All Happy Families
The Looming Battle over Gay Parenting

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Wayne LaRue Smith had never been so happy to be called bitch.

About two months earlier, Smith and his partner, Dan Skahen, had taken in a 3-year-old foster child we’ll call Charlie. The boy had emerged from the caseworker’s car reeking of stale cigarette smoke, hair matted and tangled, barely able to walk, and, except for the occasional raspy cry, stone silent. “We think,” whispered the caseworker, leaning in, “he’s retarded.”

Week after week, Smith recalls, Charlie refused to say anything. Then one day, as Smith was trying to prevent the boy from climbing around on the furniture, Charlie uttered the first word Smith had heard escape his lips: “Bitch!” Nonplussed at the vocabulary (“He didn’t learn that language from us!” Smith says), Smith was nevertheless delighted that the child had said something. His silence broken, Charlie pressed his tiny fists to his hips and added “Asshole!” before scampering away. Within weeks he was speaking in complete—and more polite—sentences.

Charlie wasn’t retarded. He had simply withdrawn from a world that until then hadn’t given him much reason to be engaged with it. That sort of history, sadly, is shared by many of the children who find their way into the nation’s foster care systems, which included half a million kids when the Department of Health and Human Services last counted, with some 126,000 available for adoption. At the end of fiscal year 2003, 30,000 of those children were in Florida, more than in any other state except New York and California, with more than 5,000 available for adoption.

Charlie locked out with Skahen and Smith. As of last April, Florida could not even account for the whereabouts of more than 500 children nominally in its custody. Every few years, the state’s papers dutifully report an especially tragic case of a child rescued from a bad home only to be deposited by the state into some fresh hell. One such child is Yusimil Herrera, who after being moved dozens of times from one foster home to another, homes in which she was beaten and sexually abused, won a famous lawsuit against the state in 1999. (The verdict was later overturned, and Herrera settled her claim.) She now stands accused of murdering her own young daughter.

Charlie was one of 23 foster children Skahen and Smith have taken in since 1999. The two boys they’re now looking after have been with them for years, and Smith and Skahen would like to adopt them, to spare them the prospect of who-knows-how-many desultory transitions from foster family to foster family.

But in Florida, thanks to orange juice pitchwoman Anita Bryant’s 1977 “Save the Children” campaign, the Department of Children and Families’ adoption forms carry a pair of “yes” and “no” check boxes—page 5, part II, section G—below the statements “I am a homosexual” and “I am a bisexual.” Check “yes” to either and you’re ineligible to adopt. The law, as its sponsor explained shortly after it passed, was meant to alert gays that “we wish you’d go back into the closet.”

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Right now only Florida explicitly prohibits any gay person from adopting, but just six states and the District of Columbia explicitly allow adoptions by homosexuals. In most cases there’s no formal policy, and several states either are known for family judges disinclined to grant homosexuals custody or have indirect statutory barriers to gay parenting. Nebraska banned gay foster parenting in 1995. Mississippi and Utah allow only married couples to adopt, a restriction geared in both cases to exclude gay couples. Just under half of U.S. states permit “second-parent adoption,” which grants parental rights to both
members of an unmarried couple, in at least some jurisdictions. And more restrictions may be on the way.

From a civil libertarian perspective, it’s clear enough why the unequal treatment of gay parents is objectionable: The human desire for family isn’t exclusive to heterosexuals, and attempts to prevent gays from raising families both stigmatize them and threaten to deprive them of an important component of a full life. But these barriers to adoption should also offend anyone concerned about family values—about ensuring that all children, especially those who have suffered in the past, find loving homes, and that enrolling those kids in school or getting them medical care is a simple, routine procedure, not a legalistic obstacle course. Yet “family values” remains the call to arms of many who support restricted parenting.

**Better an Orphanage?**

In 2004 the U.S. Supreme Court refused to hear an appeal of a lower court decision upholding Florida’s ban on gay adoption. The challenge was brought by the American Civil Liberties Union on behalf of Smith, Skahan, and other gay parents. Among the plaintiffs were Steve Lofton and Roger Croteau, who care for five children born with HIV. Three of the kids have been with the couple since infancy.

“Good,” reacted *World* Editor Marvin Olasky on the Christian news magazine’s weblog. “Maybe more states will now pass legislation protecting kids from gay adoption.” Mathew D. Staver, head of Liberty Counsel, which filed an amicus brief supporting Florida’s policy, agreed. “Children in Florida will be benefited,” he opined to the Christian news service AgapePress, “but not only that—I think other states will follow Florida’s lead to enact similar laws.”

Some lawmakers and judges in other states do indeed share a horror of gay parenthood. In 2003, as he introduced a bill to ban gay foster parenting, Texas legislator Robert Talton (R-Pasadena) told the state’s House of Representatives: “If it was me I would rather [leave] kids in orphanages as such—this is where they are now if they’re not fostered out. At least they have a chance of learning the proper values.” (Texas doesn’t actually have orphanages, but you get the point.) Talton pushed a similar bill through his state’s House in April, though Talton’s language was later stripped from the Senate version of the law. Former Alabama Supreme Court Judge Roy Moore used uncommonly vehement language, but perhaps not uncommon logic, when he wrote in 2000 that a lesbian mother should be denied custody of her three children because homosexuality was “an evil disfavored under the law,” and that the state should “use its power to prevent the subversion of children toward this lifestyle, not to encourage a criminal lifestyle.”

State legislatures are now pushing to erect a variety of legal barriers to gay couples seeking to raise kids. Carrie Evans, state legislative lawyer for the Human Rights Campaign, a gay advocacy group, has tracked state legislation on gay parenting since 2000. “This year has been the worst,” says Evans. “Usually we have a few, but I’ve never seen this many in one year.” Just four months into 2005, lawmakers in seven states—Alabama, Arkansas, Indiana, Oregon, Tennessee, Texas, and Virginia—had introduced bills that would restrict the parenting rights of gay couples and individuals. This new assault seems to be the result of several complementary factors:

- **The Gay Baby Boom**: Extrapolating from 2000 census data, Urban Institute demographer Gary Gates conservatively estimates there are at least a quarter million children living in households headed by same-sex couples; 4.2 percent are either adopted or foster children, almost double the figure for heterosexual couples. (Single gay parents, of course, are not captured by those numbers.) While the increase in gay parenting can’t be precisely measured, Gates estimates that one in 20 male same-sex couples and one in five female couples were raising children in 1990. By 2000 those figures had risen to one in five for male couples and one in three for female couples. A 2003 survey by the Evan B. Donaldson Adoption Institute found that 60 percent of adoption agencies place children in gay households, and a 2001 Kaiser Family Foundation survey found that, while about 8 percent of gay respondents were currently parents or guardians of children under 18, almost half of those who weren’t hoped to one day adopt children of their own. As the ranks of gay parents swell, they become more visible—and more visible targets.

- **The Tipping Point**: A 2004 Harris poll found that a plurality of Americans still disapproves of adoption by same-sex couples—43 percent and 45 percent for female and male couples, respectively. But that represents a dramatic decrease in opposition since 1996, when majorities of more than 60 percent disapproved in both cases. Conservatives may worry, with good reason, that if laws restricting gay parenting aren’t locked in now, perhaps drawing strength from the momentum behind anti-gay marriage legislation, their time will soon have passed.

- **The Marriage Factor**: “Among both the youngest and oldest cohorts,” a 2003 study by the Pew Forum on Religion and Public Life found, “those who know someone who is gay are about twice as likely to favor gay marriage as those who do not.” The expansion of gay parenting means people who might not otherwise encounter gay couples will be more likely to see them at PTA meetings and Little League games. And the Harris poll found an overwhelming majority agrees that children being raised by gay couples should “have the same rights as all other children.” For practical purposes, that means ensuring that their parents have rights too. If, other things being equal, it’s better for children to be raised by married couples, then as the number of kids raised by gays increases, the conservative case for expanding marriage rights becomes more potent. All of which means that as more same-sex couples raise children, opposition to gay marriage is likely to erode—a matter of concern to the social conservatives on whom Republican politicians increasingly rely for support.
The Lawrence Effect: Until recently, sodomy laws in 13 states confirmed Judge Moore’s assessment of homosexuality as “an evil disfavored under the law.” But in the 2003 case Lawrence v. Texas, the Supreme Court held that sodomy laws were unconstitutional, yielding, in the words of the Human Rights Campaign’s Evans, “rapid changes in custody and visitation case law.” The Lawrence decision, she explains, “really helped us because for a long time, especially in adoption cases, judges restricted gay parents’ rights on the grounds that sodomy was a felony.” But now the baton has been passed to lawmakers, who know that courts are more deferential to legislators on questions of family policy than on issues of sexual privacy.

“Kids Need a Mom and Dad”: Even Americans otherwise favorably disposed to gay rights may have concerns about how growing up in a gay household affects children. Traditionalists have used their best to heighten those concerns, arguing that discriminatory laws serve the best interests of kids.

The Phantom Menace

The mantra that “children need a mother and a father” has acquired a patina of conventional wisdom through frequent repetition. Yet there is little evidence that children raised by gay couples fare worse than other children.

Gay rights opponents such as Family Research Institute chief Paul Cameron and the Family Research Council’s Timothy Dailey are fond of arguing that gay men are disproportionately likely to molest children—a potent charge rejected by the serious social scientists who have directly investigated it. Large-scale studies of molestation victims have repeatedly found that abusers overwhelmingly were either heterosexual in adult relationships or lacked any sexual response to adults.

Noting that about a third of molestation cases involve male adults targeting male children, Dailey and Cameron insist those adults must, by definition, be homosexual. Since homosexual men make up a far smaller proportion of the general population, Dailey reasons, gay men must be disproportionately likely to abuse children.

The problem with this view is that psychologists generally regard pedophilia an orientation of its own. Men who molest boys are not necessarily—and indeed, are almost never—“gay” in the colloquial sense. Even if one accepts a definition that calls such men “homosexual,” the fact remains that there is little overlap between that group and men who pursue romantic relationships with other adult men, the relevant comparison group for gay adoption.

Most child welfare professionals don’t see things Dailey and Cameron’s way. After reviewing the available data in 2002, the American Academy of Pediatrics endorsed second-parent adoption rights for gay couples. A resolution passed by the American Psychological Association in 2004 declared that there was “no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.” It also noted that “the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.”

The Child Welfare League of America, an organization founded in 1920 that now comprises more than 1,100 public and private agencies providing child services, filed an amicus brief in 2004 supporting the ACLU’s challenge to Florida’s adoption ban, noting the consensus that “children are not adversely affected by their parents’ lesbian or gay orientation” and that “all of the mainstream professional organizations in the fields of child health and welfare agree that there is no basis to exclude gay men and lesbians from adopting children.” That same year, an Arkansas circuit court overturned a state Child Welfare Agency Review Board regulation prohibiting gay foster parenting after extensive fact finding, including testimony from a variety of psychologists, social workers, and sociologists, concluding that the ban contradicted the agency’s mandate to serve the best interests of children.

The statistical evidence meshes with the experience of Adam Pertman, executive director of the Donaldson Institute, an adoption policy-research organization, and author of Adoption Nation. “The evidence on the ground, based on the markers that we have, is that these are good families,” he says. “The social workers I talk to are asking how they can recruit more [gay parents], because they’re working. That’s the best validation I can think of, unless you think all these child welfare professionals are out to harm kids.”

Opponents of gay parenting, for the most part, have been forced to fall back on the assertion that the jury’s still out. Noting—correctly—that none of the research on children of gay couples made use of the large random samples that generate the most robust results, they claim studies to date provide no basis for supposing that gay parents won’t be inferior. But as New York University sociologist Judith Stacey argues, “they have to stretch pretty far to find that. The studies have been very consistent and very positive.” Stacey concedes that most of them are “small scale” but adds that “there are some 50 studies now, and we don’t see them going the other way. I have yet to see one legitimate refereed publication or scholar come out with a generally negative finding.”

As in so many other disputes, child welfare may be serving as a proxy for a values debate. Marjorie Heins, director of the Free Expression Policy Project at the National Coalition Against Censorship and author of Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth, puts it this way: “If you’re convinced that certain attitudes and values are wrong, then you consider exposing a child to those values a harm in itself.”

The Second-Parent Trap

Even on the assumption that heterosexual households are somehow better for children, some restrictions on gay parenting are hard to fathom. For children in Florida’s foster care system, the alternative to gay parents may be no parents at all. And many policies don’t prevent gay couples from raising children; they just make life more difficult for gay parents and their children.
ANNUAL EDITIONS

Barriers to second-parent adoption in some states create a variety of difficulties for gay couples raising children, often allowing only one to be recognized as a legal parent. Allison Bauer is an attorney who sits on the board of the Family Pride Coalition, an advocacy group for gay families. She lived in Virginia before moving to Massachusetts, where she could adopt her partner Marie Longo’s biological children, twin girls. During the pregnancy, says Bauer, “we told our friends that if Marie went into labor, they should drive her into D.C. and then call an ambulance—we knew D.C. would issue an amended birth certificate with both our names later, and Virginia wouldn’t.” Until they moved, she adds, “I spent 14 months holding my breath. One night when the kids were six months old, Rebecca woke up with a terrible barking cough. We knew it was croup, and I had to wake Marie up because I was afraid the hospital would question my authority to authorize care, even though I had a document that gave me power of attorney.”

Such fears are why Anne Magro is fighting to overturn an Oklahoma law stipulating that “this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.” Magro, an accounting professor at the University of Oklahoma, had moved from New Jersey, where the state had granted her partner of 13 years, Heather Finsuen, second-parent rights over Magro’s biological daughters.

The child welfare argument against gay parenting may be a proxy for a values debate. “If you’re convinced that certain attitudes and values are wrong,” says Marjorie Heins, “then you consider exposing a child to those values a harm in itself.”

Oklahoma state Rep. Thad Balkman (R-Norman), who supported the adoption law, defends it as a “reflection of our public policy that we support one-man-one-woman adoptions. To grant privileges like birth certificates to people who aren’t in that relationship is doublespeak; we have to be consistent.” Yet Balkman also claims that all the rights “so-called parents” have when their adoptions are recognized can be obtained through other means, such as by obtaining durable power of attorney for the second parent.

Brian Chace, an attorney with the gay rights litigation firm Lambda Legal who is representing Magro and Finsuen, disagrees. “A final adoption decree entitles a child to Social Security benefits and medical benefits that can’t be conferred by a power of attorney,” he says. “Furthermore, the most important right guaranteed by a final adoption is the right to continue to care for a child if something were to happen to the other parent. No power of attorney or will confers the degree of security that accompanies an adoption.” And such workarounds, Magro adds, are often complex, time-consuming, and expensive.

New York University law professor Linda J. Silberman, an expert in interjurisdictional legal conflicts, believes policies like Oklahoma’s may violate the Constitution’s Full Faith and Credit Clause, which says “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” “If you’re talking about one state applying another state’s law,” Silberman explains, “there’s a public policy exception. If you have a court judgment from another state, though, you can’t just say ‘oh, we have a different public policy’ and ignore it on that basis.”

But the 1996 Defense of Marriage Act stipulates that “the United States Constitution shall not be construed to require any state or territory to give effect to any public act, record, or judicial proceeding respecting a relationship between persons of the same sex that is treated as a marriage under the laws of another state or territory.” That attempt to reach judicial proceedings, normally not subject to “public policy exceptions,” adds a new wrinkle, says Silberman. A state hostile to gay rights might, for instance, refuse to recognize a custody ruling from another state that allowed civil unions.

That scenario isn’t just a hypothetical: It has already happened. In 2003 Lisa and Janet Miller-Jenkins, a lesbian couple who had been together since 1998 and were joined in a Vermont civil union in 2000, split up. Lisa moved to Virginia with her biological daughter and filed for dissolution of the union—and child support—in a Vermont court. Vermont awarded Janet visitation rights, as it might for a divorcing married couple. But when Virginia passed its Marriage Affirmation Act, which declared same-sex “civil unions . . . and any rights created thereby . . . void and unenforceable,” Lisa appealed to Virginia to, in effect, declare that Janet was just a nice lady who once lived with Mommy. Frederick County Circuit Court Judge John Prosser did just that, and the case is now in the hands of the Virginia Court of Appeals.

Family Values

On a drizzly weekend at the end of April, some 250 gay parents, prospective parents, and their kids gathered at Sligo Middle School in Silver Spring, Maryland, for a day-long Family Pride Coalition conference on gay parenting. Standing under a scrolling rainbow LED marquee announcing “Congratulations, Honor Roll Students,” Cayo Gamby, a writing professor at George Washington University, surveyed the day’s dense program and quipped: “It would be wonderful if straight people came to parenting with this kind of scrutiny. . . . For us it’s a choice, not an accident or a destiny.”

At a breakout workshop on adoption, a few dozen participants studied the details of that choice. Panelists related their experiences adopting through private agencies, through foster care, and from the shrinking number of foreign countries open to gay parents. They recounted spending tens of thousands of dollars, waiting anxious months, sitting through lengthy and intrusive interviews and “home studies,” and filing out mountains of paperwork in a process one likened to “buying a house and applying to grad school simultaneously.”
Conservatives should ask a child in foster care which makes him feel more threatened: the thought of being raised by homosexuals, or the prospect of an indefinite number of years spent passing through an indefinite number of homes.

The hearts of conservatives would, one might think, be warmed by such a group. They feel the universal human need for family as deeply and acutely as anyone and are unusually determined to make committed parenting a central part of their lives.

Those behind the burgeoning assault on gay parenting would have us believe these people are a menace to the children they would take in. And had any of them visited Sligo Middle School that afternoon, they surely would have heard their share of complaints from the children and teenagers in attendance: complaints about homophobic teachers, about classmates whose peers and parents have taught them to use gay as an epithet. Concerned conservatives might ask those kids: Are those complaints a sign there’s something wrong with your gay families, or with the broader culture?

Better still, they could visit Florida and ask a child in foster care which makes him feel more threatened: the thought of being raised by homosexuals, or the prospect of an indefinite number of years spent passing through an indefinite number of homes. They could ask whether “family values” are best served by attempting to marginalize gay couples who raise families, by “protecting” abused or sick children from people who want to give them a home, by forcing parents to worry whether they’ll have the legal authority to bring their kids to the hospital in an emergency. They could ask Charlie.

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