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The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men

Carlos A. Ball*

I. INTRODUCTION

Opponents of gay rights frequently argue that same-sex sexual conduct is immoral and that, as a result, the government should discourage such conduct as much as prudentially possible.¹ I have written elsewhere that gay rights supporters should not permit their opponents to monopolize questions of morality as they relate to public policy disputes.² This is particularly true now that the gay rights movement is seeking not only to protect individuals from outright coercion and harassment by the state, but is also requesting that the state

* Professor of Law, Penn State University. An earlier version of this Essay was presented at this Symposium, as well as at the annual meeting of the Western Political Science Association held in Albuquerque, New Mexico, in March 2006. I would like to thank the organizers of both events, and in particular Gordon Babst for inviting me to participate in the latter. I would also like to thank Richard Storrow for reading an earlier draft of this Essay and for providing me with insightful comments.

1. John Finnis, for example, has argued that while same-sex sexual conduct should not, for prudential reasons, be criminalized, the state should take other steps to discourage such conduct because it is “intrinsically shameful, immoral, and indeed depraved or depraving.” John M. Finnis, *Law, Morality and “Sexual Orientation”*, 69 NOTRE DAME L. REV. 1049, 1055 (1994). See also Richard F. Duncan & Gary L. Young, *Homosexual Rights and Citizen Initiatives: Is Constitutionalism Unconstitutional?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 93, 104–05 (1995) (arguing that “sodomy laws are no more suspicious than legislation outlawing burglary or drug use” because such laws “are the product of a sincere and reasonable societal objection to conduct deemed immoral”) (footnote omitted); Robert P. George & Gerard Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 301 (1995) (arguing “that sodomy, including homosexual sodomy, is intrinsically nonmarital and immoral”) (footnote omitted).

2. See generally CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* (2003) [hereinafter, BALL, *THE MORALITY OF GAY RIGHTS*] (explaining why gay rights supporters should raise moral arguments to advance their positions); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1996) [hereinafter, Ball, *Moral Foundations for a Discourse on Same-Sex Marriage*] (arguing that moral arguments on behalf of same-sex marriage are both appropriate and necessary). See also Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 141 (2005) (noting that “[a]s a theoretical matter, our lack of engagement with moral questions represents a serious deficiency in our articulation of the justification for LGBT equality”).

affirmatively recognize and support their intimate and familial relationships.³ It is important, given these more expansive goals of the movement, that gay rights supporters make an affirmative moral case as to why the relationships of lesbians and gay men merit social recognition and support. It is no longer sufficient for gay rights proponents to ask that the state simply remain neutral on the value and goodness of same-sex sexual intimacy and relationships.⁴

The last time that liberals and progressives explicitly incorporated notions of morality into their political activism in a consistent and effective manner was during the civil rights era of the 1950s and 1960s.⁵ Since then, commentators and activists on the left have, generally speaking, preferred to ground equality and fairness arguments in value-neutral language that is independent from considerations of

3. See Carlos A. Ball, *This Is Not Your Father's Autonomy: Lesbian and Gay Rights from a Feminist and Relational Perspective*, 28 HARV. J. L. & GENDER 345, 360–64 (2005) (explaining how the goals of the gay rights movement have changed through the years).

4. Neutrality-based arguments seek to address questions of justice and rights without taking positions on questions related to morality and the good. Neutrality-based arguments seem particularly inapt in matters related to children and their best interests, which is the focus of this Essay. It is not possible to discuss what is in the best interests of children without engaging in a discussion about what is good for children. It seems impossible, therefore, for the state to remain neutral when developing and implementing policies aimed at promoting the welfare of children.

The neutrality argument is more plausible when it comes to the recognition of adult relationships independently of the existence of children. It can be contended, for example, that notions of morality are irrelevant to the issue of same-sex marriage because the argument for recognition of such marriages is, in essence, one of basic equality: If opposite-sex couples are provided with benefits distributed through the institution of marriage, then so should lesbians and gay men.

The problem with relying only on state neutrality in arguing on behalf of the recognition of same-sex marriage is that there is an antecedent question that must be asked in equality cases, namely, is the group making the equality claim similarly situated to the group that currently enjoys the benefits in question? It seems difficult to address this antecedent question in the context of marriage without a discussion of whether same-sex relationships are as good and valuable as opposite-sex relationships, by which I mean, do they have the potential for the same type of love, care, and reciprocity? For an elaboration of these issues, see BALL, *THE MORALITY OF GAY RIGHTS*, *supra* note 2, at 1–40.

5. Professor Rebecca Zietlow has noted that:

It might seem strange to talk about moral values in conjunction with rights of belonging in today's political climate, with the Defense of Marriage Act and constitutional amendments prohibiting gay marriage at the top of the political agenda. Indeed, the instinctive response of most people today is that moral values are in opposition to rights of belonging, not in conjunction with them. However, notwithstanding the current political dynamics, the fact is that throughout our history, moral values have also been the impetus for expanding rights of belonging. For example, in 1964 the civil rights movement succeeded because it framed the issue in terms of moral values. Similarly, during the New Deal, labor leaders saw the right to join a union as a fundamental right with moral implications.

Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 1006 (2005) (footnote omitted).

morality and of the good.⁶ There are some indications, however, that this is beginning to change, as a growing number of liberals and progressives are grappling with how to incorporate their moral understandings, both secular and religious, into their political activism as they seek to foster a more egalitarian and fair society.⁷

In this Essay, I continue to explore the role of morality in questions of gay rights. However, instead of making an affirmative case for the *morality* of gay rights positions, as I have done elsewhere,⁸ this Essay explores the *immorality* of some anti-gay rights positions that have been codified into law. In particular, I examine from a morality perspective, adoption laws that make distinctions on the basis of sexual orientation. In doing so, I focus on two laws. Part II discusses Florida's categorical prohibition against adoption by lesbians and gay men.⁹ Part III explores an Oklahoma law that prevents state agencies and courts from recognizing adoption decrees issued to same-sex couples by courts from other jurisdictions.¹⁰

The Florida law has lately received considerable national attention, in part because of the (ultimately unsuccessful) constitutional challenge raised by *Lofton v. Department of Child and Family Services*.¹¹ The Oklahoma law has also been subject to a similar challenge.¹² The

6. See generally GEORGE LAKOFF, MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON'T (1996) (arguing that conservatives are more effective in translating their moral views into political action than are liberals). It has been suggested that when it comes to political organizing and activism, "the biggest barrier for liberals may be their regard for pluralism: for letting people say what they want, how they want to, and for trying to include everyone's priorities, rather than choosing two or three issues that could inspire a movement." Neela Banerjee, *Religious Left Struggles to Find Unifying Message*, N.Y. TIMES, May 19, 2006, at A17.

7. See, e.g., GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE—THE ESSENTIAL GUIDE FOR PROGRESSIVES INCLUDING POST ELECTION UPDATES (2004) (discussing how the left can rely on its values to help frame political debates); JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT (2005); Banerjee, *supra* note 6 (noting that "[i]nitiatives by liberals have been percolating locally and nationally from state interfaith alliances in Ohio . . . to national campaigns to reduce poverty by liberal evangelicals . . .").

8. See BALL, THE MORALITY OF GAY RIGHTS, *supra* note 2, at 75–138 (defending gay rights positions within a moral framework that focuses on the necessary background conditions for the meeting of basic human needs and the exercise of basic human capacities).

9. See *infra* Part II (discussing FLA. STAT. ANN. § 63.042(3) (West 2005)).

10. See *infra* Part III (discussing OKLA. STAT. ANN. tit. 10, § 7502–1.4(A) (West Supp. 2006)).

11. 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004), *cert denied*, 543 U.S. 1081 (2005).

12. A federal district court recently concluded that the Oklahoma law violates the Full Faith and Credit Clause, the Equal Protection Clause, and the Due Process Clause. See *Finstuen v. Edmondson*, No. Civ-04-1152-C 2006 WL 1445354 (W.D. Okla. May 19, 2006). The state has appealed and, as this Essay goes to print, the case is before the U.S. Court of Appeals for the

purpose of this Essay, however, is not to explore the constitutionality of the two laws in question; instead, the purpose is to examine whether the laws are moral.¹³ My argument is that the Florida and Oklahoma statutes are immoral because they harm children and because they treat children, in Kant's famous maxim, as means to an end rather than as ends in themselves.¹⁴

Now that social conservatives have succeeded in amending the constitutions of half of the states in order to ban same-sex marriage,¹⁵ they are turning their attention to the issue of adoption by lesbians and gay men.¹⁶ Some of these conservatives believe, or at least hope, that the issue of adoption by lesbians and gay men will resonate with as many Americans in the next few years as same-sex marriage has over the last few years.¹⁷ It is important that gay rights supporters, in countering these efforts by social conservatives, explicitly raise moral questions about current and proposed adoption laws that make distinctions on the basis of sexual orientation.

I should note, before proceeding, that I will concede in this Essay, *for purposes of argument only*, that it is better for children to be raised by married heterosexual couples than by lesbians and gay men. I do not

Tenth Circuit. Nicholas Riccardi, *Gay Couple Awaits Adoption Ruling from U.S. Court*, L.A. TIMES, Nov. 26, 2006, at A18.

13. It may very well be that a law which is immoral is also a law that lacks sufficient rationality to pass constitutional muster under either the Equal Protection Clause or the Due Process Clause. That is a question of constitutional law, however, which I do not address in this Essay.

14. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor trans., Cambridge Univ. Press, 1997) (1785).

15. Fifteen states amended their constitutions in 2004 and 2005, which brought the total number of states with constitutions banning same-sex marriage to nineteen. Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1513–15 (2006). In 2006, voters in seven additional states approved constitutional provisions banning same-sex marriage. Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16. Arizona voters became the first in the nation to reject such a constitutional provision. *Id.*

16. See Andrea Stone, *Drives to Ban Gay Adoption Heat Up*, USA TODAY, Feb. 21, 2006, at 1A [hereinafter Stone] (“Social conservatives view family makeup as the next battleground after passing marriage amendments in 11 states in [November] 2004.”). See also Julian Sanchez, *All Happy Families: The Looming Battle over Gay Parenting*, REASON, Aug. 1, 2005, at 30 (“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.”). One Tennessee legislator, in writing about her support for a proposed adoption ban, stated that “gay men adopt boys ‘in order to have unfretted [sic] access to subject them to a life of molestation and sexual abuse.’” Jim David, *Friend or Foe?*, ADVOCATE, May 23, 2006, at 23.

17. See Stone, *supra* note 16, at 1A (describing the most recent efforts to ban gays and lesbians from adopting children).

make this concession because I agree with the claim. Instead, I do so because I do not want the moral arguments raised here to depend on its (in)validity. My position is that even if the claim is correct, the Florida and Oklahoma laws are nonetheless immoral.

II. THE FLORIDA LAW

Florida is the only state in the nation that statutorily bans all lesbians and gay men from adopting children.¹⁸ The law, enacted in 1977, was an outgrowth of the efforts by social conservatives, led by the artist/activist Anita Bryant, to strike back against some of the earliest advances in gay rights in the United States, such as the enactment by Dade County, Florida, of an ordinance prohibiting employment, housing, and public accommodation discrimination on the basis of sexual orientation.¹⁹ There is, to my knowledge, no evidence that lesbian or gay individuals were adopting children in Florida prior to 1977. This did not prevent the legislature from enacting the ban in order, as one legislator noted, to send a message “to homosexuals that ‘[w]e’re really tired of you. We wish you would go back into the closet.’”²⁰

To fully appreciate the immorality of the Florida adoption ban, it is necessary to place it in the broader context of how, and in some in-

18. See FLA. STAT. ANN. § 63.042(3) (West 2005) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”) In 2000, the Mississippi legislature enacted a law prohibiting “[a]doption by couples of the same gender.” MISS. CODE ANN. § 93-17-3(5) (2006). Unlike in Florida, however, lesbians and gay men in Mississippi, who are single, are not statutorily prohibited from adopting. In Utah, same-sex couples are barred from adopting under a statutory provision which states “that it is not in a child’s best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.” UTAH CODE ANN. § 78-30-9 (2006).

19. See *Lofton v. Sec’y of Dep’t of Child & Family Servs.*, 377 F.3d 1275, 1301–02 (11th Cir. 2004) (Barkett, J., dissenting from denial of en banc review) (discussing the legislative history of Florida’s adoption ban). In 1987, New Hampshire followed Florida in prohibiting lesbians and gay men from adopting. See 1987 N.H. Laws ch. 343, as amended at N.H. REV. STAT. ANN. § 170-B:4 (1987). Twelve years later, the legislature repealed the ban. See 1999 N.H. Laws ch. 18 (codified at N.H. REV. STAT. ANN. § 170-B:4 (1999)).

20. *Lofton*, 377 F.3d at 1303 (Barkett, J., dissenting from denial of en banc review) (footnote omitted). The same legislator added that “[t]he problem in Florida is that homosexuals are surfacing to such an extent that they’re beginning to aggravate the ordinary folks, who have a few rights of their own.” *Id.* at 1303, n.36. The group organized and led by Anita Bryant called itself “Save Our Children, Inc.” See WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 475–77 (2d ed. 1996) (providing an excerpt from ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION’S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 145–48 (1977)). Bryant contended that the enactment of the Dade County antidiscrimination ordinance was part of a broader effort by the gay rights movement to “recruit” children. See *id.* at 476 (arguing that homosexuals must recruit to “freshen their ranks” as they cannot reproduce).

stances, even of *whether*, the State in the last few years has gone about promoting the welfare of children under its care. The Florida Department of Children and Families (DCF), the agency entrusted with the protection and promotion of children's welfare, most recently came under national scrutiny and criticism in 2002 when it admitted that it did not know the whereabouts of a five-year-old girl who had been missing from her foster-care home for fifteen months.²¹ Rather than an isolated incident, DCF admitted a few months later that seven children had died while missing from their foster-care homes in the previous three years.²²

In the spring of 2002, in an attempt to address this disturbing pattern of neglect, the governor ordered DCF child protection workers to visit all of the children who were then under the care of the State.²³ Two months after the governor issued the order, DCF had failed to contact more than 1,800 children.²⁴ Incredibly, a year later, the State conceded that there were still 500 foster-care children whose whereabouts were unknown.²⁵

Losing track of vulnerable children is not the only way in which DCF has failed to protect children from harm. A disturbing number of children under the care of DCF have also been victims of abuse. In fact, two studies released in 2002 found that the number of children in foster care in Florida subjected to physical or sexual abuse increased significantly in the previous two years.²⁶ Another survey found that the

21. See Dana Canedy, *Case of Lost Miami Girl Puts Focus on an Agency*, N.Y. TIMES, May 3, 2002, at A19 (noting criticism from child advocates nationwide). The child's foster mother was eventually charged with murdering her. See Abby Goodnough, *Woman Accused of Killing a Missing Child in Florida*, N.Y. TIMES, March 17, 2005, at A24 (discussing the indictment of the girl's caretaker).

22. Megan O'Matz, *Two More Child Deaths Revealed Since Five Were Reported Dec. 29*, FT. LAUDERDALE SUN-SENTINEL, Jan. 26, 2003, at 14A.

23. David Damron, *DCF's Workers Fail to Visit 1,841 Children in June*, ORLANDO SENTINEL, July 6, 2002, at B1.

24. *Id.*

25. Megan O'Matz, *DCF Is Still Losing Track of Children, Data Show*, FT. LAUDERDALE SUN-SENTINEL, July 24, 2003, at B4.

26. Rene Stutzman, *Foster-Care Abuse Rises Sharply*, ORLANDO SENTINEL, June 22, 2002, at B1. The article noted that:

From July 1, 2000, to June 30, 2001, there were at least 154 confirmed cases [of abuse], 47 more than in the previous year. In 2000, there were 27 more cases than the year before.

According to DCF statistics, reported incidents involving abused foster children have been climbing since 1998, when there were 76 such cases. In 1999, that number jumped to 80, and to 107 in 2000.

In addition, investigators found some evidence of abuse in at least 395 cases in fiscal 2001, up from 342 the year before, 260 in 1999 and 265 in 1998.

Physical abuse was most common in both categories—confirmed cases and those

number of children suffering repeated incidents of abuse increased from 7.3% to 9.7% between the first and second halves of 2002.²⁷

The State responded to these and other glaring failures in its ability to protect children from harm by contracting out to private parties many of the functions previously carried out by DCF.²⁸ There are early indications, however, that this move to privatize foster care “has made the system worse, not better.”²⁹ One of the ongoing concerns is that the number of families who are willing to provide foster care in some Florida counties is shrinking.³⁰

The first reason, then, why the Florida law that prohibits lesbians and gay men from adopting is immoral is because its implementation leaves children, who would otherwise be adopted, subject to a dysfunctional foster-care system that in many instances cannot protect children from harm, much less affirmatively advance their welfare. Florida contends that the adoption ban is necessary because it is better for children to be adopted by married heterosexual couples than by lesbians and gay men.³¹ It is undisputed, however, that there are many more children—approximately 2,000³²—who are eligible for adoption in Florida than there are heterosexuals (married or single) willing to adopt them.³³ The

producing some evidence of abuse—accounting for 331 cases in fiscal 2001. Forty-three cases involved sexual abuse, the agency reported.

Id.

27. Megan O'Matz, *Report: DCF Misses Re-Abuse Goals*, FT. LAUDERDALE SUN-SENTINEL, Jan. 28, 2004, at B5.

28. Kathleen Chapman, *Private Foster Care Adds Profit to Mix of Helping Children*, PALM BEACH POST, Nov. 28, 2005, at 1A. In 2002, the governor appointed Jerry Regier, who had “previously worked for the Christian conservative Family Research Council,” to head the troubled DCF agency. Mark Hollis, et al., *DCF Chief Regier Resigns*, FT. LAUDERDALE SUN-SENTINEL, Aug. 31, 2004, at 1A. Regier resigned two years later after the governor’s “Inspector General’s office [found] that Regier and his top aides had accepted favors from lobbyists seeking multimillion-dollar agency contracts.” *Id.*

29. Jill Taylor, *Families, Workers Say Private Foster Care Adrift*, PALM BEACH POST, May 8, 2005, at 1A.

30. *See id.* (noting that despite hopes that privatization would increase the total number of foster homes in Florida, after privatization the number of foster homes had dropped twenty-three percent as of May 2005); Jacqui Goddard, *Is Outsourcing the Answer to States’ Foster-Care Woes?*, CHRISTIAN SCI. MONITOR, June 1, 2005, at 2.

31. *See* Brief of Appellees at 20–21, *Lofton v. Sec’y of Dep’t of Child & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (No. 01-16723-DD), 2002 WL 32868748 (arguing that a preference for having children raised by married heterosexual couples is a rational basis for the ban on adoption by lesbians and gay men).

32. *See* Stephanie Erickson & Pamela J. Johnson, *Home Sweet Home: A Ceremony Celebrated Floridians who Open their Arms to Foster Children Eager to be Adopted*, ORLANDO SENTINEL, Nov. 7, 2003, at B1 (stating that although 2,246 children were adopted that year, 2,071 children were still awaiting adoption).

33. The only reason why the number of children in Florida who are without legal parents

issue for these children is not, as the State contends, whether they will be better off with straight or gay parents; instead, the issue is whether the children will have parents at all. To leave these children without legal parents under the auspices of a foster-care system with a poor record of promoting the welfare of children is immoral because it places the well-being of children at risk.

Family law is, of course, driven by the goal of providing for the best interests of children. Even if one were to concede for purposes of argument that the State is correct that it is better for children to be raised by married heterosexual couples than by lesbians and gay men, such a justification for the adoption ban is inapplicable to the hundreds of Floridian children who, but for the ban, would today have full legal parents rather than being relegated to the care of a dysfunctional foster-care system. The State is, in effect, promoting what it perceives to be the well-being of some children by sacrificing the well-being of others. It cannot be denied that because of the adoption ban, *some* of the children who would have otherwise been adopted by lesbian or gay individuals have instead been adopted by married heterosexual couples. However, even if one were to concede that the State is correct in concluding that these children are better off as a result, there are still many other children who are *worse* off because they have not been adopted at all.

In the end, the State is sacrificing the well-being of the children who would have been adopted but for the ban in order to promote what it believes to be the best interests of the children who, as a result of the ban, were adopted by married heterosexuals rather than by lesbians or gay men. The State, in other words, is using the former (those not adopted because of the ban) as means to advance the interests of the latter (those adopted by married heterosexuals because of the ban). This use of the lives of some children to benefit other children is immoral.

The State might argue, of course, that the harm to children in having parents who are lesbian or gay is so significant that it outweighs the harm that might result from their having to remain in the foster-care system. The State, however, cannot make this argument in good faith because it allows lesbians and gay men to provide foster care to children.³⁴ The fact that the State permits lesbians and gay men to serve

despite their eligibility for adoption is not even higher is because the State, despite its position that heterosexual married couples provide the best kind of parenting, relies extensively on single people to adopt children. Twenty-five percent of adoptions in Florida are by single parents. *Lofton*, 377 F.3d at 1291 (Barkett, J., dissenting from denial of en banc review). In Miami-Dade County, “the figure is over forty percent.” *Id.*

34. *Id.* at 1292 (Barkett, J., dissenting from denial of en banc review). In any event, the

as foster parents shows that it does not believe that their sexual orientation harms the children under their care.³⁵

In fact, the second reason why the State's ban on adoption is immoral because it deprives lesbian and gay foster parents, who have provided children with good and valuable care, the opportunity to adopt those same children. Indeed, the moral untenability of Florida's adoption ban is clearest when one considers the valuable caretaking provided by lesbian and gay foster-care parents in that State. For example, Steven Lofton, the gay man who was the lead plaintiff in the most recent constitutional challenge to the adoption ban,³⁶ began serving as a foster parent, along with his partner, in 1988.³⁷ During the following fifteen years, the State placed eight children in their home, all of whom were HIV-positive.³⁸ Four of those placements were not temporary, with Lofton caring for the children since they were infants. At the time of the lawsuit, two of the children were fourteen years old and the third was eleven.³⁹ The fourth child died of AIDS when she was six.⁴⁰

The State never contended that Lofton provided anything but excellent care to the children. In fact, the State encouraged Lofton to quit his job so that he could dedicate himself full-time to the care of the

argument would be difficult to defend given (1) that the social science studies have found no correlation between the sexual orientation of parents and harm to children; and (2) the well-documented failures of Florida's foster-care system. Carlos A. Ball and Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 272-308 (analyzing empirical data and concluding that the children of lesbians and gay men are not harmed by their parents' sexual orientation); *see also supra* notes 21-30 and accompanying text.

35. The State has tried to distinguish its sexual orientation policy relating to adoption from that relating to foster care by noting that the former parental status is always permanent while the latter is not. Brief of Appellees, *supra* note 31, at 33. The important point, however, is that the State has not argued that the sexual orientation of lesbian and gay parents constitutes a problem only when they care for children for extended periods of time. In fact, the State *cannot* make this argument given that it allows some lesbian and gay foster parents to care for children *permanently*. *See Lofton*, 377 F.3d at 1291 (Barkett, J., dissenting from denial of en banc review) ("Florida . . . permits homosexuals . . . to serve as foster parents on a *permanent* basis, and the state acknowledges that such foster care placements involve a state of '*de facto* permanency.'") (footnote omitted). *See also infra* note 49 and accompanying text (discussing the state's consent to the judicial award of permanent legal custody to gay foster-care parents).

36. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001), *aff'd*, 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005). A previous constitutional challenge to the adoption ban, brought in the state courts, was also, like *Lofton*, unsuccessful. *Cox v. Fla. Dep't of Health & Rehab. Svcs.*, 656 So. 2d 902 (Fla. 1995).

37. Brief of Appellant at 7, *Lofton v. Sec'y of Dep't of Child & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004) (No. 01-16723-DD), 2005 WL 1841530.

38. *Id.*

39. *Id.*

40. *Id.*

HIV-positive children.⁴¹ In 1998, ten years after Lofton and his partner first welcomed foster-care children into their home, the agency that placed the children with them created an award for outstanding foster parents of the year. Not only did the agency give Lofton and his partner the award, they named the award after them.⁴²

Consider also the goodness that inheres in the care of children provided by Curtis Watson and his partner. As of 2004, the two Florida men had taken twenty-nine foster children into their “home for varying lengths of time.”⁴³ In 2003, a caseworker, under contract with DCF, was desperately trying to find a home for a young girl whose behavior was “so violent and temperamental that she had been *in 17 different foster homes in two months*.”⁴⁴ Watson and his partner agreed to take the girl into their home.⁴⁵ The gay couple soon provided the child, apparently for the first time in her life, with the necessary combination of care, love, and discipline that led the girl not only to cease acting self-destructively, but also allowed her to thrive.⁴⁶ The transformation in the girl’s conduct was so remarkable that a trial judge issued an order awarding the two men long-term custody of the girl.⁴⁷

As the cases of Steven Lofton and Curtis Watson show, Florida relies on lesbians and gay men to provide foster care to children who are difficult to place because of disability or behavioral problems.⁴⁸ Lesbians and gay men, then, are apparently good enough to provide care for children when no one else will, but not good enough to be deemed the full legal parents of those same children.

41. *Id.*

42. *Id.*

43. Curtis Krueger, *Gay Dads Get Daughters Plus Praise from Judge*, ST. PETERSBURG TIMES, Sept. 9, 2004, at 1A.

44. *Id.* (emphasis added).

45. *Id.*

46. *Id.*

47. *Id.* Long-term custody in this context gives a couple permanent custody but not the legal status of adoptive parents. *Id.*

Also consider the story of Wayne Larue Smith and his partner Dan Skahen. The two Florida men have taken care of twenty-three foster children since 1999. Sanchez, *supra* note 16, at 30. One of those children was Charlie, a three year old whose caseworker, upon bringing the child to the men’s home for the first time, stated that the child was “retarded,” in part, because he rarely emitted a sound. *Id.* After a few weeks in the men’s home, however, Charlie began speaking in complete 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.” *Id.*

48. See *supra* notes 36–40 and accompanying text (noting the award-winning care by gay men of HIV-infected children for over a decade); see also Maya Bell, *Court to Hear Latest Round in State Gay Adoption Case*, FT. LAUDERDALE SUN-SENTINEL, Mar. 4, 2003, at 1B (noting that Lofton “was recruited as a foster parent in 1988 to care for kids few others wanted: black babies infected with AIDS”).

There are indications that a growing number of Florida courts are beginning to approve the type of long-term custody arrangement granted to Curtis Watson and his partner.⁴⁹ In doing so, these courts have recognized that the children in question would be *harmed* if they were taken away from the individuals who have provided them with valuable and nurturing care for extended periods of time.⁵⁰

Florida finds itself in a difficult moral position because it has, on at least some occasions, consented to these long-term parenting arrangements by lesbians and gay men that fall short of adoption.⁵¹ The adoption prohibition, as applied to the men and women who are providing what even the State sometimes concedes is good and valuable care for children, does not seem to be about promoting the best interests of children. Instead, the purpose of the ban as applied to these parents appears to be, as the ban's supporters noted twenty years ago, about sending a strong message of disapproval of homosexuality.⁵² The State is jeopardizing the well-being of children who it concedes are currently receiving wonderful care from loving parents in order to send a message that homosexuality is incompatible with permanent parenting. The State, in other words, is using these children as means to an end rather than as ends in themselves, and as such, is acting immorally.

49. See Bell, *supra* note 48, at 1B (reporting on the awarding of permanent legal custody to gay individuals who had been caring for children); see also *supra* notes 43–47 and accompanying text (discussing long-term custody arrangement).

50. See Bell, *supra* note 48, at 1B (explaining that, while unable to adopt legally, courts award custody to lesbians and gay men for the sake of children in their care); Krueger, *supra* note 43, at 1A (discussing the case of a gay couple who cared for two troubled young foster girls and who were awarded long-term custody).

51. See Adam Liptak, *Gay Couple Challenges Florida Ban on Homosexual Adoptions*, N.Y. TIMES, Mar. 2, 2003, at A16 (noting that “[w]hile the state has vigorously defended the adoption law, it also recently consented to a novel arrangement fashioned by a state judge” that awarded long-term custody to a gay couple who had served as foster parents to a young child). These long-term arrangements are also frequently supported by the children’s biological parents. See Bell, *supra* note 48, at 1B (reporting on a case where a biological parent requested his child be cared for by a gay individual); see also Brief of Appellant, *supra* note 37, at 10 (noting that the biological father of a child asked a gay man, who became the legal guardian of the child, “to take care of his son”).

52. See *Lofton v. Sec’y of Dep’t of Child and Family Servs.*, 377 F.3d 1275, 1303 (11th Cir. 2004) (Barkett, J., dissenting from denial of en banc review) (noting that the legislative history showed that anti-gay animus was the driving force behind the adoption law). It should be noted that Florida’s “adoption statute accords everyone other than homosexuals the benefit of an individualized consideration that is directed toward the best interests of the child. Child abusers, terrorists, drug dealers, rapists and murderers are not categorically barred by the adoption statute from consideration for adoptive parenthood in Florida.” *Id.* The fact that Florida law categorically prevents lesbians and gay men, but no others, the opportunity to adopt, also strongly suggests that the law was aimed at sending a message of disapproval of homosexuality.

III. THE OKLAHOMA LAW

A few years ago, a handful of same-sex couples living outside of Oklahoma who had adopted children born in Oklahoma requested that the Oklahoma Department of Health (Department) issue new birth certificates listing them as the children's parents.⁵³ The Department was unsure of whether Oklahoma law allowed for the issuance of the new birth certificates.⁵⁴ As a result, it wrote to the Attorney General asking for his opinion on whether the Department had the legal authority to issue the certificates.⁵⁵ The Attorney General, in 2004, issued an opinion concluding that the Full Faith and Credit Clause of the United States Constitution required Oklahoma agencies to recognize adoption decrees awarded by courts from other jurisdictions.⁵⁶ He also concluded that no provision of Oklahoma law prohibited the issuance of the new birth certificates to same-sex couples who had adopted children in states that allowed such adoptions.⁵⁷

The Attorney General's opinion created a political firestorm of sorts in Oklahoma. For example, several days after it was issued, a Republican state legislator stated that the opinion opened "[t]he proverbial barn door [that] need[ed] [to be] shut . . . immediately."⁵⁸ He added that "[w]e ought to protect Oklahoma children from adoption by homosexual couples" and that the opinion was "a threat to families and children."⁵⁹ Another Republican state legislator warned that "Oklahoma could become the national capital for same-sex adoption in America."⁶⁰ Within a few weeks, the Oklahoma senate—by a vote of 44 to 0⁶¹—and the house—by a vote of 93 to 4⁶²—enacted a bill that prohibited state agencies and courts from "recogniz[ing] an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."⁶³

53. Marie Price, *GOP Vows Gay Adoption Law*, TULSA WORLD, Mar. 23, 2004, at A14.

54. *Id.*

55. *Id.*

56. 04 Op. Okla. Att'y Gen. 8, ¶¶ 11–14 (2004), 2004 WL 557472.

57. *Id.* at ¶ 15.

58. Price, *supra* note 53, at A14.

59. *Id.*

60. *Id.*

61. *Senate Approves Anti-Gay Adoption Amendment*, TULSA WORLD, Apr. 13, 2004, at A8.

62. *House Bill on Adoption Approved*, THE OKLAHOMAN, Apr. 27, 2004, at 7A.

63. OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (West Supp. 2006). The new language created an exception to the otherwise statutory obligation on the part of state courts to recognize adoption decrees issued by other jurisdictions. *Id.*

The law, by its own terms, does not address the question of whether lesbians and gay men are allowed to adopt under Oklahoma law.⁶⁴ Instead, the law is aimed only at the effect on Oklahoma law of adoption decrees issued by courts in other states.⁶⁵ The legislature also did not seek to nullify the effect of *all* out-of-state adoption decrees issued to lesbians and gay men. The law, for example, is not aimed at adoption decrees issued to single lesbian or gay adoptive parents;⁶⁶ instead, it is aimed at adoption decrees obtained by same-sex couples.⁶⁷ Even when the adoption decree in question is issued to a same-sex couple, the Oklahoma law appears not to be intended to strip both parents of their legal status. Instead, the law refuses to recognize two individuals of the same sex as the parents of the same child.⁶⁸

It is interesting that the statute does not specify *which* of the two same-sex parents, in any given case, will be stripped of his or her parental status under Oklahoma law. Presumably, in second-parent adoption cases, that is, in cases in which individuals adopt their same-sex partners' children, it is the former who will be stripped of their parental status.⁶⁹ It is not clear, however, who will be so stripped when members of a same-sex couple simultaneously become the parents of a child through an adoption.

64. *Id.* Although no provision of Oklahoma law explicitly bans same-sex couples from adopting in that state, the adoption statute seems to allow individuals to adopt as couples only if they are married. See OKLA. STAT. ANN. tit. 10, § 7503-1.1 (West 1998) (establishing age and marital status requirements for eligibility to adopt). Nonetheless, according to the 2000 U.S. Census, "Oklahoma had between 2,100 and 2,300 households headed by same-sex couples who were raising children." *Setting it Straight*, *The Oklahoman*, May 8, 2004, at 2A (correcting an earlier article, Judy Gibbs Robinson, *State Bill Reaffirms Stance on Adoptions by Gays*, *THE OKLAHOMAN*, May 1, 2004, at 7A). Single individuals, however, are allowed to adopt, and the adoption statute does not make distinctions based on sexual orientation. See OKLA. STAT. ANN. tit. 10, § 7503-1.1 (requiring only that unmarried persons be at least twenty-one years old).

65. See OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (West Supp. 2006) (disallowing recognition of out-of-state adoptions by same-sex couples). See also *Finstuen v. Edmondson*, No. Civ-04-1152-C, 2006 WL 1445354 at *8 (W.D. Okla. May 19, 2006) ("[T]he effect of the Amendment is to refuse legal recognition of certain parent-child relationships that have been legally formed in a different state.").

66. See *Finstuen*, 2006 WL 1445354, at *10 (noting that the Oklahoma statute "has no effect on single-parent adoptions, even when the single parent is homosexual.").

67. See OKLA. STAT. ANN. tit. 10, § 7502-1.4(A) (explicitly referring to "more than one individual of the same sex").

68. John Williamson, the Oklahoma Senate Republican leader, and a principal supporter of the law, noted during the legislative debate that he did not "believe [that] the names of 'George and Steve' should be on a birth certificate." John Greiner, *Senate Passes Measure Concerning Adoptions*, *THE OKLAHOMAN*, Apr. 13, 2004, at 6A. He added that "[j]ust one name is needed." *Id.*

69. Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 *TULSA L. REV.* 467, 467 n.2 (2005).

In any event, for our purposes, the important point is that the effect of the statute is to deny children of same-sex couples the ability to have a second parent. To begin to think about the moral questions raised by the implementation of the Oklahoma law, let us imagine that a gay male couple, we will call them Adam and Bob, jointly and simultaneously adopted a child in Illinois, whom we will call Timmy, in 2000. In 2006, the couple relocated to Oklahoma for job-related reasons. Under the Oklahoma statute in question, the moment that the family crosses the state line, one of the two men will cease to be the legal parent of the child.

Let us suppose that State officials determine that Adam but not Bob remains a parent of Timmy while the family is in Oklahoma.⁷⁰ Bob, for the last six years, has served as Timmy's *de facto* and *de jure* parent. An Illinois court made an individualized assessment of Bob's qualifications to be a parent and concluded that having Bob as a parent was in Timmy's best interests. Nonetheless, under the Oklahoma statute, Bob, while in Oklahoma, is not Timmy's legal parent.

Children in Timmy's situation are harmed in many tangible ways. For example, as a result of the implementation of the statute, Timmy loses the legal right (1) to inherit from Bob;⁷¹ (2) to recover for Bob's wrongful death;⁷² (3) to receive child support from Bob;⁷³ and (4) to be taken care of by Bob if Adam were to get sick or die. Furthermore, the statute would prevent Bob from being able to make medical and educational decisions on behalf of Timmy, and may even, in the case of a medical emergency, prevent Bob from accompanying Timmy on an ambulance or even visiting him in a hospital.⁷⁴ These tangible harms inflicted on children like Timmy are enough to render the Oklahoma statute immoral.⁷⁵

70. Again, it is not clear exactly how the State would go about making this determination.

71. See OKLA. STAT. ANN. tit. 84, § 213 (West 2006) (discussing intestate succession rules).

72. See OKLA. STAT. ANN. tit. 12, § 1054 (West 2000) (listing who may bring a wrongful death action).

73. See OKLA. STAT. ANN. tit. 10, § 4 (West 2006) (requiring a parent with custody of a child to provide support and education).

74. See *Finstuen v. Edmondson*, No. Civ-04-1152-C, 2006 WL 1445354, at *2 (W.D. Okla. May 19, 2006) (noting allegation by lesbian parents, who resided in Oklahoma after adopting their children in another state, that they were afraid of signing medical care documents because they were unsure of their validity and were initially prevented from accompanying one of their children on an ambulance to a hospital and from being present in an examination room).

75. Although I focus here on the harmful effects of the law on a family headed by lesbians or gay men who are Oklahoma residents, such an impact is by no means limited to them. The law can also negatively affect families that are simply visiting Oklahoma. If, for example, a family headed by lesbians or gay men suffers a car accident while traveling through Oklahoma that injures the children and kills or severely injures one of the adults, the other adult may be deemed

The tangible harm inflicted by the law on children is the primary reason for its immorality, but it is not the only one. Supporters of the law argued that its enactment was necessary in order (1) to prevent lesbians and gay men from adopting⁷⁶ and (2) to encourage adoption by married heterosexual couples.⁷⁷ The statute, however, accomplishes neither goal. As already noted, the statute is aimed only at the effect in Oklahoma of adoption decrees issued by other jurisdictions.⁷⁸ An Oklahoma statute, of course, cannot prevent couples like Adam and Bob from adopting a child—even one born in Oklahoma—in another state. Furthermore, as already noted, the statute does not address the question of whether lesbians and gay men can adopt a child under Oklahoma law.⁷⁹ The Oklahoma statute, therefore, will not serve as a legal impediment to any adoption by lesbians or gay men within or outside of Oklahoma.⁸⁰

It is also unlikely that the statute will increase the number of adoptions by heterosexual couples. The impact of the statute, once again, is limited to children who have already been adopted in other jurisdictions.⁸¹ No one expects that children like Timmy will be re-adopted by heterosexual couples. Timmy, even under Oklahoma law, still has one gay father. The Oklahoma law will not result in the finding

to be a nonparent and thus may not be legally able to make decisions about the medical care of the children. That person may also be prevented from visiting the children in the hospital.

76. See Price, *supra* note 53, at A14 (quoting statements by legislators who supported the law stating that “[w]e ought to protect Oklahoma children from adoption by homosexual couples” and “Oklahoma could become the national capital for same-sex adoption in America”).

77. See News Release, Okla. House, Republican Legislators Applaud Passage of Bill to Prevent State Recognition of Same-Sex Adoptions, Apr. 26, 2004, available at <http://www.lsb.state.ok.us/HOUSE/news6772.html> (quoting statements by legislators who supported the bill such as “I believe children are better off with two parents—a mother and a father—not two fathers or two mothers” and “[t]his bill will help ensure that children are raised in traditional family environments”); Marie Price, *House Roundup: Bill to Ban Recognizing Gay Adoptions Sent to Governor*, TULSA WORLD, Apr. 27, 2004, at A9 (quoting Republican co-sponsor of bill as stating that “[t]his legislation eliminates the threat to families and children and keeps adopted kids in traditional family homes”).

78. See *supra* note 65 and accompanying text.

79. See *supra* note 64 and accompanying text.

80. The statute does make it illegal for the Department of Health to issue birth certificates to same-sex couples who adopt children in other states. It is unlikely, however, that that will by itself deter couples residing in other jurisdictions from adopting children born in Oklahoma since the adoption decree, rather than the birth certificate, is the legal document that establishes the couples’ parental status. This reasoning does not deny, of course, that birth certificates are important documents and that a failure to issue them with all of the correct information included can create real problems for the families involved. My only point is that the inability to get a birth certificate with the names of *both* parents on it is unlikely to serve as a disincentive to potential lesbian and gay adoptive parents outside Oklahoma.

81. See *supra* note 65 and accompanying text.

of new, and presumably better, parents for children raised by same-sex couples; instead, the law will result in legally depriving children of one of their two current parents. The statute, in other words, is about *taking parents away* from children; it is not about providing those children with different parents.

Given that the Oklahoma statute accomplishes neither of its purported goals, it seems clear that it was enacted simply to send a message of disapproval of adoption by lesbians and gay men. As the Republican state senator who crafted the legislation noted after the bill became law, “we wanted to show as a policy of our state that we don’t agree with other states” that recognize adoptions by same-sex couples.⁸² And as the State admitted, in defending the constitutionality of the statute in federal court, the law “was intended to halt the erosion of the mainstream definition of the family unit”⁸³

The Oklahoma statute, then, like the Florida statute, is ultimately about sending a message of disapproval regarding the incompatibility of homosexuality and parenting. And the Oklahoma law, like the Florida law, is immoral, not only because it harms children,⁸⁴ but also because it uses children as means to achieve a particular end—that of sending a message about homosexuality and parenting.

Such an effort to strip *an entire group of individuals* of their legal status as parents has not been attempted in this country since the days of slavery.⁸⁵ What the Oklahoma legislature has done is deny legal recognition of the parental status of an entire class of individuals, namely, the partners of lesbian and gay parents, because of who they are. To return to our hypothetical family, the statute does not call for an individualized assessment of how good a parent Bob is; it does not matter that a court from another jurisdiction already determined that it is in Timmy’s best interest that he be cared for by Bob⁸⁶ or even that

82. Amy Fagan, *Same-Sex Adoption Negated in State*, WASH. TIMES, May 7, 2004, at A5. The senator added that the law was necessary because “[t]he radical homosexual agenda includes trying to be recognized both as married couples and as a . . . family union. That’s their agenda and they’re going to continue pushing the envelope. . . . The whole concept of family . . . is being challenged across the nation.” *Id.*

83. *Finstuen v. Edmondson*, No. Civ-04-1152-C, 2006 WL 1445354, at *9 (W.D. Okla. May 19, 2006). During the course of the litigation, the State conceded that the law “was intended to protect Oklahoma children from being targeted for adoption by gay couples across the nation and to ensure that children are raised in traditional family environments.” *Id.* at *11 (internal citation omitted).

84. See *supra* notes 71–74 and accompanying text.

85. Cf. DAVID A. J. RICHARDS, *THE CASE FOR GAY RIGHTS: FROM BOWERS TO LAWRENCE AND BEYOND* 68–69 (2005) (noting racist arguments used in the nineteenth century in the United States to justify separating slaves from their spouses and children).

86. The court in *Finstuen* noted that “a court of competent jurisdiction has determined the

Timmy may be thriving under Bob's care; all that matters is that Bob is gay and that is, by itself, a sufficient ground to deny Timmy the legal right to be cared for and supported by one of his two parents.⁸⁷

The Oklahoma statute, then, will have no positive impact on children, even if one uses the State's own criteria (i.e., married heterosexual couples make better parents than same-sex couples) in determining what kind of parenting is best for children. But the statute will inflict tangible harms on some children for no reason other than the legislature's desire to send a message of disapproval to other jurisdictions that have issued adoption decrees to same-sex couples. As a result, the Oklahoma law is immoral.

IV. CONCLUSION

An opponent of gay rights who is confronted with the arguments raised in this Essay is likely to justify his or her support of the Florida and Oklahoma laws by contending that children are better off raised by married heterosexual couples and that that alone justifies the types of legislative actions that I have criticized here. I have attempted to show in this Essay, however, that the laws in question are immoral even if we concede, for purposes of argument, the empirical point regarding the benefits to children of being raised by married heterosexual parents as opposed to by parents who are lesbian or gay. In Florida, there are many more children waiting to be adopted than there are married heterosexual couples interested in adopting.⁸⁸ When a lesbian or a gay man is denied the opportunity to adopt a particular child in Florida, therefore, it does not mean that that child will be adopted by a married heterosexual couple.⁸⁹ It does, however, mean that the child is more likely to be relegated to a foster-care system that frequently fails to promote the welfare of the children under its care.⁹⁰ Similarly, the Oklahoma law is not about finding heterosexual married couples to

adoptions are in the Plaintiff children's best interest. The Amendment attempts to undo that determination with no consideration of changed circumstances or any other evidence that indicates the earlier decision was in any way incorrect." *Finstuen*, 2006 WL 1445354, at *14.

87. Although this Essay does not address the constitutionality of the statutes under discussion, it should be noted that an individualized assessment of a parent's fitness is usually constitutionally required before the state can terminate parental rights. *See id.* at *14 n.13 (noting that the Oklahoma law's "effect of terminating a parent's rights without any process likely would run afoul of procedural due process protections. . .").

88. *See supra* notes 32–33 and accompanying text.

89. *See supra* notes 32–33 and accompanying text.

90. *See supra* notes 21–30 and accompanying text.

adopt children; instead, it is about denying children the opportunity to be cared for by a second legal parent.⁹¹

There are similarities between the arguments raised by opponents of gay rights in the context of marriage and those they raise in the context of adoption. Opponents believe it is necessary to defend the *institutions* of marriage and the family, as they have traditionally been understood, from reform efforts pursued by gay rights proponents.⁹² Those proponents, on the other hand, argue that the focus should not be on institutions as such, but on the human beings who constitute them and on the human beings who are excluded from them.⁹³ The many state constitutional amendments banning same-sex marriage that have been approved in the last few years would seem to indicate that gay rights proponents, in at least some parts of the country, have not been particularly successful in “humanizing” the same-sex marriage debate in such a way that has convinced a majority of the populace that a recognition of same-sex marriage would not harm heterosexuals but would avoid harms inflicted on lesbians and gay men.

It may be easier to humanize the issue of adoption because, by definition, it involves the best interests of actual children, who everyone agrees need care. The best interests of children paradigm should involve an assessment of what is best for children given alternatives that are realistic and probable. It is one thing to accept, or at least not question, the traditional understanding that children are better off if they are raised by what is taken to be the “gold standard” of parenting, namely, the raising of children by men and women who are married.⁹⁴ It is, however, another matter altogether to deny actual children the opportunity to be adopted at all (as in Florida) or to be cared for by a second parent (as in Oklahoma) because the current or prospective parents do not meet that “gold standard.” Perhaps enough voters in states that do not currently have adoption restrictions based on sexual orientation will be sufficiently troubled by what their enactment will mean for actual children, that efforts by social conservatives to restrict adoption by lesbians and gay men will be thwarted.⁹⁵

91. See *supra* notes 80–87 and accompanying text.

92. See *supra* notes 76–77 and accompanying text.

93. See, e.g., BALL, *THE MORALITY OF GAY RIGHTS*, *supra* note 2, at 120 (arguing that the focus of the same-sex marriage debate should not be “on the purported intrinsic goodness of a social institution as currently defined” but on “the human attributes and potentialities that the institution is meant to account for”).

94. The phrase “gold standard,” as used in the parenting context, is taken from Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *AMER. SOC. REV.* 159, 162 (2001).

95. In fact, gay rights activists have recently derailed bills pending in several legislatures

Gay rights supporters, in making the case against current and proposed laws limiting adoption on the basis of sexual orientation, should not hesitate to raise moral questions about their impact on children. Many opponents of gay rights assume that morality and values are on their side; proponents of gay rights sometimes unintentionally add credibility to that assumption by failing to raise explicit questions about the morality of their opponents' positions. The Florida and Oklahoma adoption laws that make distinctions on the basis of sexual orientation are immoral because they harm children and because they use children as means to an end rather than as ends in themselves.

nationwide that would have restricted adoption by lesbians and gay men. *See* Maya Bell, *Gay-Adoption Foes Struggle to Pass Bans*, ORLANDO SENTINEL, May 7, 2006, at A32 (discussing the difficulties faced by opponents of adoption by lesbians and gay men). It is heartening that the activists, in attaining these political victories, have argued successfully that “[w]ith 119,000 foster children across the nation available for adoption, . . . it’s cruel and *immoral* to eliminate an entire group of potential parents from consideration.” *Id.* (emphasis added).