously established rights of parenthood,

144. Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

145. *Smith*, 431 U.S. at 842 n. 45, 842-44 ("There can be, of course, no doubt of appellees' standing to assert this interest, which, to whatever extent it exists, belongs to the foster parents as much as to the foster children.").

146. *Moore*, 431 U.S. at 503, (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972), Ginsberg v. New York, 390 U.S. 629, 639 (1968), Griswold v. Connecticut, 381 U.S. 479, 496, Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

147. *Smith*, 431 U.S. at 843.

148. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

149. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1057-58 (1990).

150. *Id*. at 1058.

procreation, and intimate association and thus be denied.[151] In some cases, such as *Bowers v. Harwick*, courts have easily distinguished a narrowly defined right from the broad, pre-existing fundamental rights used to support it.[152] However, given the breadth of rights already protected, including the rights of child rearing,[153] familial relationships,[154] procreation,[155] marriage,[156] contraception,[157] decisions to beget or bear a child,[158] and of intimate association,[159] even a narrower definition of the right to adopt may be sufficient to protect both the rights of adoptive parents and children and withstand judicial scrutiny.

A basic examination of the history of the United States provides support for this conclusion: adoption is a practice that has been traditionally valued and protected by society. To hold otherwise is to ignore thousands of years of history.[160] Written adoption laws existed as early as 1780 BC, and modern American adoption laws based on Napoleonic Codes and Roman adoption laws have been in use since the late 1800s.[161] "By the mid-1950s, 90,000 children per year were being placed for adoption."[162] Certainly, the values underlying adoption and the procedures used to accomplish it have evolved; but to say that adoption is not a traditionally recognized and protected aspect of our culture is ill informed at best. However, even if one could successfully challenge this conclusion and elevate adoption to the status of a "traditionally protected" interest, courts would still need to consider it a fundamental right.

No matter how the right is stated, the state may always infringe upon it when the infringement survives a strict scrutiny analysis.[163] Strict scrutiny analysis requires that the action, law, or policy is narrowly tailored to achieve a compelling government interest and that it is the least restrictive means of achieving that interest.[164] Therefore, necessary infringements could be analyzed on a case-by-case basis that would allow for protection of other competing interests. And no matter how the right is defined, where the interests of a child must be considered, courts should not waive the "best interests" standard as a

151. *See, e.g.*, *id.* at 1066 (discussing the level of specificity used in defining the right at issue in Bowers v. Hardwick, 478 U.S. 186 (1986) and its effect on the case's outcome).

152. *See id.* at 1069.

153. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

154. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

155. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

156. Loving v. Virginia, 388 U.S. 1, 12 (1967).

157. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

158. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

159. Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

160. *See* MOE, *supra* note 2, at 123-44 (giving a detailed chronology of the history of adoption). *See also* BABB, *supra* note 6, at 28-42.

161. *See* BABB, *supra* note 6, at 30-33.

162. GROZA & ROSENBERG, *supra* note 11, at 110.

163. *See, e.g.*, *In re* R.L.S., 820 N.E.2d 1201, 1204-05 (Ill. App. Ct. 2004) (stating that there is a "fundamental right of a parent to the care, custody and control of [the] child"); Foe v. Vanderhoof, 389 F. Supp. 947, 954 (D. Colo. 1975) (stating that to infringe on a privacy right the state must show a compelling interest).

164. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

banner of opposition to adoptive parents' rights. Due Process jurisprudence must evolve to ensure that the child's best interests, which are themselves often debated, do not prevent adoptive parents from exercising their own fundamental rights. The Supreme Court itself has admitted that due process history "counsels caution and restraint. But it does not counsel abandonment."[165] Some adoption groups and lawmakers seem to fear that establishing adoption as a fundamental right would set a precedent that neglects the needs of the children. "The purpose of adoption is to provide the best possible parents for children, not to provide children for adults who desire to parent them . . . Children's interests, not ideologies, should come first."[166] However, there is no reason that, in the context of a strict scrutiny analysis, a court could not still meaningfully consider a child's best interests.

B. Equal Protection for Older Adoptive Parents

The argument for Equal Protection can take two different paths: first, one can argue that, even if age cannot be given any type of suspect classification, the current laws and practices discriminating against older adoptive parents fail even the low standards of rational review. Second, one can argue that age should be considered a quasi-suspect or suspect classification and should be afforded heightened judicial review. Once given this classification, laws discriminating against older adoptive parents would fail the heightened standard of review. In order to set the stage for these analyses, an examination of the existing precedent is helpful.

1. Equal Protection Jurisprudence in Same-Sex Adoption

Same-sex couples have raised Constitutional arguments in the context of adoption and have seen little success. These challenges provide a basis for ageist discrimination, because same-sex couples have raised many of the same justifications for equal protection of the law. Couples facing discrimination because of their sexual orientation have had to argue against the "best interests" standard as well, and one of the strongest arguments advanced has been that denying them the right to adopt is a denial of their Fourteenth Amendment rights. Until recently, Florida had a statutory ban on both public and private adoptions by any person that "is a homosexual."[167] This law was challenged unsuccessfully in *Lofton v. Secretary of Department of Children and Families*,[168] at least partially because sexuality is not considered a suspect or quasi-suspect classification.[169] Because of this, the Eleventh Circuit was able to

165. Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

166. National Council for Adoption, *The Rights of Adopted Children Should Be Protected*, *in* ADOPTION: OPPOSING VIEWPOINTS 82, 84-85 (Mary E. Williams ed., 2006).

167. FLA. STAT. § 63.042(3) (1992).

168. Lofton v. Sec'y of Dep't of Children and Families, 358 F.3d 804 (11th Cir. 2004).

169. *See* Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); State v. Limon, 122 P.3d 22, 29 (Kan. 2005).

hold that banning homosexuals from adopting children was rationally related to the legitimate state interest of furthering the best interests of children.[170]

The problematic subjectivity of the "best interest" standard was highlighted in *Lofton*. Although scholarly literature is in disagreement with this conclusion, the court sided with the argument that homes with married mothers and fathers "provide the stability that marriage affords and the presence of both male and female authority figures, which [the state] considers critical to optimal childhood development and socialization."[171] In doing so, the court essentially eschewed a substantial body of well-respected research across a variety of fields that believes same-sex parents do not negatively impact their children's best interests.[172] Additionally, it is important to note that Florida does not ban single adults from adopting,[173] despite the aforementioned "critical" presence of both male and female authority figures. Although national journals on medicine, psychiatry, and social science have all published empirical studies on the impact of same-sex parenting, the "best interest" standard's subjectivity allowed the court to make its own determination.[174] The court also noted that protecting and furthering "public morality" was a legitimate state interest that would be rationally related to the statute; although the court never explicitly said that homosexuality is immoral, its holding leaves little doubt about the question.[175]

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170. *Lofton*, 358 F.3d at 818-19.

171. *Id*. at 818. For a view of the alternate arguments regarding same-sex adoption's impact on children, *see*, *e.g*., Ellen C. Perrin & Comm. on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS, 341, 343 (2002); Charlotte J. Patterson, *Lesbian and Gay Parents and Their Children: Summary of Research Findings*, *in* LESBIAN AND GAY PARENTING, 5, 15 (2005). For those that are opposed to same-sex parenting, see GETTING IT STRAIGHT: WHAT THE RESEARCH SHOWS ABOUT HOMOSEXUALITY (Peter Sprigg & Timothy Dailey eds., 2004); Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 ADOLESCENCE 757, 772 (1996). For a study that questions the validity of studies that claim children raised by homosexual parents are no different than those raised by heterosexual parents, see ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING (2001), *available at* http://www.emaso.com/links/REF-Books/REF.6-D.pdf.

172. *See*, *e.g*., Perrin & Comm. on Psychosocial Aspects, *supra* note 171, at 343. *See also* Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 CHILD DEVELOPMENT 1886, 1897 (2004); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 CURRENT DIRECTIONS IN PSYCH SCIENCE 241, 243 (2006).

173. FLA. STAT. § 63.042(2)(b) (1992).

174. *See supra* notes 170-72.

175. *See Lofton*, 358 F.3d at 819 n. 17 ("We also note that our own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest. The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny. In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases." (internal citations and quotation marks omitted)).

A more recent judicial holding examined the Florida adoption ban from a rational basis perspective and, which will be discussed below, held the law to be unconstitutional.[176] While challenges to this statute and commentary on its irrationality are numerous, the *Lofton* case aptly demonstrates the difficulty an adoptive parent faces when being measured against the "best interest" standard, particularly under the rubric of equal protection. Just as certain authorities feel that same-sex households do not foster a child's best interest, many argue that older parents simply cannot measure up to the best interest standard. Because sexuality does not rise to the level of a suspect classification, the best interest standard allowed the court to craft its own rationale out of the divergent authorities in order to satisfy the rational basis test.

2. Rational Basis Review

The Constitution has also failed to provide a solution for age as a suspect classification, as is exemplified by the Supreme Court's decision in *Massachusetts Board of Retirement v. Murgia*.[177] Although the case involved a challenge of mandatory retirement laws, the Court's reasoning is applicable to age-related claims generally. The plaintiff argued that a state law violated the Equal Protection Clause because of its age-based classification; however, "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right, or when it operates to the peculiar disadvantage of a suspect class."[178] The Court held that the class in question, uniformed police officers over the age of 50, was not a suspect classification and thus not entitled to strict scrutiny.[179] The Court's reasoning did acknowledge the existence of age-related discrimination, however.

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.[180]

Therefore, the Court's holding applies to all age-based discrimination claims, and the test for any discriminatory action is merely rational review. Although more than thirty years have passed since the *Murgia* decision was rendered, the Supreme Court still follows its holding and reasoning.[181]

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176. Florida Dep't of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 92 (Fla. Dist. Ct. App. 2010).

177. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (per curiam).

178. *Id*. at 312.

179. *Id*. at 313.

180. *Id*. (citing San Antonio School District v. Rodriguez, 411 U.S. 1, 16 (1973)).

181. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000); Gregory v. Ashcroft, 501 U.S. 452, 470-71 (1991); Vance v. Bradley, 440 U.S. 93, 96-97 (1979).

Because age-related claims are subject to the lowest level of judicial scrutiny, any governmental action need only be rationally related to a legitimate government interest.[182] This standard is extremely deferential; for example, a statute or action is not invalid under the rational basis test simply because it is not the best possible method or least burdensome method to achieve the state's objective.[183] A statutory classification should not be overturned on equal protection grounds unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the legislature's actions are irrational.[184] "[T]he burden is on the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification."[185]

a. Homosexual Adoptions

Decisions in which a state action fails this deferential standard are extremely rare. One of these very few cases is *Romer v. Evans*.[186] In *Romer*, homosexuals challenged an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. Because homosexuals have not been granted suspect or quasi-suspect classification, the amendment was tested against rational review. However, in this context, the amendment imposed such a "broad and undifferentiated disability on a single named group," that the Court held the action invalid.[187] Further, the breadth of the enactment was so extreme and its proffered justifications so "discontinuous with the reasons offered for it," that the Court felt its only motivating factor was animus toward homosexuals generally.[188] The Court pointed out the amendment's primary flaw in language that could easily be used to describe age bans in adoption: "It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."[189]

Another recent case resulted in the overturning of the Florida ban on homosexual adoptions: *Florida Department of Children and Families v. Adoption of X.X.G.* In *X.X.G.*, a homosexual foster father petitioned to adopt

182. Exxon Corp. v. Eagerton, 462 U.S. 176, 195-96 (1983).

183. *See, e.g.*, Mitchell v. Commission on Adult Entertainment Establishments of State of Del., 10 F.3d 123 (3d Cir. 1993); American Booksellers v. Webb, 919 F.2d 1493, 1509 (11th Cir. 1990).

184. *See Kimel*, 528 U.S. at 83 ("The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision").

185. Bd. of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 367 (2001) (internal quotations omitted).

186. Romer v. Evans, 517 U.S. 620 (1996).

187. *Id*. at 632.

188. *Id*.

189. *Id*. at 633.

two foster children who had been placed in his care.[190] The foster father, Martin Gill, was a licensed foster parent who was matched with his two children in 2004.[191] Mr. Gill was considered an "experienced" foster parent who had successfully fostered seven other children before being matched with his sons, referred to as X.X.G. and N.R.G.[192] When the two children were placed with Mr. Gill, their situation was dire: "The children arrived with medical problems and other needs. X.X.G. arrived wearing a dirty adult-sized t-shirt and sneakers four sizes too small. Both children were suffering from ringworm and the four-month-old suffered from an untreated ear infection. X.X.G., the four-year-old, did not speak and his main concern was changing, feeding and caring for his baby brother."[193] Although Mr. Gill was initially told that the placement was only temporary, the relatives who had intended to adopt the boys changed their minds and the boys' great-grandmother asked Mr. Gill to adopt them.[194]

The final judgment of adoption held that Mr. Gill was a fit parent and that the adoption was in the best interests of the children.[195] Yet the Department of Children and Families appealed. No one in the *X.X.G.* case argued that the adoption ban was based on a belief that homosexuals were unfit to be parents. Rather, the Department argued that there was a rational basis for the prohibition because children would have "better role models, and face less discrimination, if they are placed in non-homosexual households, preferably with a husband and wife as the parents."[196] Further, the Department argued that homosexuals should be barred from adopting "because the homes of homosexuals may be less stable and more prone to domestic violence"[197] and because "placement of children with homosexuals presents a risk of discrimination and societal stigma."[198] Interestingly, the Department had no such qualms, or ban, on placing children with gay foster parents.[199]

After lengthy testimony from experts, the court held that the statute was not supported by any rational basis. The court emphasized: "The classification must be based **on a real difference** which is reasonably related to the subject and purpose of the regulation."[200] Because Florida law allows for adoption by single parents, the Department's proffered justification—better role models—

190. Florida Dep't of Children and Families v. Adoption of X.X.G., 45 So.3d 79, 81 (Fla. Dist. Ct. App. 2010).

191. Bonnie Rochman, *Florida's Gay Adoption Ban Crumbles: The Dad Behind the Case Celebrates*, TIME, November 19, 2010, *available at* http://healthland.time.com/2010/11/19/floridas-gay-adoption-ban-crumbles-the-dad-behind-the-case-celebrates/.

192. *Adoption of X.X.G.*, 45 So. 3d at 82 n. 3.

193. *Id*. at 82.

194. Rochman, *supra* note 191.

195. *Adoption of X.X.G.*, 45 So. 3d at 81.

196. *Id*. at 85.

197. *Id*. at 90.

198. *Id*. at 91.

199. *Id*. at 86 ("The average length of stay in foster care before adoption is thirty months.").

200. *Id*. at 83 (emphasis in the original).

was insufficient.[201] The court further dismissed the Department's social science testimony: "**These reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children.** These conclusions have been accepted, adopted and ratified by the American Psychological Association, the American Psychiatry Association, the American Pediatric Association, the American Academy of Pediatrics, the Child Welfare League of America and the National Association of Social Workers."[202] Ultimately, the court affirmed the final judgment of adoption: "this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."[203] Current reports note that the state will not appeal the decision.[204]

Generally, the state's interest in adoption proceedings is the expeditious facilitation of adoptions of children into suitable homes.[205] The state may also have a legitimate interest in protecting the integrity of the adoption process.[206] Most agencies and legislators justify age limitations placed on adoptive parents in the same way that the Department of Children and Families did in *X.X.G.*: limitations are rationally related to the state's interests; even though limiting the age of adoptive parents may not be the *best* possible way to achieve the state interest, it may still be valid.[207] Despite the fact that these practices identify persons by a single trait—their age—and then deny them protection because of it, the actions are continually justified as having a "rational" relationship to the facilitation of adoption.[208] Statutes that implicitly or explicitly allow age to be considered under this kind of analysis will probably withstand constitutional scrutiny even in light of the recent Florida decision overturning the ban on homosexual adoption.

201. *Id*. at 85 ("The percentage of adoptions of dependent children in Florida that were by single parents for the year 2006 was 34.47 %.")

202. *Id*. at 87 (emphasis in the original).

203. *Id*.

204. *Florida Ends Ban on Gay, Lesbian Adoptions*, CNN.com, (Oct. 22, 2010), http://articles.cnn.com/2010-10-22/us/florida.gay.adoptions_1_frank-martin-gill-lesbian-adoptions-adoptions-by-gay-men?_s=PM:US ("'We had weighed an appeal to the Florida Supreme Court to achieve an ultimate certainty and finality for all parties,' said Joe Follick, the department's communications director. 'But the depth, clarity and unanimity of the DCA opinion . . . has made it evident that an appeal would have a less than limited chance of a different outcome.'").

205. *In re* D.D.D., 961 So.2d 1216, 1221 (La. Ct. App. 2007); N.T. v. Doe (*In re* Adoption of Doe), 199 P.3d 368, 370 (Utah Ct. App. 2008).

206. *See In re* C.M.D., 287 S.W.3d 510, 513 (Tex. App. 2009).

207. Schweiker v. Wilson, 450 U.S. 221, 234-35 (1981) (holding that as long as the limitation "rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.").

208. *Supra* notes 74-82.

b. Grandparent Adoptions

The prevalence of grandparent adoptions and the courts' preference for these types of placements undermine arguments that age is rationally related to the successful facilitation of adoption, however. Courts' preference for grandparent adoption stems from the perceived importance of being raised with biological relatives. It may also reflect reality. In 1998, 3.9 million children were living in homes maintained by their grandparents in either an informal arrangement or because of formal adoption; one million households were run by grandmothers with a single daughter or by a grandmother alone.[209] However, these arrangements are often due to major family disruptions or breakdowns, and the needs of both the grandparents and grandchildren may suffer as a result. Children living in grandparent-maintained households were more likely to be without health insurance, to be living below the poverty line, and to be receiving public assistance.[210] Despite the realities of kinship care, professionals still favor it. One survey of 50 state licensors of adoption agencies and 22 professional and child welfare associations and adoption-related organizations found that, in identifying the "best interest of the child" standard, three factors were paramount: "the desire and ability of birth family members to raise the child, the potential or actual parenting ability of those parents, and the option of being raised with biological relatives."[211]

Further, the federal Adoption Assistance and Child Welfare Act of 1980 codified this preference to a degree: it directs states to give preference to relatives of the adoptive child.[212] The same survey revealed that adoption professionals overwhelmingly supported adoptions by people with physical disabilities. Of 71 people surveyed, only one person felt that physically disabled people should not be allowed to adopt.[213] So adoption professionals agree, at least in theory, that older adults who are biologically related to the adoptee and those with physical disabilities should be allowed to adopt. Nevertheless, a disconnect exists between theory and practice when it is applied to non-relative adults over a certain age.

This may seem contradictory. The facilitation of adoption is a legitimate government interest, and limiting the pool of prospective parents thwarts that state goal. "Any practice that potentially reduces the pool of prospective adoptive parents raises grave concerns."[214] Certainly, a simultaneously existing overly broad and overly narrow policy would seem to decrease the number of applicants and degrade the quality and efficacy of the process. Although it is arguable, though tenuously, that age limitations are rationally related to

209. SHAPIRO ET AL., *supra* note 128, at 125.

210. *Id*. at 126.

211. BABB, *supra* note 6, at 97-98, 103.

212. 42 U.S.C. § 671(a)(19) (2006) ("[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.").

213. BABB, *supra* note 6, at 101 (survey did not ask about attitudes regarding adoption by older non-relatives).

214. Adoption of Vito, 728 N.E.2d 292, 303 (Mass. 2000).

adoption, it is also arguable that they are fundamentally at odds with the purported state interest. With so many different parties' interests to consider, courts do not always reach predictable conclusions when considering the state's and child's interests. For example, a Wisconsin court held that the fact that an adoption will be in a child's best interests, by itself, does not authorize the court to grant the adoption petition.[215] If current laws cannot produce predictable or even desirable results, it is possible that the laws no longer bear any rational relationship with the government interests. However, cases like *Romer* are not the norm; most courts will not hesitate to find a rational relationship sufficient to withstand the low level of scrutiny required by the rational basis test.

3. Age as a Quasi-Suspect Classification

Perhaps a stronger argument against the use of rational review is that courts should consider age a quasi-suspect classification. "[A] state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[216] Treating the aged and aging as a monolithic group certainly seems irrational. It is time that the courts reconsider the per curiam conclusion of the *Murgia* Court that the aged "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[217] Older adults may be subject to discrimination based on scientifically sound findings about a very limited number of generalizations, but there still exists a vast amount of ageist discrimination based on "pure empirically unsupportable prejudice."[218] Social Security benefits, Medicare, and the Age Discrimination in Employment Act are clear examples of older people being treated unequally, and both the existence of these programs and the policies that underlie them are crucial to recognizing that older Americans *are* subject to "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[219] While younger adults have historically treated older adults differently, the historically used justifications for this differential treatment are becoming progressively

215. *In re* Angel Lace M., 516 N.W.2d 678, 681 (Wis. 1994).

216. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985).

217. Mass. Bd. Of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).

218. *See* FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES 112, 129-30 (2003); *see also* Phoebe Weaver Williams, *Age Discrimination in the Delivery of Health Care Services to Our Elders*, 11 MARQ. ELDER'S ADVISOR 1, 3, 4, 40-41 (2009) (discussing pervasive age discrimination in healthcare).

219. *Murgia*, 427 U.S. at 313. These programs' very existence highlights the paradox of discrimination: discriminating against someone negatively because of a characteristic they cannot control is wrong. But discriminating against someone positively because of those same characteristics is both accepted and desirable. For an overview of the justifications supporting positive age discrimination, see Frolik & McChrystal Barnes, *supra* note 17, at 32-37.

more divorced from reality.[220] Reconsideration is especially overdue in the adoption context, where courts have allowed kinship adoptions between grandparents and their grandchildren for decades; however, courts and agencies still arbitrarily and irrationally discriminate against non-relative adults who they consider too "old."[221]

Further, Justice Marshall's dissent in *Murgia* strongly admonished the continued use of a "rigid two-tier model" to analyze age-based equal protection cases, [222] and in the years following *Murgia*, the Court shifted to accept Justice Marshall's reasoning for other equal protection claims. In *Craig v. Boren*, decided only six months after the *Murgia* decision, the Court established the intermediate level of scrutiny under which the challenged statute must further an important governmental interest and be substantially related to that interest.[223] Maybe more importantly, under the intermediate level of scrutiny, the justification for classifications must be genuine and must not depend on broad generalizations or stereotypes.[224] And yet, these broad generalizations and stereotypes are nearly impossible to escape. For instance, although adults age 65 and older comprise 12.7% of the population, less than 2% of prime-time television characters are age 65 or older.[225] Advertisements for wrinkle creams, vitamins, diet regimens, hair dyes, plastic surgery, and pharmaceuticals are inescapable, and they perpetuate the aging process as negative, undesirable, and debilitating. And the messages are targeted at progressively younger audiences: marketing focus groups for anti-aging products designed to treat appearance concerns are comprised of people as young as 36 years old.[226] However, their messages seem to be succeeding: in 2006, the U.S. market for anti-aging products and services was estimated to reach $72 billion by 2009.[227] Our constant exposure to ageist stereotypes and condoned age discrimination may be desensitizing American society to the extent and depth of the problem; however, the reality is that our culture's perception of older people is based almost exclusively on broad, erroneous generalizations and groundless stereotypes.[228]

To date, courts have only applied intermediate scrutiny to sex or gender based classifications, classifications based on illegitimacy, and regulations that

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220. *See generally* ANTI-AGEISM TASKFORCE AT THE INTERNATIONAL LONGEVITY CENTER, *Ageism in America* (2006), *available at* http://www.ilcusa.org/media/pdfs/Ageism in America - The ILC Report.pdf.

221. *Supra* notes 76-84.

222. *Murgia*, 427 U.S. at 318 (Marshall, J., dissenting).

223. Craig v. Boren, 429 U.S. 190, 197 (1976).

224. United States v. Virginia, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations . . .").

225. Margie M. Donlon, Ori Ashman & Becca R. Levy, *Re-Vision of Older Television Characters: A Stereotype-Awareness Intervention*, 61 J. OF SOC. ISSUES 307, 308 (2005).

226. ANTI-AGEISM TASKFORCE, *supra* note 220, at 13-14.

227. *Id*. *See also id*. at 41-47 (discussing the cultural ageism).

228. *See* Frolik & McCrystal Barnes, *supra* note 17.

have a substantial impact on free speech.[229] The Supreme Court also has cited two other considerations that may be relevant in determining whether statutory provisions pertaining to a particular group are subject to heightened scrutiny.[230] First, if the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control, the classification should be subject to heightened scrutiny.[231] As much as society urges us to wish otherwise, aging is clearly an immutable process. The second consideration is whether the group is "a minority or politically powerless."[232] While politicians usually consider older Americans to be a highly coveted bloc of constituents, their political power is not matched by their numbers. The U.S. Census Bureau projected that the number of Americans over the age of 65 would reach 40 million by 2010; that number is only 12.9% of the estimated 2010 population of 310 million.[233] If subject to these considerations that accompany heightened review, age discrimination in adoption would once again fail to find justification. Unfortunately, because states use age as a proxy for stereotypical qualities of older people, and because these distinctions are presumptively rational under the lower level of scrutiny, age-based stereotypes will continue to proliferate via state action. Courts need to recognize both the myriad of policy reasons and daily-lived realities that support elevating age to a quasi-suspect classification. Courts will then be able to address properly the invidious discrimination against older people in adoptions.

Some positive recent support for this argument can be found in Connecticut's 2008 holding that sexuality should be considered a quasi-suspect classification. In *Kerrigan v. Commissioner of Public Health*, the Supreme Court of Connecticut examined at length the arguments about sexuality's classification—including the *Lofton* decision.[234] In *Kerrigan*, same-sex couples who were denied marriage licenses brought an action against the state alleging that the denial was unconstitutional under Connecticut's State Constitution.[235] Importantly, the *Kerrigan* court noted the "long history of purposeful and

229. United States. v. Miller, 604 F. Supp. 2d 1162, 1169 (W.D. Tenn. 2009) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

230. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 429 (Conn. 2008).

231. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986).

232. Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (quoting *Lyng*, 477 U.S. at 638).

233. U.S. Census Bureau, U.S. Population Projections, Tables 2 & 3 (2008), http://www.census.gov/population/www/projections/summarytables.html (last visited April 15, 2011).

234. *Kerrigan*, 957 A.2d at 463 (holding contrary to the Eleventh Circuit's decision in *Lofton*, but noting the U.S. Supreme Court has yet to address the issue of quasi-suspect or suspect classification for sexuality).

235. Connecticut's Constitution reads slightly differently than the Fourteenth Amendment to the U.S. Constitution: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." CONN. CONST. art. I, § 20.

invidious discrimination that continues to manifest itself in society" against gay persons.[236] In one excerpt, the court stated:

> The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens. Because sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so.[237]

This passage could easily apply to older adoptive parents with minimal editing: the characteristic that defines the group—their "advanced" age—bears no logical relationship to their ability to perform in society, *especially* in familial relationships. And while the court further conceded that, as a group, gays have made great strides toward equal treatment in recent years, the court felt that as a minority group, they "continue[] to suffer the enduring effects of centuries of legally sanctioned discrimination."[238] Older Americans continue to battle against discrimination in myriad contexts, and the existence of the Age Discrimination Act of 1975 and the Age Discrimination in Employment Act of 1967 stand as glaring reminders of that fact. Although the *Kerrigan* decision's precedential value is somewhat limited by its use of the Connecticut state constitution (as opposed to the U. S. Constitution), the analysis is still valuable. The reexamination of the analytical underpinnings that ground suspect classification serves to demonstrate that change is possible—even under the existing legal constraints.

C. Adoption and the State Action Doctrine

Even if a constitutionally based solution to age discrimination in adoption exists, the protections against discrimination found in the Federal Constitution are limited to government actions rather than those of private individuals.[239] While many children who have spent time in the some aspect of state-run child welfare systems are adopted every year, adoptions involving wards of the state do not comprise the majority of placements. Though studies and numbers vary, approximately 50,000 public agency adoptions are completed annually,[240] while approximately 127,000 children total are adopted annually.[241] When public agencies are involved, state actors and tax dollars bring these adoptions under the aegis of governmental bureaucracy. Adoption agreements entered into

236. *Kerrigan*, 957 A.2d at 432.

237. *Id*.

238. *Id*.

239. Virginia v. Rives, 100 U.S. 313, 318 (1879).

240. Centers for Disease Control and Prevention, *supra* note 53, at 17.

241. *How Many Children Were Adopted in 2000 and 2001? Highlights*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU, at 1, *available at* http://www.childwelfare.gov/pubs/s_adoptedhighlights.pdf.

privately between birth parents and adoptive parents may, at least initially, lack any governmental imprimatur. But no matter how the adoption is facilitated, the prospective parents must file an adoption petition for court approval, which ultimately inserts the state into the decision-making process.

Additionally, though state laws vary, most courts require some sort of agency consent or investigation before granting an adoption.[242] Some courts will proceed with an adoption in the face of adverse agency findings, and some courts will proceed in the absence of agency approval altogether.[243] When an agency does withhold consent, courts generally look to the reasonableness of the agency's refusal as an important factor in deciding whether to act in compliance with that agency's determination.[244] The relevant state action in an adoption proceeding is both the "grant of a statutory privilege" and the judicial enforcement of the agency recommendation.[245] The interest asserted is "the affirmative right to receive official and public recognition."[246] When states act *in loco parentis* for children in need of protection, constitutional remedies for discrimination are applicable via incorporation.[247] It is beyond question that when the state and its court act as *parens patriae* in these adoption proceedings, any constitutional limitations on discrimination are applicable. It is less clear how independent and agency adoptions fit into the state action doctrine.

When private entities and individuals facilitate adoptions, the court's involvement is typically limited to approval of the placement. In independent adoptions and those involving private agencies, the opportunity for discrimination against prospective adoptive parents is far more common; this is because agency policies and the wishes of birth parents dictate the choice of applicants.[248] This further exacerbates the dichotomy between public adoptions and private adoptions. Infants are often considered the most "desirable" of adoptable children; national surveys show that of women actively seeking to adopt a child, 49.2% would prefer a child under the age of two, 56.3% would prefer a single child without siblings, and 55.1% would prefer a child with no disabilities.[249] However, infants are typically voluntarily relinquished and adopted through private agencies or independently with the help of private

242. *See, e.g.*, 2010-12A HAW. REV. STAT. ANN. 520 (LexisNexis); IND. CODE ANN. § 31-19-8-5 (LexisNexis 2007); MD. CODE ANN., FAM. LAW § 5-3B-16 (LexisNexis 2006); MINN. STAT. ANN. § 259.53 (West 2007); N.H REV. STAT. ANN. § 170-B:18 (LexisNexis 2010).

243. *See In re* Harshey, 318 N.E.2d 544, 548 (Ohio Ct. App. 1974) (refusing consent to an adoption by a "certified organization . . . does not impair the jurisdiction of the probate court to fully hear and determine an adoption proceeding."). *But see In re* Adoption of Shawn, 222 N.W.2d 139, 142 Wis. 1974).

244. *See, e.g.*, Bland v. Dep't of Children & Family Services, 490 N.E.2d 1327, 1332 (Ill. App. Ct. 1986); Rodriguez v. Miles, 655 S.W.2d 245 (Tex. App. 1983).

245. Lofton v. Sec'y of Dep't of Children and Family Services, 358 F.3d 804, 817 (11th Cir. 2004) (applying Florida law).

246. *Id*.

247. U.S. CONST. amend. XIV, § 1.

248. *See* Krawiec, *supra* note 59, at 231.

249. Centers for Disease Control and Prevention, *supra* note 53.

attorneys.[250] And these agencies and private individuals, relying on ageist stereotypes, rarely consider older applicants to be the most desirable candidates for parenthood.[251] As one researcher commented, "Placement agencies have been charged with often subordinating the interests of parents and children alike in maintaining their own authority."[252] Therefore, given the proliferation of discriminatory agency standards, the most coveted of adoptable children are also those who are least likely to be matched with an older applicant. This raises the question of whether a court's approval of an age discriminatory private placement rises to the level of state action.

Even mere court approval of an adoption petition becomes state action under the "public function" and "entanglement" exceptions to state action. The public function exception imputes state action onto a private actor in instances of "exercise by a private entity of powers traditionally exclusively reserved to the State."[253] Since the state has long served as the arbiter in adoption proceedings, and because it is the court that holds exclusive powers to grant or deny an adoption,[254] states should not be able to avoid the protections of the Constitution by delegating the task to private agencies. "[T]he judicial insistence on reserving to the courts the final word in adoption proceedings does represent a major victory for prospective parents whose interests clash with agency arbitrariness and subjectivity."[255]

An even more direct theory is the entanglement exception, in which the Constitution applies to private actions where the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.[256] The most famous illustration of judicial entanglement is arguably *Shelley v. Kraemer*, in which the Supreme Court held that courts cannot enforce privately-established racially restrictive covenants.[257] In *Kraemer*, it was argued that private contractual agreements need not comply with the Constitution and that court enforcement was simply implementing private choices.[258] This is analogous to private adoption placements; courts have construed adoption agreements as contracts with terms "strictly prescribed by state law."[259] The *Kraemer* Court held that court enforcement of the restrictive covenants was the equivalent of government facilitation of discrimination.[260]

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250. GROZA & ROSENBERG, *supra* note 11, at 4.

251. *See* Krawiec, *supra* note 59, at 230-31.

252. AIGNER, *supra* note 5, at 184.

253. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

254. *See In re* Adoption of Reinius, 55 Wash. 2d 117, 137, 346 P.2d 672, (Wash. 1959). *See also* Thomas Muskus, Annotations, *Adoption of Persons*, 2 C.J.S. § 5 (2003).

255. AIGNER, *supra* note 5, at 181.

256. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 552 (3d ed. 2009). *See also* Osler *ex rel*. Osler v. Huron Valley Ambulance Inc., 671 F. Supp. 2d 938, 943-45 (E.D.Mich.2009).

257. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

258. *Id*. at 13-14.

259. Does 1, 2, 3, 4, 5, 6, and 7 v. State, 993 P.2d 822, 829 (Or. Ct. App. 1999).

260. *Kraemer*, 334 U.S. at 20.

Shelley v. Kraemer remains controversial because of its expansiveness, and it has only rarely been applied as a basis for finding state action.[261] Later decisions articulated a two-part test to limit the state action exception. In *Lugar v. Edmonson Oil Co*., the Court held that first, "the deprivation must be caused by the exercise of some right or privilege created by the state, or by a rule of conduct imposed by the state."[262] Although courts have not considered adoption to be a right created by the state, they have deemed it a state-created privilege;[263] therefore, adoption fulfills the first prong of *Lugar*'s state action test. Next, the Court in *Lugar* dictated that the party charged with the deprivation must be a person who may be called a state actor "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[264] Agencies cannot accomplish adoption without the aid of the court. And ultimately, the approval of a discriminatory placement can only be charged to the judge who makes it. Therefore, adoption is a state action that brings it under the protections of the Constitution. Because of this, potential constitutional remedies to age discrimination in adoption proceedings should apply to both public and private agencies and individuals alike.

IV. SEARCHING FOR A REMEDY: STATUTORY CHANGES

State laws applicable to adoption proceedings produce little to no uniformity on a national level. While a Uniform Adoption Act does exist, the 1971 version has only been adopted by eight states.[265] Further, many states are completely silent on age discrimination against prospective parents.[266] Those state statutes that do address the topic usually do so broadly; Alabama's statute gives one such example: "No rule or regulation of the Department of Human Resources or any agency shall prevent an adoption by a single person solely because such person is single or shall prevent an adoption *solely because such person is of a certain age*."[267] While the language of the Alabama statute is helpful in thwarting baseless age discrimination, "age" is all too often used as proxy for other perceived limitations that are based upon stereotypes and generalizations. While a 45 year old applicant may not be denied simply

261. Additionally, it has traditionally been applied in cases of racial discrimination. *See*, *e.g*., Evans v. Newton, 382 U.S. 296, 320 n. 4 (1966) (Harlan, J. dissenting); Evans v. Abney, 396 U.S. 435, 445 (1970). *See also* Bell v. Maryland, 378 U.S. 226, 330 (1964) (Justice Black dissenting that the reason the restrictive covenants in *Shelley v. Kraemer* were deemed state action was not merely because the state court had acted, but because it had acted to deny petitioners, on the basis of their race, the enjoyment of property rights).

262. Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982).

263. Lofton v. Sec'y of Dep't of Children and Family Services, 358 F.3d 804, 809 (11th Cir. 2004) (applying Florida law).

264. *Lugar*, 457 U.S. at 937.

265. Tenenbaum, *supra* note 18, at 333.

266. *See*, *e.g*., 750 ILL. COMP. STAT. ANN. 50/4.1 (West 2009); IOWA CODE ANN. § 600.4 (West 2001); MINN. STAT. ANN. § 259.22 (West 2007); ARK. CODE ANN. § 9-9-204 (2009).

267. ALA. CODE § 26-10A-5 (LexisNexis 2010) (emphasis added).

because she is 45, that does not mean that a court or agency may not deny her because of attendant characteristics that are often assumed to accompany "advanced" age (*e.g.*, decreased quality of life, decreased health and wellbeing, decreased mobility, decreased lifespan).[268] Additionally, many adoption codes are silent on their purposes and policy or present very limited purposes and policy.[269] When a code is silent on age discrimination or underlying policy, or both, agencies and courts are given far too much freedom to unjustifiably discriminate against older adoptive parents.

The first step toward creating a workable statutory scheme is a well-articulated purpose that identifies as concretely as possible what the best interests of a child are. The Connecticut adoption code provides a practical example: "The best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family."[270] This statement, though broad, reinforces the notion that a child's interests are served when he or she is part of a loving and supportive family, regardless of the exact characteristics of each family member. Despite its generality, a statement such as this helps support the argument that age discrimination is not rationally related to the amount of love or support a child will receive. Coupled with language similar to that in the Alabama statute, the laws will require a much more rigorous analysis of any age-based adoption decisions.

Another step toward creating an effective adoption statute is the inclusion of a framework that either prohibits private agencies from instituting arbitrary age bans or that strongly encourages them not to include such bans. This type of incentivizing has been achieved in the context of race through the Interethnic Adoption Provisions of the Small Business Job Protection Act.[271] When this bill amended the Multiethnic Placement Act, it subjected states to penalties for noncompliance, including reductions in federal funding of up to 5%.[272] However, the penalty for private agencies is dire: any entity in a state that receives federal funds and violates the Act must remit back to the government *all* funds that it received during that year.[273] A similar type of penalty should be enacted in the context of age discrimination, and states and agencies that allow discrimination to continue should expect there to be consequences. While some portion of private adoption agencies may be able to continue to render services despite any financial penalties, the incentive to abandon age restrictions would be substantial.

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268. *See In re* Adoption of Brown, 85 So.2d 617 (Fla. 1956).

269. *See, e.g.*, MINN. STAT. ANN. § 259.20 (West 2007); 70 ILL. COMP. STAT. ANN. 50/0.01 (West 2009).

270. CONN. GEN. STAT. ANN. § 45a-727a(3) (West 2004).

271. Small Business Job Protection Act, Pub. L. No. 104-188, § 1808(a), 110 Stat. 1755, 1903 (1996).

272. *Id*. at § 1808(b).

273. *Id*. at § 1808(b)(2).

CONCLUSION

Age discrimination in adoption exists, and courts condone it by approving placements that are dictated by private and out-dated discriminatory ideologies.[274] While those who deny adoptions on the basis of age may believe they are serving the best interests of the child, both prospective adoptive parents and children in need of a home are harmed by the denial. Treating older adults as a homogenous group of incapable caregivers relies on incorrect stereotypes that marginalize the abilities and the potential of a vast group of individuals. Additionally, the reality of the present day is that both the quality and length of life are increasing; instead of relegating older adults to the use of technologies like ART in order to become parents, adoption agencies, courts, and society need to embrace older adults as adoptive parents.

In order to achieve this result on a national level, prospective adoptive parents must either push for a change in federal mandates to include age as a prohibited basis on which to deny an adoption, or they must look to the Constitution for an as-yet untested solution. For valid reasons, adoption may never be considered a fundamental right; however, these reasons are inapplicable to older adults, who should be granted status as a quasi-suspect class. Unlike the court in *Murgia*, I argue that older adults have "experienced a history of purposeful unequal treatment" in the adoption industry, and this treatment has led to "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[275] Once older adoptive parents are characterized as a quasi-suspect class, discriminatory adoption actions can be scrutinized under a heightened level of scrutiny. Discriminatory laws and practices will not be able to survive intermediate judicial scrutiny, because age, standing alone, is not substantially related to neither an adoptive child's best interests nor the state's interest in facilitating adoption. Additionally, state and federal legislators must consider reworking the existing statutory schemes and implementing financial penalties for continued discrimination. Only then will adoption agencies, both public and private, be forced to acknowledge older adults as capable and competent prospective parents for children in need.

274. *See* AIGNER, *supra* note 5, at 176.

275. Mass. Bd. Of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam).