

# Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents

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*Bureaucrats working for executive agencies have been as central to the victories of the LGBT rights movement as judges and legislators. This Article uncovers the history of gay and lesbian family law to establish how the administrative state shaped discourse about homosexuality and made marriage equality litigation possible. In the mid-1980s and early 1990s, states began promulgating bans on gay and lesbian foster and adoptive parenting, prohibitions that civil servants opposed because they did not serve the best interests of children. Instead of implementing the bans, bureaucrats worked to overturn them, limited their application, or defied them in their entirety, thereby nullifying the laws. The actions of bureaucrats not only helped to dispel social prejudices that portrayed gays and lesbians as harmful to children, but also publicly recast gay men and women as parents and community members, which promoted other LGBT rights. With gay and lesbian families becoming increasingly common, the need to protect the interests of children with same-sex parents became a powerful argument in favor of marriage equality. The discursive shift that agency nullification fostered was essential to the fight for marriage rights and demonstrates the power of bureaucrats to effectuate legal change. The history that this Article presents revises existing scholarship on LGBT legal history, which has focused on the ways in which bureaucrats have frustrated rights claims, and contributes to an emerging scholarship on the role of the administrative state in promoting civil rights.*

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## INTRODUCTION

In November 2015, Utah state judge Scott Johansen made headlines when he removed a foster child from the home of a lesbian couple, explaining that it was “not in the best interest of children to be raised by same-sex couples.”<sup>1</sup> Johansen rescinded the order the next day, after the state Division of Child and Family Services joined the women in filing a motion for reconsideration.<sup>2</sup> In advocating for the lesbian couple, state social workers were continuing an extended history of executive agency bureaucrats supporting gay and lesbian foster and adoptive parenting.<sup>3</sup> In the mid-1980s and early 1990s, gays and lesbians increasingly sought to foster and adopt children, resulting in a maelstrom of political controversy. Despite elected officials’ edicts and lawmakers’ efforts to prevent gays and lesbians from serving as foster and adoptive parents, social workers believed that gay and lesbian parents often provided homes that best served children’s needs. They consequently defied rules and regulations to promote the welfare of their wards.

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<sup>1</sup> Christine Hauser, *Utah Judge Orders Lesbian Couple to Give Up Foster Child*, N.Y. TIMES, Nov. 13, 2015, at A22; Richard Pérez-Peña, *Utah Judge Drops Order on Lesbians’ Foster Child*, N.Y. TIMES, Nov. 14, 2015, at A13.

<sup>2</sup> Pérez-Peña, *supra* note 1, at A13.

<sup>3</sup> The term “bureaucrat” refers to government administrators generally, which in state agencies for child placements can include social workers. See *infra* note 85. Foster care, unlike adoption, is intended as a temporary placement for abused or neglected children who cannot safely remain in their homes. If the children cannot be reunited with their parents, then they are made available for adoption. See Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 FUTURE CHILD. 5, 6 (2004).

Drawing on unpublished documents mined from archives around the country, interviews conducted with state officials and advocates, judicial opinions, court filings, government publications, articles from national and local newspapers, and other primary sources, this Article uncovers an untold history of gay and lesbian rights—which had bureaucratic beginnings and developed in the interstices of the administrative state—and presents an overlooked path for LGBT rights advocacy.<sup>4</sup> The Article analyzes the ways in which social workers undermined bans on gay and lesbian foster and adoptive parenting in Massachusetts, New Hampshire, and California—the three states where national debates centered in the mid-1980s—revealing a complex relationship between the elected officials who promulgated the administrative policies and the civil servants who were charged with executing the regulations.<sup>5</sup> The bans on gays and lesbians serving as foster and adoptive parents took various forms, from explicit prohibitions to rules that excluded unmarried couples or gave preference to “traditional family settings,” using these terms as proxies for heterosexuality. Civil servants in these three states subverted the bans, with some going so far as to nullify the laws.<sup>6</sup> In Massachusetts, social workers joined a lawsuit challenging the regulations, while in New Hampshire, civil servants nullified the law by refusing to enforce it. In California, social workers also acted to undercut the ban, appealing to courts to approve the adoptions that the civil servants themselves could not endorse. After years of thwarting the law, the California agency rescinded its regulation, defying an explicit order from the gover-

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<sup>4</sup> This Article uses the term “LGBT” to refer to the contemporary rights movement. While many communities have embraced a broader membership and vision of rights—including queer, intersex, and asexual individuals within their umbrella—the legal movement, for better or worse, has limited its focus to lesbian, gay, bisexual, and transgender issues. When discussing the movement of the 1980s and early 1990s, this Article refers to “gay and lesbian rights” or just “gay rights” advocates, as the movement’s scope had not yet expanded beyond these categories. Steven G. Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy*, in *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 66–68, 74–75 (Barry D. Adam et al. eds., 1998); Amy L. Stone, *More than Adding a T: American Lesbian and Gay Activists’ Attitudes towards Transgender Inclusion*, 12 *SEXUALITIES* 334, 335–36, 349 (2009).

<sup>5</sup> For a discussion of how the administrative process is implemented by bureaucrats, see MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 8–25, 87–116 (1980); Heather C. Hill, *Understanding Implementation: Street-Level Bureaucrats’ Resources for Reform*, 13 *J. PUB. ADMIN. RES. & THEORY* 265 (2003); Charles H. Koch Jr., *Effective Regulatory Reform Hinges on Motivating the “Street Level” Bureaucrats*, 38 *ADMIN. L. REV.* 427, 432–36 (1986); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 586 (1984).

<sup>6</sup> The term “nullification” is typically applied to juries and refers to a jury’s decision to acquit an otherwise guilty defendant because the jury objects to the law or its application to the defendant. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 700 (1995). However, the history of gay and lesbian foster and adoptive parenting makes clear that bureaucrats may similarly nullify the laws with which they disagree. Adam Shinar has referred to agency dissent and refusal to implement laws as agency resistance, but the term “nullification” better articulates the legal issues this practice implicates. See Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 *FLA. ST. U.L. REV.* 601 (2013).

nor. By working to undermine the prohibitions on gay and lesbian foster and adoptive parenting, social workers asserted their authority and ability as trained professionals to determine the best interests of children and challenged the prerogative of elected officials to craft foster care and adoption regulations. All three states eventually withdrew their bans, ultimately vindicating the efforts of social workers.

Through acts of subversion and nullification, social workers not only promoted foster and adoptive parenting rights, but also helped to dispel prejudices against gays and lesbians, who had been cast as child molesters, psychopaths, and hedonists for much of the twentieth century.<sup>7</sup> In helping gay men and women create families, social workers contributed to a changing public perception of gays and lesbians as parents and community members, which facilitated other rights claims—especially calls for marriage equality.<sup>8</sup> The growing numbers of gay- and lesbian-headed families rendered same-sex marriage not only less radical, but also more recognizably necessary to protect the interests of children with same-sex parents.<sup>9</sup>

Scholarship on marriage equality has centered on the role of courts and legislatures, where the direct battles for marriage rights were waged,<sup>10</sup> but the administrative state also had a significant impact on how the push for marriage equality developed and gained acceptance in American society.<sup>11</sup> In defying bans on gay and lesbian foster and adoptive parents, social work-

<sup>7</sup> JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990s* 217 (1996); Marie-Amélie George, *The Harmless Psychopath*, 24 J. SEXUALITY 225, 232–33 (2015).

<sup>8</sup> These societal prejudices also applied to transgender, queer, and intersex individuals, who violated social sexual and gender norms. While the creation of gay and lesbian families has helped change public perceptions of same-sex sexuality, deep-seated phobias continue to limit the effort to advocate for other sexual minorities. See James Esseks, *How to Win the Fight for Trans Rights*, DAILY BEAST (Nov. 23, 2015, 1:00 AM), <http://www.thedailybeast.com/articles/2015/11/23/how-to-win-the-fight-for-trans-rights.html>, archived at <https://perma.cc/Q45C-6BQT>.

<sup>9</sup> See Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1, 4–7 (2015) (tracing the radical genesis of same-sex marriage claims). But see Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 87–88 (2014) (criticizing views of marriage equality as initially radical).

<sup>10</sup> See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* chs. 3–5 (2013) (identifying court cases as the catalyst for same-sex marriage bans); KENJI YOSHINO, *SPEAK NOW: MARRIAGE EQUALITY ON TRIAL* chs. 5–16 (2015) (detailing the *Perry v. Schwarzenegger* litigation); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1413–16 (2004) (criticizing marriage equality litigation for limiting the scope of the gay liberation movement); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1985–87, 1992 (2006) (analyzing changing judicial norms in marriage equality decisions).

<sup>11</sup> Family law scholarship has similarly centered on courts, even though a great deal of family law is created and negotiated by the administrative state. See generally Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (tracing developments in the field through legislatures and courts, but not administrative agencies). Clare Huntington, *Introduction*, 50 FAM. CT. REV. 179 (2012) (tracing the evolution of family law scholarship, the majority of which centers on the role of courts). By focusing on the central role of state agen-

ers were focused on the best interests of children and were not acting as gay rights advocates, but their work nevertheless proved crucial to attaining the goals of the LGBT movement. The history presented in this Article establishes how government bureaucrats shaped the discursive framework of struggles for gay rights, rendering LGBT claims for equality increasingly successful.<sup>12</sup>

This Article also upends existing scholarship on the impact of executive agencies on gay and lesbian rights. Thus far, legal academics have identified only how bureaucrats have foreclosed and frustrated rights claims.<sup>13</sup> This Article uncovers the work that many government agents did to promote gay and lesbian interests, constituting a liberalizing force that had an impact beyond adoption and foster care rights. In doing so, it builds upon the scholarship of Karen Tani and Sophia Lee, whose works on administrative constitutionalism emphasize the ways in which the administrative state has served to promote rights claims.<sup>14</sup> This Article extends their observations by identifying how civil servants can create rights in the face of legislative, executive, and public opposition, helping to fuel a national movement. It demonstrates that the administrative state has worked to promote gay and lesbian rights and can serve as a site for movement advocacy.

By analyzing the flexibility of administrative bureaucrats in executing regulations and the wider societal impact their decisions may have, this history provides valuable, if controversial, lessons for legal advocates. Agencies can be used to either bolster or undercut civil rights, as recent reports of clerks refusing to issue marriage licenses to same-sex couples vividly illustrate.<sup>15</sup> Additionally, agency nullification raises important questions about bureaucratic legitimacy, democratic governance, and separation of powers,

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cies in creating gay and lesbian families, this Article argues for a broadening of the family law canon.

<sup>12</sup> See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 949 (2006) (arguing that social movements can change the meaning of law); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2799–800 (2014) (arguing that social movements can be sources of law); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1323 (2006) (analyzing “how constitutional culture channels social movement conflicts”).

<sup>13</sup> MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 140, 146, 151 (2009); DANIEL WINUNWE RIVERS, *RADICAL RELATIONS: LESBIAN MOTHERS, GAY FATHERS, AND THEIR CHILDREN IN THE UNITED STATES SINCE WORLD WAR II* 181–86 (2013); MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* 175–80, 185–89 (2010).

<sup>14</sup> See SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* chs. 2, 7 (2014); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 355–68 (2012); see also Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1082, 1132–43 (2014); cf. PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* ch. 5 (2009).

<sup>15</sup> See *Cato v. Lang*, No. 4:15-cv-00491-A (N.D. Tex. July 6, 2015); Editorial, *Illegal Defiance on Same-Sex Marriage*, N.Y. TIMES, July 10, 2015, at A26.

and as such, it is a fraught avenue for legal advocacy.<sup>16</sup> Bureaucrats are charged with executing the law, not creating it, and since their authority derives from carrying out measures that democratically elected representatives have enacted, agency nullification seems to undermine their legitimacy.<sup>17</sup> While this Article identifies the administrative state as an unrecognized locus of change, it does not take a normative position with respect to agency nullification.<sup>18</sup> Instead, it focuses on the broader issue of how nullification occurred in the context of gay and lesbian foster and adoptive parenting and influenced both LGBT rights and wider discourse on homosexuality.

This Article proceeds in six Parts. Part I explains why gay and lesbian foster and adoptive parenting became a matter of national debate in the mid-1980s, arguing that the rise of both the Religious Right and the LGBT rights movement pushed the acceptability of gay- and lesbian-headed families to the forefront of national politics. Part II traces how executive agency policies on gay and lesbian foster care and adoption evolved. In the 1970s, social workers matched homosexual couples only with self-identified gay and lesbian teenagers, but the need for additional homes and the emergence of social science research on the benign impact of parental homosexuality on children led social workers to consider placing more and younger children with gays and lesbians. These expanding placements provide the context for Part III, which takes up the debate over gay and lesbian foster and adoptive parenting in Massachusetts. The state's ban focused national attention on the subject and exposed the rifts between the state governor and the social workers charged with executing his policies. Although civil servants in Massachusetts enforced the ban during a legal challenge pending in the courts, the same was not true in New Hampshire and California. Parts IV and V analyze how social workers in those states actively undermined prohibitions on gay and lesbian foster and adoptive parenting, demonstrating the ways in which bureaucrats have flexibility in their execution of the law, and how they can nullify the rules with which they disagree. Finally, Part VI assesses as the implications of this historical study for contemporary and future rights movements.

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<sup>16</sup> See, e.g., Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1369–70 (2013); see also *infra* Section VI.A.

<sup>17</sup> See Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U.L. REV. 1201, 1226–35 (2012) (detailing the principal-agent problem); cf. Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1328–41 (1997) (outlining the common rationales for prosecutorial discretion and the criticisms of these justifications); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 268–78 (2010) (comparing prosecutorial discretion in criminal and immigration law).

<sup>18</sup> See *infra* Section VI.A.

I. A PERFECT STORM: THE RELIGIOUS RIGHT, GAY RIGHTS,  
AND THE FOSTER CARE CRISIS

The desire of gays and lesbians to foster and adopt children became a national political issue in the mid-1980s, generating controversy across the United States. Executive agency bans on gay and lesbian parents were a product of their historical period, in which the gay rights movement came head-to-head with the rise of the Religious Right, a broad coalition of organizations devoted to promoting a Christian vision of politics. As both groups rose to national prominence, they became clear opponents in a fight over American values. At the same time, America faced a national foster care crisis, with a rapid increase in the number of children in the foster system and a corresponding need for additional homes. When social workers filled this void with gay and lesbian parents, foster care and adoption policies became one of the battlegrounds over which the left and the right waged their cultural war.

Beginning in the 1970s, the Religious Right became increasingly influential in local, state, and federal governments, creating a precarious political environment for gay rights advocates.<sup>19</sup> The Religious Right's roots can be traced back to Cold War politics and Barry Goldwater's 1964 run for president, which created a conservative bloc that led to Richard Nixon's presidency.<sup>20</sup> However, Evangelical Christians became involved only in the 1970s, in response to *Roe v. Wade*,<sup>21</sup> the Equal Rights Amendment, and the gay liberation movement, all of which seemed to attack traditional gender roles and the primacy of the nuclear family.<sup>22</sup> As Robert Self has convincingly argued, the political battles of the 1970s were waged around ideas of the family, with "conservative evangelicals creat[ing] a furor over the state of the American family without precedent in the twentieth century."<sup>23</sup> The 1976 presidential campaign, which drew increased attention to the role of Evangelicals in politics and the nation's religious resurgence, led Newsweek to declare 1976 "The Year of the Evangelical."<sup>24</sup> Evangelicals' emphasis on

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<sup>19</sup> See JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES 65, 69–72 (2002); Greg Goldin, *The 15 Per Cent Solution: How the Religious Right Is Building from Below to Take Over from Above*, VILLAGE VOICE, Apr. 6, 1993, at 19.

<sup>20</sup> DARREN DOCHUK, FROM BIBLE BELT TO SUNBELT: PLAIN-FOLK RELIGION, GRASSROOTS POLITICS, AND THE RISE OF EVANGELICAL CONSERVATISM 229–30, 332–33 (2010); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 132–36, 143–46, 211–15 (2001); AMY L. STONE, GAY RIGHTS AT THE BALLOT BOX 4–5 (2012).

<sup>21</sup> 410 U.S. 113 (1973).

<sup>22</sup> STONE, *supra* note 20, at 4–5; see also ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960s 277–78 (2013); MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE ch. 6 (2015) (describing the varied conservative responses to the *Roe* decision); Gillian Frank, "The Civil Rights of Parents": Race and Conservative Politics in Anita Bryant's Campaign Against Gay Rights in 1970s Florida, 22 J. HIST. SEXUALITY 126, 127 (2013).

<sup>23</sup> SELF, *supra* note 22, at 349.

<sup>24</sup> Kenneth L. Woodward et al., *Born Again!*, NEWSWEEK, Oct. 25, 1976, at 68; see also DOCHUK, *supra* note 20, at 365.

“traditional family values” became part of the national political conversation. As part of his presidential campaign, Jimmy Carter promised “a White House Conference on the American Family to help restore the public-private partnership in preservation of this sacred institution.”<sup>25</sup> While Carter was a Southern Baptist who attended church weekly, he did not draw a great deal of support from the Religious Right, in large part due to his centrist politics.<sup>26</sup> Instead, it was Ronald Reagan’s candidacy that inspired Evangelicals. After their support for the born-again politician propelled him into the White House, religious conservatives became a powerful force in national politics. As a testament to their influence in that presidential campaign, the Republican Party’s 1980 platform vowed to “‘protect[ ] and defend[ ] the traditional American family’ and to appoint judges ‘who respect traditional family values and the sanctity of innocent human life.’”<sup>27</sup>

The anti-gay activism of the Religious Right, which would become a hallmark of its politics, began in 1977, when Anita Bryant launched the Save Our Children voter referendum campaign to overturn Miami’s recently enacted gay rights law. That ordinance amended the city’s anti-discrimination law to include protection based on “sexual or affectional preference.”<sup>28</sup> Bryant, who was a well-known singer, spokeswoman for Coca-Cola and Florida Citrus, and former Miss America pageant contestant, argued the government should not protect the rights of homosexuals because they posed a danger to children. Bryant and the Save Our Children campaign emphasized: “[H]omosexuals cannot reproduce—so they must recruit. And to freshen their ranks, they must recruit the youth of America.”<sup>29</sup> Their rhetoric, which often equated homosexuality with pedophilia, resonated with Miami residents; almost 70% of voters approved the law’s repeal.<sup>30</sup> The success of the Miami referendum inspired a series of ballot initiatives around the country, with voters in Wichita, Kansas; Eugene, Oregon; and St. Paul, Minnesota overturning gay rights ordinances the following year.<sup>31</sup> In California, state senator John Briggs announced a statewide referendum, known as Proposition 6, to bar gay men and women from teaching in public schools.<sup>32</sup> While Briggs’ initiative was unsuccessful, it contributed to a national anti-gay atmosphere, reinforced the political reach of the Religious

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<sup>25</sup> DOCHUK, *supra* note 20, at 367.

<sup>26</sup> *See id.* at 373.

<sup>27</sup> NeJaime, *supra* note 9, at 101–02 (alterations in original).

<sup>28</sup> Frank, *supra* note 22, at 141.

<sup>29</sup> ANITA BRYANT, THE ANITA BRYANT STORY 62 (1977).

<sup>30</sup> *See* DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 299, 303–04, 308 (2001); FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA’S DEBATE ON HOMOSEXUALITY 96, 121, 123, 131 (2008).

<sup>31</sup> *See* FEJES, *supra* note 30, at 172–74, 176–77; STONE, *supra* note 20, at 14.

<sup>32</sup> *See* FEJES, *supra* note 30, at 183.



Right, and taught future conservative leaders, like Jerry Falwell and Louis Sheldon, how to run ballot measure campaigns.<sup>33</sup>

In the wake of the anti-gay initiatives, conservatives formed a number of influential new organizations, including Christian Voice, Focus on the Family, Moral Majority, and Concerned Women for America.<sup>34</sup> Their anti-gay rhetoric, when combined with the AIDS crisis, had a significant impact on Americans' views of homosexuality. The percentage of Americans who identified homosexual sex as "always wrong" rose from 73% in 1980 to 78% in 1987. Similarly, the percentage of Americans who opposed the decriminalization of consensual same-sex sodomy increased from 39% in 1982 to 55% in 1986.<sup>35</sup> These anti-gay attitudes found expression in national politics and policies. In 1987, President Reagan appointed a federal task force to analyze adoption practices and make recommendations to improve adoption procedures.<sup>36</sup> The advisory group concluded that the government should "not support adoption by homosexuals," even though it recognized the need to expand the pool of prospective adoptive parents.<sup>37</sup> Importantly, while conservatives fervently promoted anti-gay politics, the Democratic Party in the 1980s either ignored or dismissed gay and lesbian issues, beginning to advocate for gay rights only during the 1992 presidential campaign.<sup>38</sup>

As the Religious Right came to national prominence, gay and lesbian families were becoming more visible. Not only were more lesbian mothers seeking custody of their children from previous heterosexual relationships, but same-sex couples also began forming families through alternative reproductive technology.<sup>39</sup> The Lesbian Rights Project of San Francisco received few calls from lesbians interested in donor insemination in the 1970s. By 1984, however, the group received an average of thirty-five calls a month from lesbians seeking this information.<sup>40</sup> By 1989, that number had quadrupled.<sup>41</sup> The Sperm Bank of Northern California in Oakland doubled the number of its self-identified lesbian clients between 1982 and 1989.<sup>42</sup> When

<sup>33</sup> See STONE, *supra* note 20, at 14–15.

<sup>34</sup> See *id.*; see also DOCHUK, *supra* note 20, at 383–85.

<sup>35</sup> KLARMAN, *supra* note 10, at 35.

<sup>36</sup> See Lou Cannon, *Reagan Creates Panel to Foster Adoption: Move to Allay Policy and Political Concerns*, WASH. POST, Aug. 25, 1987, at A15.

<sup>37</sup> INTERAGENCY TASK FORCE ON ADOPTION, AMERICA'S WAITING CHILDREN: A REPORT TO THE PRESIDENT FROM THE INTERAGENCY TASK FORCE ON ADOPTION 34 (1988) (on file with Carl A. Kroch Library, Cornell University, National Gay and Lesbian Task Force Records, Collection No. 7301, Box 87, Folder 53) [hereinafter NGLTF].

<sup>38</sup> See GALLAGHER & BULL, *supra* note 7, at 68–73, 85–87.

<sup>39</sup> GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE 103 (2004); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1196 (2016); Gina Kolata, *Lesbian Partners Find the Means to be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13; *Mother<sup>2</sup>: Lesbian Parenting Gains New Ground in Boston*, BOS. PHOENIX, July 28, 1989 (on file with Manuscripts and Archives, Yale University, Gay and Lesbian Advocates and Defenders, Collection No. MS 1961, Box 61, Folder 14) [hereinafter GLAD].

<sup>40</sup> See RIVERS, *supra* note 13, at 174–75.

<sup>41</sup> See *id.* at 175.

<sup>42</sup> See *id.*

lesbian rights attorney Roberta Achtenberg held workshops on the legal implications of donor insemination, hundreds of women attended.<sup>43</sup> Similarly, the Lesbian Mothers' National Defense Fund in Seattle received requests for information about alternative reproduction from women all over America.<sup>44</sup> As a result of the growing numbers of gay and lesbian families, parental and domestic rights became a central focus of the LGBT rights movement in the late 1980s and early 1990s. The National Gay and Lesbian Task Force ("NGLTF") responded to this change by starting its Families Project in the late 1980s.<sup>45</sup> Also contributing to this shift was the HIV/AIDS crisis of the early 1980s, during which hospitals denied same-sex partners of those with HIV/AIDS access to their loved ones and prohibited same-sex partners from participating in the medical decision-making process.<sup>46</sup> These medical exclusions rendered the questions of marriage and family more salient to the LGBT community as a whole, helping these issues become a focal point of rights advocacy. The LGBT movement's emphasis on gay and lesbian families thus set the stage for a political clash with Evangelicals over gay and lesbian foster and adoptive parenting.<sup>47</sup>

As the Religious Right made "traditional family values" the centerpiece of its politics, and as gays and lesbians sought legal protections for their families, the foster care system was facing a crisis that made finding more homes its top priority. In the early 1970s, the number of children in foster care increased dramatically—the result of increased public awareness of child abuse and a wave of mandatory child abuse reporting laws that swept the nation in the mid-to-late 1960s.<sup>48</sup> Between 1962 and 1977, the number of foster care children almost doubled, and the amount of time children spent in foster care also grew significantly.<sup>49</sup>

In the 1970s, the foster care system became so overburdened that children languished in temporary homes, neither being returned to their families nor placed with adoptive parents. Mounting criticism produced congressional action. In 1980, Congress passed the Adoption Assistance and Child Welfare Act,<sup>50</sup> which emphasized the need for stability for foster children and provided financial incentives for state agencies to develop permanent placement plans for each of their wards. Immediately after the law's implementation, the number of foster care children dropped sharply, and the me-

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<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.* at 193; see also KLARMAN, *supra* note 10, at 51.

<sup>46</sup> See RIVERS, *supra* note 13, at 193.

<sup>47</sup> See TINA FETNER, *HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM* 79 (2008).

<sup>48</sup> See Kathy Barbell & Madelyn Freundlich, *Foster Care Today v* (2001), available at [http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf), archived at <https://perma.cc/JK92-A3BP>.

<sup>49</sup> See *id.* at 1–2, 13.

<sup>50</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, amended by Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 670 *et seq.* (2012)).

dian length of stay in foster care declined. However, this change was short-lived. By the mid-1980s, as families felt the effects of a stagnant economy and the crack cocaine and HIV/AIDS epidemics, the number of children in foster care was again on the rise, as was the average length of stay.<sup>51</sup> By 1992, there were 54% more children in foster care than there had been just six years earlier.<sup>52</sup>

As social workers struggled to place the increasing number of foster care children into homes, mental health professionals began to take stances favoring gays and lesbians serving as foster and adoptive parents. This offered a possible solution for the foster care crisis by suggesting that a new set of homes should be made available. This shift in perspective was the product of an alliance between mental health professionals and gay rights advocates that crystallized in 1973, when gay liberationists<sup>53</sup> successfully lobbied the American Psychiatric Association to declassify homosexuality as a mental illness.<sup>54</sup> Gay rights activists had made the diagnostic change a central part of their advocacy, viewing the medical diagnosis as the major impediment to gay rights claims.<sup>55</sup> As a result of their efforts, the American Psychiatric Association issued a press release that simultaneously announced its declassification decision and called on the government to protect the civil rights of gays and lesbians.<sup>56</sup> Gay rights advocates thus not only changed the way in which mental health professionals conceived of homosexuality, but also pushed scientists to consider how their work influenced the legal rights of gays and lesbians. The National Association of Social Workers (“NASW”) responded to the American Psychiatric Association’s call in 1976 by creating a Task Force on Gay Issues, which was later renamed the National Committee on Lesbian and Gay Issues. The Committee was charged with “further[ing] the cause of social justice by promoting and defending the rights of persons suffering injustices and oppression because they are lesbian [or] gay.”<sup>57</sup> It was composed of openly gay and lesbian

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<sup>51</sup> See Barbell & Freundlich, *supra* note 48, at 13.

<sup>52</sup> See *id.*

<sup>53</sup> The gay liberation movement formed in the late 1960s, replacing its “homophile” predecessor. See JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, 81, 87, 108–09, 233–35 (1983). While homophiles advocated for middle-class respectability, gay liberationists sought a radical transformation of American society. See *id.* In the 1970s, gay liberation gave way to the gay rights movement, which used the language of civil rights and promoted the view of gays and lesbians as a minority group. See Epstein, *supra* note 4, at 43–46.

<sup>54</sup> See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* ch. 4 (1981) (detailing gay activism and the decision to declassify homosexuality as a mental illness).

<sup>55</sup> See D’EMILIO, *supra* note 53, at 154, 162; Franklin E. Kameny, *Government v. Gays: Two Sad Stories with Two Happy Endings, Civil Service Employment and Security Clearances*, in *CREATING CHANGE 198–99* (John D’Emilio et al. eds., 2000).

<sup>56</sup> Press Release, Am. Psychiatric Ass’n (Dec. 15, 1973) (NGLTF, Box 164, Folder 39).

<sup>57</sup> See Nat’l Ass’n of Soc. Workers, National Committee on Lesbian, Gay, Bisexual and Transgender Issues (Sept. 2012), <https://socialworkers.org/governance/cmtes/nclgbi.asp>, archived at <https://perma.cc/V7HM-92JU>.

members, indicating that gays and lesbians were becoming a visible contingent in the social worker community. Their presence would become important as social workers became responsible for implementing anti-gay foster care and adoption regulations.

The American Psychiatric Association, American Psychological Association, and NASW consequently became involved in a number of LGBT legal efforts, including advocacy for gay and lesbian foster and adoptive parenting. In 1976, the American Psychological Association admonished that the “sex, gender identity, or sexual orientation of natural[ ] or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases.”<sup>58</sup> Recognizing this professional imperative, the NASW in 1980 issued a code of ethics that prohibited discrimination on the basis of sexual orientation.<sup>59</sup> The American Psychiatric Association followed the trend in 1986, affirming that homosexuality should not be a bar for foster parenting and citing the “wide body of clinical experience” and research studies that showed parental homosexuality did not influence child development.<sup>60</sup> By 1987, the NASW had committed itself to “working for the adoption of policies and legislation to end all forms of discrimination against gays and lesbians at the federal, state, and local levels in all institutions.”<sup>61</sup>

Mental health professionals thus came out strongly in favor of gay and lesbian foster care and adoption rights, urging social workers to make placements without regard to the prospective parents’ sexual orientation, during a period when the foster care system was in desperate need for additional homes.<sup>62</sup> At the same time, the nation was embroiled in a broader debate over the rights of gays and lesbians, with the Religious Right gaining political power and the LGBT movement increasingly focusing on questions of family law. These movements created a perfect storm in which politicians promulgated gay and lesbian foster and adoptive parenting bans that social workers opposed, setting the stage for agency nullification.

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<sup>58</sup> AM. PSYCHOLOGICAL ASS’N, COMM. ON LESBIAN & GAY CONCERNS, AMERICAN PSYCHOLOGICAL ASSOCIATION POLICY STATEMENTS ON LESBIAN AND GAY ISSUES 2 (1991) (on file with ONE National Gay and Lesbian Archives, American Psychological Association Subject File) [hereinafter ONE].

<sup>59</sup> NAT’L ASS’N OF SOC. WORKERS, LESBIAN AND GAY ISSUES (1987) (on file with Carl A. Kroch Library, Cornell University, Wendell Ricketts Papers, Collection No. 7681, Box 2, Folder 19) [hereinafter Ricketts Papers].

<sup>60</sup> *Board Discusses Treatment Book, Prospective Payment*, PSYCHIATRIC NEWS, Aug. 1, 1986, at 8.

<sup>61</sup> NAT’L ASS’N OF SOC. WORKERS, *supra* note 59.

<sup>62</sup> See RIVERS, *supra* note 13, at 70–72 (discussing social science studies on lesbian mothers). This is not to say that all social workers supported gay and lesbian foster and adoptive parents. See Section II.A. Rather, the profession as a whole encouraged social workers to combat discriminatory administrative regulations, with professional pressure mounting in the early and mid-1980s. See *supra* notes 56–61 and accompanying text.

## II. CHANGING LANDSCAPES: PLACING CHILDREN WITH GAY AND LESBIAN FOSTER PARENTS

Although national debates over lesbian and gay foster parents erupted in the mid-1980s, social service agencies had been placing children in the homes of openly gay men and women since the mid-1970s. Though these first placements were limited to adolescents who self-identified as gay or lesbian and were sexually active, they were still extremely controversial. Even before the Religious Right became a national political force, gays and lesbians were widely considered unsuitable parents because of their sexual orientation.<sup>63</sup> Many believed that gay and lesbian parents would model their homosexuality, such that their children would grow up to be homosexual themselves.<sup>64</sup> The contentious nature of the decisions to place already self-identified gay and lesbian teenagers in the homes of homosexuals indicates an even deeper discomfort with gay and lesbian foster and adoptive parenting than the vocalized objections suggest. It also illustrates civil servants' willingness to exercise their discretion in the face of widespread disapproval. Section II.A gives a brief account of agency efforts to place homosexual teenagers with gay and lesbian foster parents in the mid- to late 1970s, contextualizing the debates over gays and lesbians fostering young children discussed in Section II.B. The expansion of placements to include young children reflected the evolution in social workers' views of gays and lesbians as foster parents during the 1970s, when civil servants became increasingly willing to place children in the homes of homosexual parents and to nullify the later bans.

### A. *Limited Beginnings: Homes for Gay Teens*

Until the mid- and late 1980s, social workers limited foster placements in the homes of gays and lesbians to self-identified homosexual teenagers, a result of public pressure and uncertainty over whether parental homosexuality would have any effect on children. Although the American Psychiatric Association had declassified homosexuality as a mental illness in 1973, gays and lesbians continued to face widespread discrimination, with the public often equating homosexuality with pedophilia.<sup>65</sup> Research studies showing that parental sexual orientation had no impact on children only became available the late 1970s.<sup>66</sup>

As a result of widespread prejudice against gays and lesbians, agency officials emphasized the limited nature of such arrangements when they became public. In Illinois, when the media reported in 1973 that the state's

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<sup>63</sup> See Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 L. & HIST. REV. 487, 501–03 (2016).

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 501.

<sup>66</sup> See *id.* at 508.

Department of Children and Family Services had been placing children with gay and lesbian parents, the agency stressed that such placements were “far from an ideal solution” and used only “as a last alternative.”<sup>67</sup> It also emphasized that social workers only considered gay and lesbian foster parents when they were convinced of the teenager’s homosexuality.<sup>68</sup> As Jerome Miller, the head of the agency, explained at the time, because of “the social pressure exerted on a youngster that we label as a homosexual,” such placements “would be too great to risk unless we are quite sure of a lifelong pattern of such behavior.”<sup>69</sup> The risk Miller feared was that the adolescent was only going through a phase, and the agency’s placement would inadvertently cement what had been a temporary aberration. Illinois was not the only state to make these types of placements; California, Iowa, Maryland, New Jersey, Pennsylvania, and Virginia soon followed, as well as the District of Columbia.<sup>70</sup> In New Jersey, social workers considered such placements only for sexually experienced teenagers whose parents were unwilling to care for them because of their homosexuality.<sup>71</sup> Even in those situations, most of the adolescents continued to be placed in heterosexual homes. Other state agencies had slightly less stringent criteria. In California, for instance, a social worker placed a twelve-year-old boy with “effeminate tendencies” with a gay foster father. The adolescent enjoyed cooking, sewing, and cleaning, which many potential foster parents could not accept. One heterosexual couple was willing to foster the boy but balked at the possibility that he might one day bring home a boyfriend. The social worker chose to place the child with a gay man, even though some officials believed that “there might be time to reverse the boy’s tendencies.”<sup>72</sup> Although the bureaucrats differed on whether the adolescent’s sexual orientation was fixed, it is important to note that their decision was based on his sexual orientation as much as his gender non-conformity. Since the performance of gender roles typically served as an indicator of sexual orientation for mental health profes-

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<sup>67</sup> *Agency Reveals Kids Placed with Gay Couples*, *ADVOCATE*, Aug. 15, 1973, at 2 (ONE, Families & LGBT Subject File); *Gay Ban Claimed in Chicago Child Placement*, *ADVOCATE*, Aug. 29, 1973, at 22 (Ricketts Papers, Box 1, Folder 4); *Illinois Agency Boiling: New Row Over Gay Foster Homes*, *ADVOCATE*, July 3, 1974, at A-6 (Ricketts Papers, Box 1, Folder 4).

<sup>68</sup> See sources cited *supra* note 67.

<sup>69</sup> See *id.*

<sup>70</sup> See Lucinda Franks, *Homosexuals as Foster Parents: Is New Program an Advance or Peril?*, *N.Y. TIMES*, May 7, 1974, at 47; Lucinda Franks, *Teens Who Have Gay “Parents,”* *S.F. CHRON.*, May 30, 1974, at 22; Martin Waldron, *Homosexual Foster Children Sent to Lesbian Homes*, *N.Y. TIMES*, Nov. 27, 1979, at B2; Letter from Mary E. Howell to Rena K. Uviller (Mar. 18, 1974) (on file with Seeley G. Mudd Manuscript Library, Princeton University, American Civil Liberties Union Records, Box 3000, Folder labeled Adoption and Foster Care) [hereinafter ACLU] Letter from Franklin E. Kameny to Del Martin (Apr. 9, 1974) (on file with GLBT Historical Society, Phyllis Lyon/Del Martin Papers, Collection No. 1993-13, Box 105, Folder 1) [hereinafter Lyon/Martin Papers].

<sup>71</sup> See Waldron, *supra* note 70.

<sup>72</sup> *Families by Adoption: A Gay Reality*, *ADVOCATE*, Aug. 28, 1974, at 1 (Ricketts Papers, Box 1, Folder 4).

sionals, social workers considered the boy's effeminacy a proxy for his homosexuality.<sup>73</sup>

Social workers in some of these states made similar placements on their own initiative, while others followed formal programs. States with official policies often turned to gay rights groups, including the Mattachine Society and the NGLTF, for referrals.<sup>74</sup> After *The New York Times* printed an article about the NGLTF's referral program, the organization was "deluged by hundreds of calls, averaging about twenty a week, from agencies all around the country who wanted [the group] to find foster homes for gay children in their care."<sup>75</sup> Gay rights advocates had developed a relationship with the mental health professions since before the declassification of homosexuality as a mental illness. In relying on gay rights organizations to help identify gay and lesbian foster parents, social workers reinforced that link. Their relationship would continue to build over time, contributing to social workers' decisions to nullify bans on gay and lesbian foster and adoptive parenting in the mid-1980s.

Top-level appointed officials did not always approve of social workers placing gay youth with homosexual foster parents, foreshadowing the later debates that would divide executive agencies. In 1974, after social workers in Washington began licensing gay foster homes, Charles Morris, the newly appointed secretary of the Washington Department of Social and Health Services, proposed a regulation banning gay foster parents.<sup>76</sup> However, following two public hearings, in which the majority of the 500 speakers opposed the policy, and lobbying by gay rights activists, Morris withdrew his proposal.<sup>77</sup> Importantly, this example shows that, despite ubiquitous opposition, some individuals did support gay and lesbian foster parenting during this period. Negative publicity also produced changes in administrative policies, demonstrating the impact of public disapproval. In 1974, after the press reported that state agencies were placing self-identified homosexual adolescents with gay and lesbian parents, the director of the Oregon Department of Human Resources ordered the Children's Services Division to stop such placements.<sup>78</sup>

Some courts reviewing placement decisions also intervened, removing children from the homes of gay foster parents. In 1975, a Washington judge ordered that sixteen-year-old Bob be removed from the home of Jim Baker

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<sup>73</sup> See George, *supra* note 63, at 509.

<sup>74</sup> See Letter from Kameny to Martin, *supra* note 70.

<sup>75</sup> MICHAEL SHERNOFF, GAY FOSTER HOMES 10–11 (Dec. 1974) (NGLTF, Box 139, Folder 40); Thomas H. Smith, *Breakthrough: Gay Foster Parents*, *IT'S TIME*, June/July 1974 (Lyon/Martin Papers, Box 105, Folder 1).

<sup>76</sup> See Foster Care/Adoption (unpublished manuscript) (Lyon/Martin Papers, Box 32, Folder 17).

<sup>77</sup> See *New Rules Proposed: Seek to Block Gay Foster Homes*, *ADVOCATE*, May 22, 1974, at 8 (Ricketts Papers, Box 1, Folder 4); *Ban on Gay Foster Care Scratched from Guide*, *ADVOCATE*, July 17, 1974, at 11 (Ricketts Papers, Box 1, Folder 4).

<sup>78</sup> Foster Care/Adoption, *supra* note 76.

and Garry McCathren and placed in a juvenile detention facility until a heterosexual home could be found.<sup>79</sup> Social workers had turned to the gay couple after multiple group homes rejected the teenager because of his sexual orientation.<sup>80</sup> Despite the support of two state agencies and expert testimony from a social worker, psychiatrist, and sociologist, all of whom explained that the sexuality of Bob's foster fathers would not have an influence on Bob, the court held: "It is not a proper function of the state to encourage and foster deviant behavior. If this were followed to a logical extreme, state action could be rationalized in placing promiscuous girls with prostitutes or psychopathic youths with the mentally ill."<sup>81</sup> The decision that a detention center was more appropriate for a teenager than the home of a gay couple speaks to the deep prejudices and antipathy that gay and lesbian foster parents faced.

Many of the criticisms of these placements centered on ideas that teenage sexuality was not yet fixed and that putting children in the homes of gay men and women would seal their fate as homosexuals. Opponents of gay rights would raise these objections in a number of other battles, including later disputes over marriage equality. In the debates over adoption, Charles Socarides, a psychiatrist who led the opposition to the American Psychiatric Association's declassification of homosexuality as a mental illness, explained that "an adolescent child might be weak or malleable, and thus 'susceptible' to becoming homosexual if put into a living arrangement with adult homosexuals."<sup>82</sup> For many, the danger of a child growing up to be homosexual was too great a risk to take, even if the alternative was to forgo potential homes. To these critics, placements with gay and lesbian parents could never serve a child's best interests. Thus, although there was some leeway in placing homosexual adolescents with gay or lesbian foster parents, no agency was willing to consider placing younger children or infants with homosexuals in the 1970s.<sup>83</sup> While social workers had a great deal of flexibility in their placements, prejudice and uncertainty still limited how they were willing to exercise their discretion.

### B. *Expanded Placements in "Homes of Last Resort"*

By the mid-1980s, a number of social service agencies had expanded their placements with gay and lesbian foster parents to include heterosexual and young children, beginning a trend that would recast gays and lesbians as heads of families and support a broader struggle for gay rights. This shift

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<sup>79</sup> Randy Shilts, *Foster Homes for Gay Children: Justice or Prejudice?*, *ADVOCATE*, Dec. 17, 1975, at 11–12 (Ricketts Papers, Box 1, Folder 4).

<sup>80</sup> *Id.* at 11.

<sup>81</sup> *Id.* at 13.

<sup>82</sup> Franks, *Homosexuals as Foster Parents*, *supra* note 70; Franks, *Teens Who Have Gay "Parents," supra* note 70.

<sup>83</sup> *Families by Adoption, supra* note 72.



occurred as gays and lesbians increasingly sought to create families through adoption, and as mental health professional associations took formal positions supporting the parenting rights of gay men and women, providing a professional impetus for social workers to consider a wider range of placements in the homes of gays and lesbians.<sup>84</sup> Section II.B analyzes these early efforts, emphasizing the patchwork nature of these changes and the variability between agencies' approaches. These different policies laid the groundwork for Massachusetts' 1985 ban, which would spark a national conversation.

Although social workers were considering placing more children in the homes of gays and lesbians, few states had instituted formal policies as to whether gays and lesbians could adopt or foster children.<sup>85</sup> The one exception was Florida, which banned adoption by same-sex parents in response to Bryant's 1977 campaign to repeal Miami's anti-discrimination ordinance.<sup>86</sup> By 1985, when Massachusetts issued its controversial regulations, which directed nationwide attention to the question of gay and lesbian foster and adoptive rights, only six other states had addressed the issue in agency rules

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<sup>84</sup> Mental health associations were responding to a growing body of social science literature that showed parental homosexuality did not influence the psychosexual development of children. See George, *supra* note 63, at 507–15, 525.

<sup>85</sup> Each state structures its foster care differently, although states typically have a public agency that contracts with private placement companies to administer foster care. See Bass, *supra* note 3, at 8. The extent to which the foster care process is privatized depends on the state, with some states relying almost exclusively on private child welfare workers and others utilizing a mix of government-employed social workers and private welfare agencies. See *id.* The executive agency responsible for administering foster care might be at the state or county level, depending on the state. See *id.* at 7. When foster care is a state-level department, the governor may appoint or replace the head of the agency, adding a level of politicization to foster care. See Juliet F. Gainsborough, *Scandals, Lawsuits, and Politics: Child Welfare Policy in the U.S. States*, 3 ST. POL. & POL'Y Q. 325, 346 (2009). Although foster care is administered at the state or county level, Congress influences foster care regulations by allocating funds to agencies following federal guidelines. See Ethan M. Krasnoo, *Foster Care and Adoption*, 7 GEO. J. GENDER & L. 999, 1002 (2006).

<sup>86</sup> See *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1302–03 (11th Cir. 2004). In contrast to foster care, adoption involves parents seeking permanent custody of a child. However, the boundaries between social workers employed in adoption and foster care agencies have been elided since the 1980s, as social workers have increasingly selected foster parents who could later adopt the child should family reunification fail. Brian Simmons et al., *The Changing Face of Public Adoption Practice*, 3 ADOPTION Q. 43, 46–48 (2000). Although a significant percentage of adoptions are intra-family, others are mediated through public agencies, private companies, and unlicensed facilitators like lawyers or clergy. Regardless of the arbitrator, social workers must conduct a home study and a court must approve the adoption before it can be finalized. See Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 287–88 (2002). Parents adopting their foster children undergo the same process as other adoptive parents, as do individuals seeking to adopt the child of their same-sex partners in second-parent adoptions. Catherine Connolly, *The Voice of the Petitioner: The Experiences of Gay and Lesbian Parents in Successful Second-Parent Adoption Proceedings*, 36 LAW & SOC'Y REV. 325, 334 (2002).

or state laws.<sup>87</sup> Four of those—New York, New Jersey, New Mexico, and Vermont—prohibited discrimination based on sexual orientation.<sup>88</sup> In 1982, New York was the first to enact a non-discrimination regulation, which read: “Applicants shall not be rejected solely on the basis of homosexuality.”<sup>89</sup> The guidelines that the state issued with the new administrative rule tackled objections to homosexual parents head-on, explaining: “There is no basis for any belief that sexual contact with children or exploitation of children under their care occurs any more frequently among homosexually oriented persons than is the case with heterosexuals.”<sup>90</sup> The guidelines also defended the rule by stating, albeit with qualifications, that a parent’s homosexuality would not influence that of the child: “Not enough is known to absolutely exclude this possibility for young children, but current belief is that children who are reaching the age of puberty have already formed their preferences in this area.”<sup>91</sup> Despite its underlying premise that gays and lesbians were fit parents, the rule also maintained that social workers could consider adoptive parents’ sexual orientations to the extent they affected the child, permitting foster care and adoption agencies to discriminate against gay applicants.<sup>92</sup> Additionally, New York’s Office of Children and Family Services did not educate officials about the rule, and the Office neither monitored nor enforced its non-discrimination provision, which further compounded the potential for discrimination.<sup>93</sup>

Many agencies in states without formal regulations or legislation governing gay and lesbian foster and adoptive parenting followed unofficial policies, demonstrating the autonomy with which administrative agencies can operate. According to a 1985 survey conducted by the Massachusetts Executive Office of Human Services, twelve states had unofficial policies against placing children with homosexual parents, while fourteen, including a number of Southern states, affirmatively supported such placements.<sup>94</sup> Agencies within the latter states had licensed gay foster homes with positive results in the past, but the agencies had not publicized this information given its con-

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<sup>87</sup> See Clara Germani, *Foster Care by Homosexuals: A Survey of States and Their Policies*, CHRISTIAN SCIENCE MONITOR, June 21, 1985; see also Sandor Katz, *Fostering Equality*, OUTWEEK, Oct. 22, 1989 (Ricketts Papers, Box 1, Folder 1).

<sup>88</sup> See Katz, *supra* note 87. North Dakota prohibited placements with unmarried couples. See *id.*

<sup>89</sup> N.Y. DEP’T OF SOC. SERVS., STANDARDS OF PRACTICE FOR ADOPTION SERVICES 15 (1981) (NGLTF, Box 139, Folder 2).

<sup>90</sup> *Id.* at 17–18.

<sup>91</sup> *Id.* at 18.

<sup>92</sup> See Katz, *supra* note 87.

<sup>93</sup> See *id.*

<sup>94</sup> See Kay Longcope, *States’ Policies Differ on Issue of Gay Foster Parents*, BOS. GLOBE, May 12, 1985, at 23. The states opposing placements with gay parents were Arizona, Colorado, Connecticut, Indiana, Kansas, Kentucky, Nebraska, Nevada, Oklahoma, South Dakota, Wyoming, and the District of Columbia. See *id.* Those permitting such placements were California, Georgia, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, North Carolina, South Carolina, Vermont, and Wisconsin. See *id.*

troversial nature.<sup>95</sup> In some cases, social service agencies never asked about prospective parents' orientations despite their suspicions that the applicants were homosexual.<sup>96</sup>

To avoid discrimination, some gays and lesbians sought to adopt as single parents, rather than couples, or stayed silent about their sexual identities.<sup>97</sup> However, this could have significant consequences when their sexual orientation became known. For example, in 1979, John Kuiper came close to losing custody of his thirteen-year-old adoptive son, Aiden, after Kuiper's homosexuality became public.<sup>98</sup> Six months after the adoption, Kuiper, a former Dutch Reformed Church minister, founded Albany's first Metropolitan Community Church, a ministry for LGBT Christians, generating media accounts that publicized his sexual orientation.<sup>99</sup> The New York court that had granted the adoption re-opened the case and ordered an investigation.<sup>100</sup> After months of uncertainty, during which the court forced Kuiper and his son to submit to psychological tests, the judge ultimately let the adoption stand.<sup>101</sup>

This is not to say that gay men and women were never open about their sexual orientation during adoption proceedings, just that their candor was much rarer. David Frater made headlines in 1982 when he adopted a teenager named Kevin in California. Kevin had lived in fourteen foster homes before being placed with Frater, a marketing specialist at a computer company who lived with his mother on the outskirts of Riverside. While Frater was not the first gay man to adopt a child, his was one of the first adoptions by an openly gay man to be approved by a social services department.<sup>102</sup> The department recommended the adoption only after receiving favorable reports by three psychologists and conducting a special hearing with four social workers.<sup>103</sup> Heterosexual candidates, on the other hand, were not typi-

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<sup>95</sup> See Kevin McKinney, *How to Become a Gay Father*, ADVOCATE, Dec. 8, 1987 (ONE, Gay Fathers (1970's & 1980's) Subject File).

<sup>96</sup> See *id.*

<sup>97</sup> See David Perry, *Homes of Last Resort: Is America Dumping Its Unwanted Children on Gays Hoping to Adopt?*, ADVOCATE, Dec. 5, 1985 (Ricketts Papers, Box 1, Folder 1).

<sup>98</sup> See George Vecsey, *Approval Given for Homosexual to Adopt a Boy: Minister Providing a Good Home, Judge Decides*, N.Y. TIMES, June 21, 1979, at B1; see also Richard Cartiere, *A Damned Good Father*, MOM . . . GUESS WHAT . . ., Aug. 1979, at 11 (NGLTF, Box 141, Folder 37).

<sup>99</sup> Cartiere, *supra* note 98, at 11.

<sup>100</sup> *Id.*; Vecsey, *supra* note 98.

<sup>101</sup> Vecsey, *supra* note 98; see also Cartiere, *supra* note 98, at 11.

<sup>102</sup> See Judith Cummings, *Homosexual Views Adoption Approval as Victory*, N.Y. TIMES, Jan. 3, 1982, at A8.

<sup>103</sup> Chris Bowman, *Gay Man Sues County to Adopt His Foster Son*, PRESS-ENTER. (Riverside, C.A.), (ONE, Custody of Children Subject File).

cally required to undergo any psychological evaluations.<sup>104</sup> Their applications were also approved much more quickly.<sup>105</sup>

In the absence of statewide policies, practices varied across counties as agencies exercised their discretion to grant or deny gay and lesbian couples' applications. In some cases, agency practices conflicted. Different agencies, for example, could apply opposing policies in the same county. In California, the Los Angeles Department of Adoptions, a municipal agency, approved openly gay parents, while the Los Angeles Adoption Operations Bureau, a state government department, rejected homosexual applicants. The state agency, which supervised international adoptions, based its position on the fact that foreign agencies mandated adoptions by married couples.<sup>106</sup> Even within the same agency, different county offices sometimes took conflicting stances. The Sacramento office of the Adoption Operations Bureau, unlike its Los Angeles counterpart, instituted a non-discrimination policy and approved openly gay applicants.<sup>107</sup> Officials in the Adoption Operations Bureau were aware of the intra-agency conflict but, absent a statewide rule, refused to force the departments to follow a single policy. This sanctioned difference illustrates the relative autonomy both among and within executive agencies.

By 1985, when Massachusetts promulgated its divisive ban, many adoption officials supported gay and lesbian foster and adoptive parenting for theoretical, personal, and practical reasons.<sup>108</sup> Social science research had established that parental homosexuality did not impact a child's future sexual orientation, which persuaded mental health professional associations to issue statements supporting gay and lesbian foster care and adoptive rights. Even before this research became available, professional associations of social workers, like the NASW, had taken strong stances in favor of gay and lesbian rights. While professional organizations called for equality, gay and lesbian parents offered homes for hard-to-place children—older children or those with developmental delays, psychological issues, or physical disabilities.<sup>109</sup> The frequency with which social workers assigned special needs children to gay and lesbian families prompted the gay magazine *The Advocate* to run an article provocatively headlined: "Homes of Last Resort: Is America Dumping Its Unwanted Children on Gays Hoping to Adopt?"<sup>110</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> The Riverside Department of Public Social Services ("DPSS") typically took six months to a year to evaluate a child placement before making a recommendation on the adoption. In Frater's case, it took almost two years. *Id.*

<sup>106</sup> See FRANK GALVAN, GAYS AS ADOPTIVE PARENTS: A STUDY CONTRASTING POLICIES IN PUBLIC ADOPTION AGENCIES IN LOS ANGELES COUNTY 2 (1980) (ONE, Adoption by Gays or Lesbians Subject File).

<sup>107</sup> See *id.* at 3.

<sup>108</sup> See Germani, *supra* note 87, at 3.

<sup>109</sup> See MASS. EXEC. OFF. OF HUM. SERVS., REVIEW OF STATES' POLICIES REGARDING FOSTER PLACEMENTS 7 (1985) (Ricketts Papers, Box 1, Folder 11).

<sup>110</sup> Peiry, *supra* note 97.

The piece cited adoption experts who admitted that gay parents would often be given “harder children,” including “crack babies” and infants with AIDS, because their homes were considered a last resort.<sup>111</sup> Roberta Achtenberg provided a more sympathetic explanation, arguing that gay and lesbian parents would often be asked to take in a child with HIV because these parents were familiar enough with the disease to know that the child did not pose a medical threat to the others in the home.<sup>112</sup> Regardless of the reasoning, children with special needs often ended up placed with gay and lesbian parents, leading historian Laura Briggs to argue that gays and lesbians served as a “safety valve” for the neoliberal state by fostering hard-to-place children that the state was unwilling to support.<sup>113</sup>

Although many social workers supported placements with gay and lesbian parents, not all of them did. In states with non-discrimination policies, social workers seeking to avoid such placements would cite other reasons to deny same-sex parents’ applications.<sup>114</sup> According to Paula Ettlbrick, then a staff attorney at Lambda Legal Defense and Education Fund, social workers who opposed the placements would highlight negative factors that would normally have gone unmentioned in the cases of heterosexual applicants.<sup>115</sup> As a result of their conflicting views, social workers within departments and agencies sometimes battled one another over placement decisions. In 1986, a social worker in San Francisco’s adoption unit matched a three-and-a-half-year-old child with Steven Fritsch Rudser, a gay man. The child’s social worker refused to read the Rudser home study,<sup>116</sup> describing the placement as inappropriate and implying that the child would grow up to be homosexual.<sup>117</sup> When the social worker visited Rudser’s home, she indicated that “she did not want to touch anything for fear of contracting AIDS [and] grilled him on his sexual history.”<sup>118</sup> After obtaining a recommendation for

<sup>111</sup> See *id.* at 46–47.

<sup>112</sup> See *id.*

<sup>113</sup> LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 242, 264–65 (2012).

<sup>114</sup> See McKinney, *supra* note 95; Letter from Richard A. Barnett (Apr. 16, 1981) (ONE, Adoption by Gays or Lesbians Subject File); Interview by Wendell Ricketts with Brian Quinn (Nov. 18, 1986) (Ricketts Papers, Box 2, Folder 12).

<sup>115</sup> McKinney, *supra* note 95. Ettlbrick did not provide any examples of what these factors could be. *Id.*

<sup>116</sup> Home studies are thorough investigations of the prospective parent, which require social workers to obtain written profiles, medical histories, background checks, and references of the petitioner. The home study also includes the social worker’s recommendation as to whether the court should approve the adoption. See Emily Duskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 6 (1999); see also Connolly, *supra* note 86, at 333.

<sup>117</sup> Interview by Wendell Ricketts with Steven Fritsch Rudser 3 (July 31, 1988) (Ricketts Papers, Box 2, Folder 12) (recounting the child welfare worker “said that because [Rudser] was gay, it would be inappropriate [to place the child with Rudser] and that this child would be especially vulnerable because of his background”).

<sup>118</sup> RIVERS, *supra* note 13, at 185; see also Interview, *supra* note 117, at 3–4.

the placement from a psychologist, those in the adoption unit who supported the match prevailed, and the child went to live with Rudser.

Statewide policies were rare in this quickly changing landscape of gay and lesbian foster and adoptive parenting. Although agencies had engendered controversy when they placed gay and lesbian teens in the homes of homosexual parents, social workers soon expanded the scope of those placements to include children of all ages and sexual orientations. This was a response both to a need for more foster and adoptive families, as well as to professional mandates that urged social workers not to discriminate on the basis of sexual orientation. However, these placements quickly created a political firestorm, as battles between the Religious Right and gay rights movement rendered foster care and adoption policies a national political issue.<sup>119</sup> These vociferous debates prompted executive policies banning gay and lesbian foster and adoptive parenting, which clashed with the views of social workers charged with implementing the regulations. Bureaucrats responded by challenging the laws, subverting the rules, and nullifying the bans. Social workers' unwillingness to accede to discriminatory policies would eventually help shift public opinion about gays and lesbians, casting them as parents and heads of family deserving of all legal protections, including the right to marry.

### III. THE MASSACHUSETTS CONTROVERSY: SOCIAL WORKERS VOICE THEIR OPPOSITION

It was in this context—as agencies across the country placed more and more children in gay and lesbian foster homes—that the Massachusetts controversy erupted. It started a nationwide debate and created divisions within the state executive branch. Part III analyzes how and why the Massachusetts ban emerged, as well as the opposition it engendered. This Part also describes how social workers vocalized their objections and participated in the lawsuit that overturned the policy. Unlike their counterparts in New Hampshire and California, bureaucrats in Massachusetts did not go as far as to nullify the law, possibly because the Massachusetts controversy was the first time that gay and lesbian foster and adoptive parenting emerged as a matter of national debate. Social workers in other states would learn from their Massachusetts colleagues how difficult it was to effectuate change, which may have spurred civil servants in New Hampshire and California to accelerate the process through outright defiance. Although social workers in Massachusetts implemented the ban once it was in place, they voiced their opposition clearly and made their objections part of the political debate. In doing so, they helped shift American public discourse about homosexuality by emphasizing that gays and lesbians could be suitable parents. Section III.A explains the origins and provisions of the rule, before analyzing how

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<sup>119</sup> See *supra* Part I.

agency bureaucrats organized in opposition to the ban in Section III.B. Section III.C details how social workers ultimately helped change the law.

### A. *Instituting the Ban*

The ban emerged as a response to a May 8, 1985, *Boston Globe* article reporting the state's approval of a gay male couple as foster parents for two young boys.<sup>120</sup> The fathers were Donald Babets, a Sunday school teacher who worked for the Boston Fair Housing Commission, and his partner of nine years, David Jean, a church musical director and business manager of a home for single mothers.<sup>121</sup> The couple had undergone an eleven-month review and successfully completed six weeks of training before being approved as foster parents.<sup>122</sup> As the state's first openly gay couple to be licensed as foster parents, top social services officials were involved in reviewing their application.<sup>123</sup> Although the Department of Social Services ("DSS") originally planned to place only adolescent gay foster children in the couple's home, a social worker later asked them to foster two physically abused boys whose mother had consented to the placement.<sup>124</sup> Two weeks after welcoming the boys, *The Boston Globe* printed a story, headlined "Some Oppose Foster Placement with Gay Couple."<sup>125</sup> The article focused on whether gay foster parents were appropriate and quoted neighbors and community members who criticized the placement.<sup>126</sup> That afternoon, DSS removed the children, citing concerns that the publicity would be harmful to their well-being.<sup>127</sup> While Governor Michael Dukakis denied being involved, anonymous sources in his administration claimed that he had personally ordered the children's removal.<sup>128</sup> The decision to remove the children fanned the flames of the story, and reporters and camera crews descended upon Jean and Babets' home.<sup>129</sup> Every day for several weeks, the *Globe* ran

<sup>120</sup> See Kenneth J. Cooper, *Some Oppose Foster Placement with Gay Couple*, BOS. GLOBE, May 8, 1985, at 21, 24.

<sup>121</sup> See Ellen Goodman, *Children's Needs*, S.F. EXAMINER, May 31, 1985.

<sup>122</sup> See *id.*

<sup>123</sup> See Kenneth J. Cooper, *Placement of Foster Children with Gay Couple Is Revoked*, BOS. GLOBE, May 9, 1985, at 1, 9.

<sup>124</sup> See Kay Longcope, *Gay Couple Express Anger, Grief and Hope: Media, Politics Blamed in Loss of Boys*, BOS. GLOBE, May 16, 1985, at 1.

<sup>125</sup> WENDELL RICKETTS, *LESBIANS AND GAY MEN AS FOSTER PARENTS* 68 (1991); Cooper, *supra* note 120, at 21.

<sup>126</sup> Cooper, *supra* note 120, at 21, 24.

<sup>127</sup> See Scot Lehigh & Neil Miller, *The Damage Done: The Breaking of a Foster Family*, BOS. PHOENIX, May 21, 1985 (on file with The History Project, March on Washington – Gay and Lesbian Defense Committee Collection, Collection No. 5, Box 1, Folder labeled Newspaper Clippings: n.d., 1983–1985) [hereinafter GLDC].

<sup>128</sup> See Mark Johnston, *State Pulls Foster Kids from Gay Male Couple*, BAY WINDOWS, May 17–23, 1985 (Ricketts Papers, Box 1, Folder 11); see also Mark Johnston, *Anti-Dukakis Feelings Explode on DSS Issue*, BAY WINDOWS, June 7, 1985 (GLDC, Box 1, Folder labeled Newspaper Clippings: n.d., 1983–1985); Lehigh & Miller, *supra* note 127.

<sup>129</sup> See Lehigh & Miller, *supra* note 127.

articles on the placement and Massachusetts' foster care policies, as well as editorials by both opponents of the placement and gay and lesbian rights advocates.<sup>130</sup> The media reports revealed that Massachusetts—like most states—did not have an official policy on gay and lesbian foster parents.<sup>131</sup>

A little more than two weeks after the initial *Globe* article had appeared, DSS issued guidelines banning gay and lesbian foster parents, causing a deep division between agency heads and DSS social workers. The new policy instituted a hierarchy for all placements, which Human Services Secretary Philip Johnston described as endorsing “traditional family settings.”<sup>132</sup> Johnston had been appointed by Dukakis in 1984 after beginning his fifth consecutive term as a representative in the state legislature.<sup>133</sup> According to the new policy, children were to be placed with relatives, and when this option was unavailable, the preference was placement with a married couple, ideally one “with parenting experience and time available for parenting.”<sup>134</sup> The next alternate was a single parent, followed by an unmarried couple, but these options required the written approval of the Social Services Commissioner.<sup>135</sup> While the policy did not mention sexual orientation, both Secretary Johnston and DSS Commissioner Marie Matava, whom Dukakis had also appointed, stated that placement with gay or lesbian foster parents was “highly unlikely.”<sup>136</sup>

The policy consequently became known as a ban on gay and lesbian foster parents.<sup>137</sup> Social workers reported that supervisors and administrators discouraged them from recommending foster care placements in the homes of gays or lesbians.<sup>138</sup> The additional paperwork required for placement with single parents or unmarried couples, along with the reputational effect of violating the implicit ban, further discouraged social workers from testing the policy.<sup>139</sup> In a 2014 interview, Johnston maintained that he never intended the policy to serve as a prohibition on gay and lesbian foster parents,

<sup>130</sup> See RICKETTS, *supra* note 125, at 69.

<sup>131</sup> Longcope, *supra* note 94, at 23; *see also* Kenneth J. Cooper, *Officials Check Other States' Policies on Foster Care*, BOS. GLOBE, May 16, 1985, at 15.

<sup>132</sup> Kenneth J. Cooper, *New Policy on Foster Care: Parenting by Gays All But Ruled Out*, BOS. GLOBE, May 25, 1985, at 24.

<sup>133</sup> *See* About Us: Philip W. Johnston, JOHNSTON ASSOCS., <http://www.pwjohnston.com/#!blank/hfeti> (last visited Sept. 17, 2014), *archived at* <https://www.perma.cc/UMV8-QNGD>.

<sup>134</sup> Mass. Dep't of Soc. Servs., 110 CMR § 7-101 (1986) (GLDC, Box 1, Folder labeled New DSS Regulations, 1986).

<sup>135</sup> *Id.*

<sup>136</sup> Cooper, *supra* note 132, at 24; Christine Guilfooy, *Outrage Grows Against Gay Foster Policy*, GAY COMMUNITY NEWS, June 8, 1985 (GLDC, Box 1, Folder labeled Newspaper Clippings: n.d., 1983–1985); Teresa M. Hanafin, *State Social Services Chief to Be Sworn In*, BOS. GLOBE, July 19, 1991.

<sup>137</sup> Cooper, *supra* note 132, at 24; Guilfooy, *supra* note 136.

<sup>138</sup> *See* Anita Diamant, *In the Best Interest of the Children: A Recent Controversy Raises Questions About the State's Foster Care System—and What Constitutes an American Family*, BOS. GLOBE MAG., Sept. 8, 1985, at 14, 92, 96.

<sup>139</sup> Interview by Wendell Ricketts with Kevin Cathcart 4–5 (Oct. 1986) (Ricketts Papers, Box 2, Folder 12).



whom he believed to provide viable placements.<sup>140</sup> As a result, he explained, he deliberately avoided referencing sexual orientation in the rule.<sup>141</sup> He additionally stated that, in “[t]he implementation of the policy by the department, which Marie Matava and I supervised, we were very clear to social workers and said they were not to consider sexual preference,” and that Matava approved gay and lesbian foster parents while the policy was in place.<sup>142</sup> Even if Johnston’s assertions were true, the policy was nevertheless widely understood and discussed—including within the Dukakis administration—as a ban on gay and lesbian foster parents.<sup>143</sup>

The political context, particularly Dukakis’ need to project a conservative image, helps explain the ban’s implementation. In 1978, after serving one term in office, Dukakis lost the gubernatorial race to conservative Democrat Edward J. King.<sup>144</sup> Throughout the race, King portrayed Dukakis “as a big-spending liberal who was antibusiness and soft on crime.”<sup>145</sup> While Dukakis defeated King in the 1982 election, he nevertheless moved toward the political center during his second term to ensure his re-election.<sup>146</sup> This shift paid off, with Dukakis’ popularity reaching an all-time high in 1985.<sup>147</sup> The foster care controversy helped Dukakis cultivate a conservative air, which increased his appeal as a candidate for national office.<sup>148</sup> As Kevin Cathcart, the Gay and Lesbian Advocates and Defenders attorney representing Babets and Jean, cynically explained, “one of the last acceptable ways to pull back from liberalism and still be called liberal is by fag-bashing. So you don’t lose your liberal credentials on policy issues, but you reassure middle America . . . .”<sup>149</sup> Less than two years after the foster care issue surfaced, Dukakis announced his campaign for President.<sup>150</sup>

In addition, while Dukakis was a liberal Democrat, he opposed gay rights advocates on a number of issues. Gay and lesbian rights groups criti-

<sup>140</sup> Telephone Interview with Philip Johnston (Oct. 22, 2014).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See sources cited *supra* note 136; Kay Longcope, *Foster-Care Ban on Gays is Reversed*, BOS. GLOBE, April 5, 1990, at 1.

<sup>144</sup> See Andrew J. Dabilis, *Some Liberal Groups Now Rap Dukakis: Old Allies Say He Abandoned Ideals*, BOS. GLOBE, Mar. 15, 1986, at 1 (GLDC, Box 1, Folder labeled Information Packet: “Dukakis is No Friend . . .”); Eric E. Rofes, *Dukakis Places a Low Priority on Gay Rights*, BAY WINDOWS, Sept. 27–Oct. 10, 1984 (GLDC, Box 1, Folder labeled Information Packet: “Dukakis is No Friend . . .”).

<sup>145</sup> Dabilis, *supra* note 144.

<sup>146</sup> See GAY & LESBIAN DEFENSE COMM., IS DUKAKIS REALLY INTERESTED IN THE WELFARE OF MASSACHUSETTS OR ONLY IN REELECTION? (GLDC, Box 1, Folder labeled Denmark Campaign – Miscellaneous).

<sup>147</sup> See Jonathan Wells, *Anger on the Left: Recent Decisions Dismay Progressives, But Dukakis Remains Politically Strong*, BOS. TAB, July 2, 1985 (GLDC, Box 1, Folder labeled Information Packet: “Dukakis is No Friend . . .”).

<sup>148</sup> See *id.*

<sup>149</sup> See Interview, *supra* note 139, at 7.

<sup>150</sup> See Eric E. Rofes, *A Dukakis Presidency: Selling Gay Issues Down the River*, EDGE, May 27, 1987 (GLDC, Box 1, Folder labeled Information Packet: “Dukakis is No Friend . . .”).

cized the governor for his failure to promote a sexual orientation non-discrimination bill that languished in the Massachusetts legislature for seventeen years before its passage in 1987.<sup>151</sup> They also criticized Dukakis because he did not appoint openly gay individuals to his staff or election committee and opposed the Democratic Party's efforts to reach out to gays and lesbians.<sup>152</sup> Dukakis drew the most ire from the gay community, however, for failing to include funding for AIDS education or research in both his 1985 and 1986 state budgets.<sup>153</sup> Dukakis' perceived homophobia prompted one gay magazine to compare him to Anita Bryant.<sup>154</sup> While some gay leaders saw him as the best available candidate and supported Dukakis in his bid for the 1988 Democratic Party Presidential nomination, many gay and lesbian protesters followed Dukakis along his entire campaign trail.<sup>155</sup>

The foster care policy not only promoted Dukakis' political career, but also found support from other Massachusetts elected officials, many of whom also opposed gay and lesbian rights.<sup>156</sup> After Dukakis announced his policy, the state House of Representatives overwhelmingly signaled its approval by passing a budget provision that prohibited DSS from placing foster children in the homes of gay parents.<sup>157</sup> The Senate version tempered the prohibition, requiring only that DSS "place children in need of foster care exclusively in the care of those persons whose sexual orientation presents no threat to the well-being of the child."<sup>158</sup> State representatives continued to enact budget amendments restricting the placement of children in the homes of gays and lesbians in the years that followed, even despite passing a bill prohibiting discrimination on the basis of sexual orientation in 1987.<sup>159</sup> Rep. Andrew S. Natsios, who voted for both the civil rights bill and the prohibi-

<sup>151</sup> See *Gays vs. Dukakis*, GUIDE TO GAY NEW ENG., July 1985, at 8 (GLDC, Box 1, Folder labeled Information Packet: "Gays vs. Dukakis"); see also LESBIAN & GAY RIGHTS CHAPTER OF THE AM. CIVIL LIBERTIES UNION OF S. CALIF., ACLU NEWS 4 (Dec. 1989) (on file with ONE National Gay and Lesbian Archives, American Civil Liberties Union of Southern California Lesbian and Gay Rights Chapter Records, Collection No. 2007-013, Box 17, Folder 8) [hereinafter ACLU CLGR].

<sup>152</sup> See *Gays vs. Dukakis*, *supra* note 151, at 7-9; Johnston, *Anti-Dukakis Feelings Explode*, *supra* note 128.

<sup>153</sup> See *Gays vs. Dukakis*, *supra* note 151, at 7.

<sup>154</sup> See *id.* at 6.

<sup>155</sup> See Joan Vennoch & Bruce Mohl, *Gays Target Dukakis' Campaign*, BOS. GLOBE, May 25, 1987, at 1; John Ward, *Gays Vote in Michigan, Illinois and Florida*, PHILA. GAY NEWS, Apr. 1-7, 1988 (GLDC, Box 1, Folder labeled Newspaper Clippings, Dukakis Campaign, 1987).

<sup>156</sup> See Patti Doten, *They Want a Chance to Care: Gay Couple Still Hurts From Decision That Took Away Their Foster Children*, BOS. GLOBE, Sept. 27, 1990, at 85.

<sup>157</sup> See Diamant, *supra* note 138, at 89; Frank Phillips & Beverly Ford, *House: Gay Home No Place for Foster Kids*, BOS. HERALD, May 24, 1985 (NGLTF, Box 88, Folder 40).

<sup>158</sup> Kenneth J. Cooper, *Foster-Care Resolution Is Voted in Senate*, BOS. GLOBE, June 4, 1985, at 17 (internal quotation marks omitted).

<sup>159</sup> See Chris Black, *Mass. House Endorses Bill on Gay Rights by 13 Votes*, BOS. GLOBE, May 6, 1987, at 1; Press Release, Coalition for Lesbian & Gay Civil Rights, Massachusetts Becomes Second State in Nation to Pass Gay Rights Bill (Nov. 6, 1989) (on file with ONE National Gay and Lesbian Archives, Coalition for Lesbian and Gay Rights (New York, NY) Records, Collection No. 2011.027).

tion on placing children in the homes of gay foster parents, explained his position as distinguishing between tolerating and endorsing homosexuality. As he told a *Boston Globe* reporter in 1985, “[t]here’s a difference between toleration of the gay lifestyle, which I abhor personally from a religious viewpoint, and endorsing it, [between] saying that we should leave someone alone and saying that we should go out and seek gay foster parents.”<sup>160</sup> While Rep. Natsios distinguished between non-discrimination and affirmative recognition, many others simply drew a line when children were involved, fearing that gay men and women would perpetrate an unspecified harm to children.<sup>161</sup>

### B. *Opposition to the Placement Hierarchy*

The hostility with which Massachusetts officials addressed gay and lesbian foster and adoptive parenting not only illustrates the limited political influence of gays and lesbians in the mid-1980s, but also makes clear how remarkable it was for bureaucrats to challenge the executive policy. Section III.B analyzes why civil servants disagreed with the placement hierarchy and how they lobbied for change. Social workers’ emphatic support of gays and lesbians as parents not only challenged social norms, but also helped recast popular understandings of gays and lesbians in ways that would later further other gay rights claims.

The placement hierarchy produced significant opposition within DSS, creating a conflict between the governor and the civil servants charged with executing his policies. The bureaucrats had support from outside DSS; in the wake of its announcement, Dukakis’ office received a great deal of correspondence from citizens, professionals, and academics arguing against the policy.<sup>162</sup> At hearings on the proposed regulations, which generated hundreds of pages of transcribed testimony, almost all of the speakers, including psychiatrists, psychologists, social workers, and social service agency representatives, opposed the policy.<sup>163</sup> The Gay and Lesbian Defense Committee (“GLDC”), a lobbying organization formed in response to Dukakis’ foster care policy, also organized public marches and rallies, including an overnight sit-in outside of the governor’s office.<sup>164</sup> The group brought together a vast coalition of interested parties, including gay rights activists, lawyers,

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<sup>160</sup> Donna Bryson, *Foster-Care Debate Could Hurt Gay Rights Bill*, BOS. GLOBE, June 27, 1985, at 25.

<sup>161</sup> Cooper, *supra* note 158, at 17.

<sup>162</sup> See Margaret S. Fearey, *The New Foster Care Regulations: Presumption and Legal Fictions*, Bos. B.J., Mar./Apr. 1986, at 13 (NGLTF, Box 88, Folder 56); see also Doten, *supra* note 156, at 85; Renee Loth, *State’s Gay Foster Care Policy Politically Based, Memos Show*, BOS. GLOBE, Aug. 19, 1988, at 22.

<sup>163</sup> See Transcript of DSS Public Hearing (Aug. 22, 1985) (GLDC, Box 1, Folder labeled DSS Public Hearing – 1985).

<sup>164</sup> Christine Guilfooy, *Foster Policy Activists Keep Pressure on Dukakis*, GAY COMMUNITY NEWS, July 6, 1985 (GLDC, Box 1, Folder labeled Newspaper Clippings: n.d., 1983–1985).

gay and lesbian parents, former foster children, and prospective foster parents.<sup>165</sup> In keeping with gay rights advocates' previous collaboration with mental health professionals, the GLDC also worked with social workers and psychologists, making their perspectives central to its arguments.<sup>166</sup> At a ninety-minute meeting between the GLDC and Dukakis to discuss the policy, Diana Waldfoegel, dean of the Simmons College School of Social Work, provided the governor with copies of seventy-five studies that undermined his policy.<sup>167</sup> Waldfoegel's three inches of clinical evidence physically dwarfed the two pages of Dr. Benjamin Spock's book on childrearing that the governor's office used to justify the regulations.<sup>168</sup> Notably, Spock himself opposed the policy and argued that Dukakis had taken his work on gender roles and the importance of two-parent households out of context.<sup>169</sup>

In addition to the GLDC's efforts, major professional organizations, including those representing social workers, united to oppose the ban. Immediately after the Dukakis administration announced the rule, the Massachusetts Association for Mental Health, the Massachusetts Human Services Coalition, the Massachusetts Psychological Association, and the Massachusetts chapter of the National Association of Social Workers ("MNASW") organized a forum at which representatives from forty human services organizations denounced the policy.<sup>170</sup> The criticisms emphasized the necessity of selecting foster parents on a case-by-case basis, with the children's needs serving as the most important consideration.<sup>171</sup> This argument side-stepped proponents' claims that foster care was not a civil right that gays and lesbians could claim and promoted the expert authority of social workers and other child welfare professionals.<sup>172</sup> Speakers further asserted that gay foster parents were not more likely to sexually abuse their

<sup>165</sup> See *id.*; see also Gay & Lesbian Defense Comm., Speaker's Fact Sheet (Aug. 1, 1985) (GLDC, Box 1, Folder labeled GLDC Speakers Fact Sheet).

<sup>166</sup> See Gay & Lesbian Defense Comm., Fact Sheet (May 28, 1985) (Ricketts Papers, Box 1, Folder 11); Guilfooy, *supra* note 164.

<sup>167</sup> See Gay & Lesbian Defense Comm., Facts of Interest (GLDC, Box 1, Folder labeled Facts of Interest Concerning Proposed D.S.S. Foster Care Policy). The Gay and Lesbian Defense Committee described the studies as ones "which support gay and lesbian parents, and none which support the Governor's policy," but did not provide any additional information on the evidence Waldfoegel proffered. *Id.*

<sup>168</sup> See Guilfooy, *supra* note 136. See generally BENJAMIN SPOCK, *BABY AND CHILDCARE* (4th ed. 1976).

<sup>169</sup> See Sarah C. Holmes, *The Year in Review: The Gay and Lesbian Defense Committee vs. the DSS Foster Care Policy*, BAY WINDOWS, June 5, 1986 (GLDC, Box 1, Folder labeled Newspaper Clippings 1986-1990); see also Press Release, Gay & Lesbian Defense Comm., Dr. Benjamin Spock Opposes Foster Care Policy (May 16, 1986) (GLDC, Box 1, Folder labeled Press Release/Information - Denmark Campaign).

<sup>170</sup> See Civil Liberties Union of Mass. ("CLUM"), *Law Suit to Challenge DSS Foster Child Placement Policy*, DOCKET, Aug. 1985 (Ricketts Papers, Box 1, Folder 11); see also Gay & Lesbian Defense Comm., *supra* note 165.

<sup>171</sup> CLUM, *supra* note 170.

<sup>172</sup> Cf. ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* chs. 2-4 (1988) (analyzing the development of professions and arguing that professions gain legitimacy from claims of expertise and exclusive jurisdiction).

charges or raise homosexual children than heterosexual parents.<sup>173</sup> Indeed, Helen Clinton, representing the MNASW, charged the Dukakis administration with “perpetuat[ing] myths about gay people that the government ought to be dispelling.”<sup>174</sup>

In arguing against the policy, mental health professionals cited their expertise and social science evidence to claim authority over elected officials. Supporting their arguments was a study of foster care that Dukakis himself had commissioned in 1975 in response to allegations of sexual abuse of children by foster fathers. It concluded “that alleged or professed homosexuality” could not in and of itself be used as “evidence of unsuitability as a foster parent.”<sup>175</sup> In announcing the new regulations, the Dukakis administration had justified its decision on the basis of scientific expertise, explaining that it had consulted with national and local child welfare experts, as well as clinicians and social workers.<sup>176</sup> However, the experts with whom Dukakis met—including representatives from the Massachusetts Psychological Association, Massachusetts Psychiatry Society, American Public Welfare Association, and Child Welfare League of America, as well as caseworkers from DSS, Department of Mental Health, and Department of Youth Services—informing him there was no evidence to support the view that “traditional” families were the most suitable placements.<sup>177</sup> Faced with this evidence from mental health professionals supporting gay and lesbian foster parents, Dukakis still announced that “tradition was upheld because ‘there is no solid evidence one way or another’ on the effects of gay foster parenting.”<sup>178</sup> Dukakis discounted the social science evidence that civil servants presented, maintaining that “‘the vast majority of people in this state and across this country’ share[d] his belief in traditional families.”<sup>179</sup>

While opposition came from all types of mental health professionals and social scientists, social workers were especially active in protesting the regulations. The reason was likely that social workers, more than any other child welfare specialists, were the ones who would have to implement the policy. Professional organizations of social workers—including the NASW, the Greater Boston Association of Black Social Workers, and the Service

<sup>173</sup> See Scott Lehigh & Neil Miller, *Dukakis’s Foster Failure: A Policy in Shambles*, Bos. PHOENIX, July 2, 1985 (NGLTF, Box 88, Folder 40). Social scientists began publishing studies in the late 1970s showing that parental sexual orientation did not influence that of their children. See George, *supra* note 63, at 503–04, 507–08 (discussing the emergence of social science literature and how it became accepted in lesbian mother custody cases).

<sup>174</sup> See Lehigh & Miller, *supra* note 173.

<sup>175</sup> Memorandum from Beth I. Warren, Assistant Comm’r, Office of Soc. Servs., to Staff, Dep’t of Pub. Welfare, at 3 (Mar. 3, 1976) (Ricketts Papers, Box 1, Folder 19).

<sup>176</sup> See Guilfooy, *supra* note 136.

<sup>177</sup> See *id.*

<sup>178</sup> Cooper, *supra* note 132, at 24.

<sup>179</sup> *Id.*; see also Kenneth J. Cooper, *Policy Debate on Gay Foster Care is Just Beginning*, Bos. GLOBE, May 26, 1985, at 22. Social science research studies arguing that homosexual parents were harmful to children were not published until after the Massachusetts controversy had subsided. See George, *supra* note 63, at 521–22.

Employee's International Union, which represented Massachusetts social workers—organized their members in opposition to the ban.<sup>180</sup> In addition to speaking at rallies and issuing statements denouncing Dukakis' policy, the MNASW also became complainants in a lawsuit challenging the new regulations.<sup>181</sup>

Not only did social workers disagree with the assumptions underpinning the placement hierarchy, but the regulations also undermined their professional expertise, engendering even stronger opposition. Instead of leveraging their skills as professionals to determine the needs of the child and assess the benefits of a particular placement, the new regulations charged social workers with identifying traditional homes and making recommendations based on where the foster parents fit within the policy's hierarchy.<sup>182</sup> Their training and education became irrelevant, and their time was relegated to filling out an increasing number of forms.<sup>183</sup> Dukakis' policy challenged social workers' conceptions of themselves as mental health experts, an especially troubling effect given the profession's long struggle to establish its authority as a mental health discipline.<sup>184</sup>

Although social workers objected to discrimination against gay parents, which the NASW code of ethics prohibited, they were also concerned by the limitations that the regulations imposed on single parents.<sup>185</sup> While the Dukakis administration developed the placement hierarchy to prevent gays and lesbians from fostering children, the policy inadvertently excluded many heterosexual single parents by using "traditional family settings" as a proxy for heterosexuality. Approximately one third of foster homes in Massachusetts were headed by single adults; in Boston, that figure reached fifty percent.<sup>186</sup> Social workers feared that the policy would aggravate the existing shortage of homes for difficult-to-place children, particularly adolescent and special-needs children.<sup>187</sup> Some social workers criticized the regulations for discriminating against foster parents of color, who were more often single, charging the Dukakis administration with implementing a "culturally inappropriate" policy.<sup>188</sup> At the time of Dukakis' announcement, DSS was in the

<sup>180</sup> See Fearey, *supra* note 162, at 13 n.7; see also Guilfooy, *supra* note 164.

<sup>181</sup> Complaint, *Babets v. Dukakis*, C.A. No. 81083 (Mass. Super. Ct.) (Ricketts Papers, Box 1, Folder 11); see also Press Release, Mass. Chapter of the Nat'l Ass'n of Soc. Workers, Statement on Proposed New DSS Foster Care Regulations (Nov. 25, 1985) (Ricketts Papers, Box 1, Folder 11).

<sup>182</sup> See LOCAL 509, REPORT OF THE S.E.I.U. LOCAL 509 D.S.S. FOSTER EQUALITY TASK FORCE 2-3 (Oct. 3, 1985) (Ricketts Papers, Box 1, Folder 11).

<sup>183</sup> See *id.*; see also Diamant, *supra* note 138, at 96.

<sup>184</sup> As Regina Kunzel has convincingly argued, social work obtained professional legitimacy by employing psychological techniques and rhetoric, a strategy that the Dukakis rule undermined. REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945* at 115, 151-52, 169 (1993).

<sup>185</sup> See Fearey, *supra* note 162, at 14-15; see also Lehigh & Miller, *supra* note 173.

<sup>186</sup> See Lehigh & Miller, *supra* note 173.

<sup>187</sup> See Fearey, *supra* note 162, at 15.

<sup>188</sup> See *id.*

midst of a recruitment campaign, which included hiring a private marketing firm to identify potential foster parents and employing “homefinders” to recruit foster homes.<sup>189</sup> The following year, the campaign focused its recruiting efforts on urban, minority homes that were capable of serving adolescent and special-needs children—the very population that social workers had feared would be harmed by the policy.<sup>190</sup>

The legislature became embroiled in the dispute between social workers and the heads of the agency when one of its subcommittees sided with the civil servants who opposed the policy, creating a fracture between the branches of government. In response to Dukakis’ placement hierarchy, and to the controversy that followed its announcement, the Massachusetts legislature appointed a legislative subcommittee on foster care to review the regulations as well as foster parent recruitment, training, monitoring, and rates of reimbursement. After interviewing ninety-one social workers and other DSS and foster care agency employees, the subcommittee recommended that DSS “reconsider the new foster care placement policy.”<sup>191</sup> The subcommittee determined that “non-traditional families” were at times in the child’s best interest, particularly for sexually abused children who benefited from being in a home with an adult of a different sex from that of their abuser.<sup>192</sup> In addition, the subcommittee found that the policy had made it more difficult to place children, contributed to waiting lists, hindered recruitment, and was “disagreed with by a significant percentage of foster care agencies.”<sup>193</sup> The experience of these civil servants persuaded the subcommittee members of the need to change the policy.

Even though the subcommittee’s report called for revising the placement hierarchy, the Dukakis administration refused to reconsider the rule. The subcommittee issued its report in December 1985, and on February 28, 1986, Johnston announced the formation of an executive branch foster care commission to review all aspects of state foster care—with the exception of the placement hierarchy policy.<sup>194</sup> Chaired by Joseph Leavey, a former Department of Youth Services commissioner, the commission included human services professionals, Catholic clergy, foster parents, former foster children,

<sup>189</sup> Kenneth J. Cooper, *State Trying to Find More Foster Parents*, BOS. GLOBE, June 10, 1986, at 21.

<sup>190</sup> See Department of Social Services Foster Care Recruitment Campaign (1986) (GLDC, Box 1, Folder labeled 1986 – Dept. of Social Services – Foster Care Recruitment and Foster Care Recruitment Campaign).

<sup>191</sup> Legislative Subcomm. on Foster Care, *In the Best Interest of the Children?* (Dec. 1985) (Ricketts Papers, Box 1, Folder 18).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See Christine Guilfooy, *Commission May Urge Foster Policy Change*, BAY WINDOWS, Nov. 20–26, 1986 (GLDC, Box 1, Folder labeled Newspaper Clippings – 1986–1990); see also Press Release, Mass. Exec. Office of Human Servs., Johnston Appoints Special Foster Care Commission (Feb. 28, 1986) (GLDC, Box 1, Folder labeled Special Commission on Foster Care – 1986).

and legislators.<sup>195</sup> Despite its original mandate, the commission's proposed changes, issued in December 1986, included eliminating the preference for traditional families in placement decisions. According to Jacquelynne Bowman, the chairwoman of the commission subgroup that drafted the recommendation: "It is clear that you can't have automatic barriers to who can and cannot be a foster parent . . . . If a family that is best able to give the child what the child needs is gay, so be it."<sup>196</sup> The commission report also recommended that all placement decisions be made by the social workers in direct contact with foster children, thereby eliminating the Commissioner's review and approval of non-traditional homes.<sup>197</sup> The recommendation drew wide support from human services workers and foster parents, but one member of the commission, Reverend Richard J. Craig, wrote a minority report objecting to any revisions to the placement hierarchy.<sup>198</sup> The Dukakis administration accepted twenty-one of the commission's twenty-two recommendations, committing itself to spending \$15 million over the following two years to implement the legal, financial, and administrative changes the commission recommended.<sup>199</sup> This included improvements in the delivery of services to foster children and increases in reimbursement rates to foster parents.<sup>200</sup> The only recommendation that the administration rejected was the change to its placement policy, which exacerbated the struggle between the governor and his administrators.<sup>201</sup>

As opponents had feared, the agency ban reinforced negative stereotypes of gay men and women, prevented qualified individuals from becoming foster parents, and likely kept children from being placed in homes where they would have flourished. As for Babets and Jean, in the wake of the media attention, youths terrorized the men by pelting their house with rocks, bottles, cans, and rotten vegetables.<sup>202</sup> The couple eventually left their home and community, settling into a rambling farmhouse where they could focus their energy on raising livestock and vegetables.<sup>203</sup> The children who had been taken from the couple, however, suffered a great deal more. After

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<sup>195</sup> See Kim Westheimer, *Mass. Commission Set to Review Foster Care*, GAY COMMUNITY NEWS, Apr. 5, 1986 (GLDC, Box 1, Folder labeled Newspaper Clippings - 1986-1990); see also Press Release, *supra* note 194.

<sup>196</sup> Gregory Witcher, *Plan Could Bring More Gay Foster Parents*, BOS. GLOBE, Dec. 2, 1986, at 1.

<sup>197</sup> See Kim Westheimer, *Mass. Seen Foot-Dragging on Foster Care Changes*, GAY COMMUNITY NEWS, Apr. 26-May 8, 1987 (GLDC, Box 1, Folder labeled Newspaper - 1986-1990).

<sup>198</sup> See SPECIAL COMM. ON FOSTER CARE, REPORT TO THE EXECUTIVE OFFICE OF HUMAN SERVICES (1987) (GLDC, Box 1, Folder labeled Special Committee on Foster Care - A Final Report - 1987); Kim Westheimer, *Majority Urges Foster Policy Change*, GAY COMMUNITY NEWS, Dec. 14, 1986 (GLDC, Box 1, Folder labeled Newspaper Clippings - 1986-1990).

<sup>199</sup> See Gregory Witcher, *State OK's 22 Foster Care Proposals But Rejects Gay Policy Item*, BOS. GLOBE, June 17, 1987, at 49.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

<sup>202</sup> See *Youths Terrorize Gay Couple*, BOS. HERALD, Sept. 21, 1985 (ONE, Foster Care/Foster Children Subject File).

<sup>203</sup> See Doten, *supra* note 156, at 1.



they were removed, the children were placed in a succession of foster homes, including one headed by a single woman. There, the foster mother's thirty-one-year-old son reportedly sexually abused the two-and-a-half- and four-year-old brothers.<sup>204</sup>

### C. *The Ban's Demise*

These harmful consequences were partially rectified when the Dukakis administration reversed its ban in 1990 to settle the lawsuit challenging the policy. The MNASW joined Babets, Jean, and two unmarried women in filing a complaint within weeks of Johnston announcing the new rule.<sup>205</sup> In their suit, the plaintiffs did not claim that the sexual orientation of prospective foster parents was irrelevant to placement decisions; rather, the plaintiffs argued that sexual orientation should not be an overriding factor.<sup>206</sup> Although the plaintiffs would have liked to eliminate sexual orientation as a consideration, their attorneys did not think they could successfully argue the point and thus presented the less controversial claim that sexual orientation should not be determinative.<sup>207</sup>

It quickly became clear that the court shared the plaintiffs' outrage over the policy. In denying the state's motion to dismiss, the court attacked the rule as strikingly at odds with Massachusetts' stated public purpose of protecting children: "[I]t is anomalous that the Commonwealth should concoct a classification so disadvantageous to a class of persons—single parents—who may well be as good as or better at parenting than some married couples."<sup>208</sup> It also characterized the ban as "wholly arbitrary and capricious and adverse to the needs of children" and denounced "[a]ny exclusion of homosexuals from consideration as foster parents [as] blatantly irrational."<sup>209</sup> The court expressed particular sympathy for the plaintiffs' arguments, remarking: "I find it perplexing that the DSS . . . approved the plaintiffs as foster parents, placed with Babets and Jean children whose 'emotional and physical condition improved dramatically,' and acknowledged that the quality of care given by Babets and Jean was 'exceptional,'

<sup>204</sup> Frank Phillips & Andrew Gully, *DA Probing Charges of Abuse of Foster Kids*, *Bos. Herald*, Jan. 18, 1986 (Ricketts Papers, Box 1, Folder 11); Joan Vennoch, *State Defends Transfer of Two Foster Children*, *Bos. Globe*, Jan. 21, 1986, at 22.

<sup>205</sup> Defendants' Memorandum in Support of Their Motion to Dismiss at 4, *Babets v. Dukakis*, C.A. No. 81083 (Mass. Super. Ct. May 22, 1986) (GLDC, Box 1, Folder labeled Babets vs. Gov. of Commonwealth - Memorandum).

<sup>206</sup> See Interview by Wendell Ricketts with Tony Doniger (July 5, 1990) (Ricketts Papers, Box 2, Folder 12).

<sup>207</sup> *Id.* The plaintiffs were represented by four lawyers, including ones from Gay and Lesbian Advocates and Defenders and the ACLU of Massachusetts. Interview by Wendell Ricketts with Kevin Cathcart (July 7, 1986) (Ricketts Papers, Box 2, Folder 12).

<sup>208</sup> *Babets v. Dukakis*, C.A. No. 81083, slip op. at 13 (Mass. Super. Ct. Sept. 18, 1986) (GLDC, Box 1, Folder labeled Babets vs. Gov. of Commonwealth - Memorandum).

<sup>209</sup> *Id.* at 13–14.

and now comes into court postulating that its preference for married couples is rationally related to a legitimate purpose.<sup>210</sup>

To settle the lawsuit, the Dukakis administration replaced its ban with a regulation that divided applicants into one of two categories—those with and without parenting experience.<sup>211</sup> It also allowed social workers to place children with inexperienced parents with the approval of a local supervisor.<sup>212</sup> While sexual orientation remained an aspect social workers could consider in determining the child's placement, the primary factors would be parenting experience and the child's best interest.<sup>213</sup> In announcing the new policy, Johnston described the earlier regulation as "regrettable."<sup>214</sup> He admitted that, in the wake of media attention to the placement of two boys with a gay couple, everyone had "overreacted," raising "unnecessary fears in the minds of some people who misunderstand the behavior of gay people."<sup>215</sup>

Members of the state legislature, however, continued to oppose gay and lesbian foster parenting, and quickly moved to countermand the settlement agreement.<sup>216</sup> Less than a week before the revised policy was to take effect, House Minority Leader Steven Pierce, who was running as a Republican candidate for governor, introduced a budget amendment stating that social workers must "consider homosexuality or bisexuality an obstacle to the well-being of a child when determining foster care placements."<sup>217</sup> The provision passed the House of Representatives by a vote of ninety-nine to fifty-six, but the Senate rejected the extreme measure, just as it had done years earlier.<sup>218</sup> Instead, the Senate voted for the more moderate statement that DSS should not "knowingly place" a child in the care of anyone "whose sexual orientation is an obstacle" to the child's development.<sup>219</sup> Dukakis re-

<sup>210</sup> *Id.* at 13 (internal citations omitted). Despite this strident language indicating the significant challenges the state would have to overcome in defending the case, the lawsuit lagged for years as the parties battled over discovery obligations. The plaintiffs requested documents on the ban's development and promulgation, including drafts and internal memoranda, which the state refused to produce, claiming executive privilege. *Babets v. Johnston*, 526 N.E.2d 1261, 1262–63 (Mass. 1988). The dispute went up to the Massachusetts Supreme Judicial Court, which ruled against the state in 1988. *Id.* at 1266.

<sup>211</sup> See Press Release, Gay & Lesbian Advocates & Defenders, Massachusetts Changes Foster Care Regulations (Apr. 4, 1990) (NGLTF, Box 88, Folder 44); see also Kay Longcope, *Foster-Care Ban on Gays is Reversed*, BOS. GLOBE, Apr. 5, 1990, at 1; *Massachusetts Acts to Permit Homosexual Foster Parents*, N.Y. TIMES, Apr. 6, 1990.

<sup>212</sup> See sources cited *supra* note 211.

<sup>213</sup> See Jeff Wutzke, *Foster Care Decision Is Lauded*, BAY WINDOWS, Apr. 12, 1990 (NGLTF, Box 88, Folder 46).

<sup>214</sup> Longcope, *supra* note 211, at 1.

<sup>215</sup> *Id.*

<sup>216</sup> Eve Epstein, *MA House Acts on Gay Foster Parents*, SENTINEL, May 24, 1990 (Ricketts Papers, Box 1, Folder 10).

<sup>217</sup> *Id.*; *Massachusetts House Acts on Gay Foster Parents, Universal Health Care*, N.Y. NATIVE, June 4, 1990 (NGLTF, Box 88, Folder 46).

<sup>218</sup> Epstein, *supra* note 216; Jeff Wutzke, *Foster Care Prohibition Loses in Senate*, BAY WINDOWS, July 5, 1990 (NGLTF, Box 88, Folder 46).

<sup>219</sup> Wutzke, *supra* note 218.

sponded by vetoing the budget amendment, and the new policy went into effect.<sup>220</sup>

Dukakis had not responded to persistent and vocal opposition from social workers; he had eliminated the ban only to settle a lawsuit. Nevertheless, by joining the legal challenge as plaintiffs, social workers contributed to the policy change and continued the pattern of LGBT activists working with mental health professionals to advance gay rights. Their collaboration in Massachusetts and their support of gays and lesbians as parents fueled a national conversation about gay and lesbian families. In winning the lawsuit, social workers helped shape the image of gay men and women not only as parents, but also as socially conscious adults who sought to help children in need. This new understanding of gays and lesbians created a discursive shift that would later prove invaluable in the fight for marriage equality.

#### IV. NEW HAMPSHIRE: INSTITUTING “DON’T ASK, DON’T TELL”

The debate over gay and lesbian foster parents that began in Massachusetts quickly spread to New Hampshire, where the question became a contested issue that divided the executive and legislative branches. Elected officials in New Hampshire—a state dominated by the Republican Party until the early 1990s—followed the increasingly anti-gay sentiment of the national GOP in its opposition to gay and lesbian foster and adoptive parents.<sup>221</sup> However, the head of the Division of Children, Youth and Families (“DCYF”), David Bundy, worked to avoid a legislative ban, wanting to maintain flexibility for social workers placing children. His attempt to resolve the issue through administrative rulemaking was unsuccessful, with the legislature instituting a ban that remained in place until 1999. Agency employees nevertheless acted to subvert the ban, approving gay and lesbian foster and adoptive parents who did not explicitly inform state employees of their sexual orientation. Since few applicants volunteered that information, civil servants effectively nullified the legislation with which they disagreed. By doing so, these bureaucrats took a more extreme approach than their Massachusetts counterparts, who followed traditional legal channels to eliminate the rule. Their nullification highlights the extent to which agency employees have discretion in enforcing the law, to the point of rendering regulations moot. This Part begins by analyzing the executive agency’s failed efforts to prevent a formal ban, tracing the evolution of the law through the legislature in Section IV.A. Section IV.B analyzes civil ser-

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<sup>220</sup> Coal. for Lesbian & Gay Civil Rights, Massachusetts Governor Dukakis Comes Full-Circle with Veto of Gay Foster Care Restrictions (Aug. 7, 1990) (NGLTF Box 88, Folder 40).

<sup>221</sup> James Pindell, *The Biggest Differences Between NH Republicans and Democrats*, N.H. MAG., Mar. 2014, <http://www.nhmagazine.com/March-2014/The-Biggest-Differences-Between-NH-Republicans-and-Democrats/>, archived at <https://perma.cc/QKP5-MHPR>.

vants' response to the ban: nullifying the law through a policy of "don't ask, don't tell."<sup>222</sup>

### A. *Efforts to Prevent A Ban*

The debate began in New Hampshire a month after *The Boston Globe* ran its first story about Babets and Jean, and it evolved much like it did in Massachusetts. The New Hampshire controversy similarly emerged after a local paper reported that its child welfare agency, DCYF, knowingly licensed a gay man, named Thomas J. Herman, as a foster parent.<sup>223</sup> Social workers commented that Herman's sexual orientation was "common knowledge" in their office, but that they had nevertheless licensed Herman after he passed a background check. Upon learning of the placement, DCYF Director David Bundy explained that no state policy prohibited the state from approving foster care licenses for homosexuals, and that no one had considered the question before the controversy arose in Massachusetts. Republican Governor John Sununu had appointed Bundy in 1983 after creating DCYF to centralize the state's youth services.<sup>224</sup>

Bundy initially expressed conflicting views on same-sex placements, although he ultimately indicated support for gay and lesbian foster parenting. In 1985, the press quoted Bundy as stating that he "absolutely does not" condone placing children with gay foster parents and that he would inform division field officers that he "won't tolerate" licensing gays or lesbians.<sup>225</sup> However, Bundy later indicated these accounts were incorrect, as he supported the Herman placement and believed that gay and lesbian foster placements could benefit children.<sup>226</sup> In the Herman case, a teenager had experienced problems when placed in traditional homes with married couples, but had thrived with Herman.<sup>227</sup> Bundy explained that DCYF's policy was to "try to find homes as close to a natural, normal family as possible" and that children should be placed in "traditional family settings . . . such as [with] a married couple with child-rearing experience, or with ap-

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<sup>222</sup> The phrase "don't ask, don't tell" entered American discourse in 1993 as a shorthand for 10 U.S.C. § 654, which revised U.S. Department of Defense regulations on homosexuality. While gays and lesbians could still be discharged for their sexual orientation, the armed forces were barred under the new regulations from explicitly asking its recruits or members about their sexual orientations. Recruits and members were likewise prohibited from disclosing their homosexuality. Alafair S.R. Burke, *A Few Straight Men: Homosexuals in the Military and Equal Protection*, 6 STAN. L. & POL'Y REV. 109, 109-10 (1994).

<sup>223</sup> See Paul R. Lessard, *Sexuality Issue Raised in Foster Child Care Case*, UNION LEADER, June 19, 1985, at 1.

<sup>224</sup> See Telephone Interview with David Bundy (Sept. 24, 2014).

<sup>225</sup> Lessard, *supra* note 223, at 1; see also Associated Press, *N.H. Bars Gays as Foster Parents*, BOS. GLOBE, June 22, 1985, at 22.

<sup>226</sup> Telephone Interview, *supra* note 224.

<sup>227</sup> See *id.*

propriate relatives.”<sup>228</sup> However, Bundy also recognized that different children had different needs and that limiting the pool of potential foster parents would be detrimental to finding proper placements.<sup>229</sup>

Bundy responded quickly to the press attention, hoping to resolve the issue in a way that would retain social workers’ autonomy and allow them to exercise their professional judgment. Nine days after the *Union Leader* article appeared, Bundy issued a directive banning “practicing homosexuals” from serving as foster parents or adopting children. The order further provided that any known homosexual foster parents would be assessed and the children removed if there was a risk that they would be harmed. Social workers were instructed not to place any additional children in the homes of gay men and women and were forbidden from re-issuing the licenses of homosexual foster parents.<sup>230</sup>

Although the policy appeared to be a prohibition on gay and lesbian foster parents, Bundy issued it to avoid a legislative ban and maintain flexibility within DCYF.<sup>231</sup> The directive prohibited social workers from placing children in the homes of gays and lesbians, but it did not obligate them to inquire into prospective parents’ sexual orientation or to remove children already living with openly gay parents. With New Hampshire social workers generally opposed to a ban on gay and lesbian foster and adoptive parents, Bundy’s directive allowed child welfare workers discretion in making child placements. His compromise, agency officials hoped, would appease the legislature while allowing social workers to make determinations according to the best interests of the child.<sup>232</sup> Although the policy implicitly characterized gays and lesbians as unfit parents and required parents to hide their homosexuality, it was better than an outright ban for both social workers and prospective parents.

Bundy’s directive did not satisfy members of the state House of Representatives, many of whom opposed gay and lesbian foster and adoptive parenting. His revised policy consequently set the stage for a conflict between the branches. A week after Bundy issued the new regulation, Rep. Mildred Ingram introduced a bill barring “admitted homosexuals” from adopting a child or receiving foster care licenses.<sup>233</sup> Ingram’s proposed law

<sup>228</sup> Lessard, *supra* note 223, at 1; *Homosexual Foster Care Out, Says Aide*, UNION LEADER, June 22, 1985, at 16.

<sup>229</sup> See Telephone Interview, *supra* note 224.

<sup>230</sup> Memorandum from David A. Bundy, Dir., Dep’t of Children, Youth & Families (June 28, 1985) (GLAD, Box 23, Folder 7); see also “Practicing” Gays Can’t Have Kids, BAY AREA REP., Sept. 12, 1985 (Lyon/Martin Papers, Box 174, Folder 18).

<sup>231</sup> See Telephone Interview, *supra* note 224; Telephone Interview with Ellen Musinsky, Co-founder of the New Hampshire Women’s Lobby (Oct. 1, 2014).

<sup>232</sup> See Telephone Interview, *supra* note 224; Telephone Interview with Musinsky, *supra* note 231.

<sup>233</sup> Donn Tibbetts, *Rep. Files Bill to Ban Homosexuals from Running Foster Homes*, UNION LEADER, July 4, 1985, at 1.

also prohibited licensing a home with any gay household members.<sup>234</sup> In explaining her bill, Ingram argued that homosexuals were more likely to molest children than heterosexuals and claimed that gays and lesbians would model homosexuality, passing it on to their children. In rhetoric that echoed Anita Bryant, Ingram stated: “The only way for homosexuals to carry on their lifestyle is to proselytize.”<sup>235</sup> Ingram assured reporters that her bill’s intent was to “protect children, not to condemn the gay lifestyle,” maintaining that she had five homosexual friends whom she loved “very dearly.”<sup>236</sup> Ingram had gained notoriety earlier in 1986 for sponsoring a bill banning homosexuals from donating blood, an incendiary measure given its almost exclusively symbolic function; the year before, the FDA had banned men who had sex with men from donating blood because the agency did not have the technological capabilities to screen blood for HIV.<sup>237</sup>

The debate over Ingram’s foster care bill was contentious. When it was first submitted, the New Hampshire Judiciary Committee quickly voted Ingram’s bill “inexpedient to legislate.”<sup>238</sup> Committee members refused to refer the bill for further consideration, describing it as “garbage” that “couldn’t possibly merit serious study.”<sup>239</sup> The bill nevertheless came to a floor vote, as the New Hampshire House of Representatives was not bound by its committees’ recommendations. In the debate, both Republicans and Democrats argued that such state-sponsored discrimination was rooted in unfounded prejudices and would reduce the already limited number of available foster homes.<sup>240</sup> However, many legislators supported some type of ban against gays and lesbians as foster and adoptive parents, although most of these representatives preferred an agency rule to Ingram’s bill. Not only would the promulgation of a rule reduce the number of laws, which appealed to conservative Republicans who championed smaller government, but many state representatives also believed that a DYCF rule, promulgated in consultation with the Attorney General and through administrative procedures, would have a greater chance of withstanding constitutional scrutiny than a law enacted by the legislature.<sup>241</sup> The state Judiciary Committee assured rep-

<sup>234</sup> See Norma Love, *Homosexual Parent Bill Stirs Emotion*, UNION LEADER, Apr. 28, 1986, at 8.

<sup>235</sup> *Id.*

<sup>236</sup> Ben Stocking, *Legislator Says Bill “To Save Children” Is Not Anti-Gay*, CONCORD MONITOR, Oct. 26, 1985.

<sup>237</sup> See Tibbetts, *supra* note 233; see also Jessica Martucci, *Negotiating Exclusion: MSM, Identity, and Blood Policy in the Age of AIDS*, 40 SOC. STUD. SCI. 215, 216, 220 (2010).

<sup>238</sup> N.H. House of Representatives, Judiciary Committee Meeting Minutes (Jan. 15, 1986) (on file with New Hampshire State Archives, House of Representatives File for H.B. 21 (1986)) [hereinafter NHSA].

<sup>239</sup> *Id.*

<sup>240</sup> See Rod Paul, *Official Tries Again to Ban Gay Foster Parents*, NASHUA TELEGRAPH, Jan. 25, 1987, at A-6.

<sup>241</sup> Telephone Interview with Donna Sytek, N.H. Republican Party Chair 1981–1984 (Oct. 4, 2014); see also John Distaso, *House Okays Smoking Ban but Rejects Homosexual Bill*, UNION LEADER, Feb. 13, 1986, at 22; *House Kills Bill Barring Gays as Foster Parents*,

representatives that DCYF would in fact cease placing children in the homes of gays and lesbians, explaining that the Committee had reached an agreement with the agency.<sup>242</sup> The House defeated the bill by a vote of 205 to 145, leaving DCYF to address the question through rulemaking procedures.<sup>243</sup>

Despite legislators' views and expectations, the rules that DCYF proposed two-and-a-half months later did not ban homosexual foster parents. This first act of agency disobedience was the result of agency officials' and social workers' views that gay and lesbian foster parents could sometimes serve the best interests of children. The new rules required foster parents only to provide "a safe, nurturing, and stable family environment which is free from abuse and neglect."<sup>244</sup> They also provided that an applicant could be denied if he or she "does not have the suitability or qualifications consistent with the philosophy" of the state's foster parent program.<sup>245</sup> This vague statement was not intended to prevent gays and lesbians from being certified as foster parents. In explaining the proposed guidelines, Bundy stated that sexual preference "would be just one of the factors that would be considered."<sup>246</sup> Gail LeShane, a member of the committee drafting the rules, also maintained that "no one would be excluded specifically because of their sexual preference, unless such a situation would render the person unstable or unable to meet the other requirements of being a foster parent."<sup>247</sup> Jack Lightfoot, an attorney for Child and Family Services who helped with the drafting, later explained that the rules did not mention sexual orientation "because the professionals didn't think it was an issue."<sup>248</sup> DCYF's decision to allow gay and lesbian foster parents generated little media attention, and at the three public hearings on the proposed rules, few commentators discussed the absence of a prohibition on gays and lesbians serving as foster and adoptive parents.<sup>249</sup> To the contrary, most of the testimony praised the new regulations, which amended foster parent qualifications to include literacy, income, background check, and training requirements.<sup>250</sup> Upon learning

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NASHUA TELEGRAPH, Feb. 13, 1986, at 12; Donn Tibbetts, *House Opposes Homosexual Bill*, UNION LEADER, Jan. 22, 1986, at 6.

<sup>242</sup> See Telephone Interview, *supra* note 241; N.H. House of Representatives, Judiciary Committee Minutes, Public Hearing on H.B. 21 (Jan. 14, 1986) (NHSA, House of Representatives File for H.B. 21 (1986)).

<sup>243</sup> See Love, *supra* note 234, at 8.

<sup>244</sup> Foster Family Care Licensing Requirements, Rule He-C 6446, at 3, 13 (effective Aug. 28, 1986) (on file with New Hampshire State Library).

<sup>245</sup> *Id.*

<sup>246</sup> *Foster Parent Rules Rewritten, Set for Hearings*, UNION LEADER, July 15, 1986, at 3.

<sup>247</sup> Steve Sakson, *Fight Brewing on Foster Parent Issue*, NASHUA TELEGRAPH, Aug. 20, 1986, at 29.

<sup>248</sup> Telephone Interview with Jack Lightfoot, Child & Family Servs. (Nov. 12, 2014).

<sup>249</sup> Ellen Musinsky, Testimony in Opposition to H.B. 70, at 1 (Feb. 3, 1987) (NHSA, House of Representatives File for H.B. 70 (1987)).

<sup>250</sup> See, e.g., *id.* at 2–3; Steve Sakson, *Foster Parent Rules to Remain Unchanged*, NASHUA TELEGRAPH, July 24, 1986, at 14; *State Civil Liberties Union Praises House Action on Foster Care Rules*, NASHUA TELEGRAPH, July 17, 1986, at 12; see also Foster Family Care Licensing Requirements, *supra* note 244, at 3–5.

of the DCYF proposal, Ingram was quoted as saying: "They are a bunch of gutless wimps. You can quote me on that."<sup>251</sup> Despite Ingram's fervor, neither she nor anyone else appeared before the joint committee of the New Hampshire legislature to speak for or against the proposed regulations, and the committee unanimously approved the new rules.<sup>252</sup>

### B. *The Path to Nullification*

In the battle over gay and lesbian foster and adoptive parenting, it appeared that agency officials had won. However, this was a short-lived victory; the legislature responded by re-introducing a ban on gay and lesbian foster and adoptive parents. The legislators' arguments illustrate the extent to which gays and lesbians were considered harmful to children, a discourse that impeded gay and lesbian rights for decades. Section IV.B analyzes how the legislative debates resulted in the ban, as well as how agency officials responded with nullification.

Ingram reintroduced her 1985 bill in February 1987, with the support of the state Republican Party and Governor Sununu, thereby directly challenging DCYF's determination as to what would best serve New Hampshire's children.<sup>253</sup> At hearings held before the House Judiciary Committee, opponents of the bill argued that it was immoral to enact a discriminatory statute and that the bill would not survive judicial scrutiny.<sup>254</sup> The New Hampshire Civil Liberties Union conceded that sexual preference was an appropriate consideration in foster care placements, equating sexual orientation to race and religion as relevant factors social workers should consider, but it maintained that the state could not ban gays as a group.<sup>255</sup> Opponents also focused on New Hampshire's shortage of foster care facilities, which had prompted the state to run classified ads for foster parents.<sup>256</sup> The need for foster homes had increased by 28% between 1985 and 1986 as a result of increasing awareness and reporting of child abuse and neglect.<sup>257</sup> However,

<sup>251</sup> *Foster Parent Rules Rewritten*, *supra* note 246, at 3.

<sup>252</sup> See Victor Emanuelson, Prepared Testimony (Feb. 3, 1987) (NHSA, House of Representatives File for H.B. 70 (1987)); *NH, ADVOCATE*, Sept. 30, 1986 (Ricketts Papers, Box 1, Folder 43); Sakson, *supra* note 247, at 29; see also *Approved Foster Care Rules Don't Preclude Homosexuals*, *NASHUA TELEGRAPH*, Aug. 19, 1986.

<sup>253</sup> See Paul, *supra* note 240, at A-6; Michael Mokrzycki, *Governor Supports Bill to Prohibit Homosexuals from Being Foster Parents*, *NASHUA TELEGRAPH*, Feb. 19, 1987, at 1; see also H.R. 70, 1987 Gen. Court, Reg. Sess. (N.H. 1987); Jay Merwin, *Democrats Rap GOP Platform*, *CONCORD MONITOR*, Oct. 8, 1986, at B1.

<sup>254</sup> John DiStaso, *Bill on Homosexuals Gets Strong Reaction*, *UNION LEADER*, Feb. 4, 1987, at 15.

<sup>255</sup> See *id.*

<sup>256</sup> See David Olinger, *Who Will Take a Foster Child?*, *CONCORD MONITOR*, June 5, 1985, at 1; *Sununu Will Continue to Make Child Welfare a Major Concern*, *UNION LEADER*, Dec. 30, 1986, at 6; Barbara Tetreault, *North Country Needs More Foster Families*, *UNION LEADER*, Sept. 27, 1986, at 3; see also Ed Roberts, *Foster Care: NH Needs Money, Homes*, *UNION LEADER*, Sept. 28, 1986, at 9A.

<sup>257</sup> See Tetreault, *supra* note 256, at 3.



the lack of traditional foster homes had required the state to pay increasingly high rates for group homes and specialized facilities.<sup>258</sup>

Arguments concerning the proposed ban drew upon stereotypes of gays and lesbians, highlighting the extent to which many Americans viewed homosexuals as harmful to children. Like Ingram, supporters of the bill maintained that gay parents would serve as role models for homosexuality, asserting “that the association of children with homosexuals in a social setting could turn these children into homosexuals.”<sup>259</sup> Former state Supreme Court Justice Charles Douglas best encapsulated this perspective when he stated: “A friend tells me that if you speak French at home around young children, they grow up learning how to speak French . . . . I think that same principle applies to young children who are raised by foster parents or who are in day care centers run by homosexuals.”<sup>260</sup> Other supporters maintained that “it is too much for a foster child to cope with the ‘homosexual environment’ on top of all the other problems such a child must face,” referencing the social stigma that the children would presumably suffer, while others claimed that children would be more likely to be exposed to AIDS in a home with gay or lesbian parents.<sup>261</sup> The House Judiciary Committee rejected these arguments, concluding that there was no “convincing documented support for their theoretical model” and that supporters did not offer evidence “that sexual preference per se affects the ability to give supportive care for children.”<sup>262</sup> The committee again objected to the proposed law, ruling the bill “inexpedient to legislate” by a vote of eleven to five.<sup>263</sup>

Although the House traditionally heeded its committees’ advice on legislation, the foster care bill spurred heated debate, reflecting the divisive nature of gay and lesbian parenting around the country.<sup>264</sup> Because one of the main objections to the bill was its questionable legality, the House voted to send it to the New Hampshire Supreme Court for a ruling on its constitutionality.<sup>265</sup> While the Supreme Court review was pending, the Senate passed the law, with its discussions focusing in large part on the bill’s enforceability.<sup>266</sup> New Hampshire Senator Susan McLane, who opposed the

<sup>258</sup> See Olinger, *supra* note 256, at 1; David Olinger, *State Needs \$3.3 Million for Foster Care*, CONCORD MONITOR, Aug. 22, 1985, at 1, 16.

<sup>259</sup> N.H. House of Representatives, Judiciary Comm., Definition and Majority Response (Feb. 3, 1987) (NHSA, House of Representatives File for H.B. 70 (1987)); John Distaso, *Foster Parents Regulation Eyed*, UNION LEADER, Feb. 17, 1987, at 1, 8.

<sup>260</sup> Distaso, *supra* note 254, at 15.

<sup>261</sup> *Id.*; see also N.H. House of Representatives, *supra* note 259.

<sup>262</sup> N.H. House of Representatives, *supra* note 259; N.H. House of Representatives, Judiciary Comm., Committee Report (Feb. 2, 1987) (NHSA, House of Representatives File for H.B. 70 (1987)).

<sup>263</sup> N.H. House of Representatives, *supra* note 262.

<sup>264</sup> See *Adultery, Homosexual Laws Doomed?*, UNION LEADER, Feb. 7, 1987, at 1.

<sup>265</sup> See Donn Tibbetts, *Homosexual-Foster Care Issue High Court Bound*, UNION LEADER, Mar. 4, 1987, at 1; Donn Tibbetts, *Parenting Bill Defines Homosexual*, UNION LEADER, Mar. 19, 1987, at 20.

<sup>266</sup> See Warran Hastings, *Solons OK Ban on Homosexual Foster Parents*, UNION LEADER, Mar. 13, 1987, at 5.

legislation, argued that homosexuality was “virtually impossible to discover or define,” as evidenced by experts’ estimation that one in twenty marriages involved a homosexual partner.<sup>267</sup> The senator stated that “it would be a different matter if there were some kind of blood test that could be run to determine who is or isn’t homosexual.”<sup>268</sup> For McLane and many other state senators, it was clear that homosexuals should not serve as adoptive or foster parents, but it was not evident how the state could accomplish that goal. The Senate debate was not exempt from the vitriolic rhetoric that marked discussions in the House of Representatives. State Senator Jack Chandler analogized child placements with gay and lesbian parents to “putting a pound of roast beef in a cage with a lion. You know it’s going to get eaten.”<sup>269</sup>

The New Hampshire Supreme Court then stepped in, weighing in on the issue that had divided the executive and legislative branches. The court determined that the prohibition on gay and lesbian foster and adoptive parents was constitutional. The bill, the court held, was rationally related to its purpose of providing appropriate role models for children. Although the court noted there were a number of studies showing no correlation between parental homosexuality and the sexual orientation of their children, it determined that environmental influences could impact sexual orientation and that therefore “the legislature can rationally act on the theory that a role model can influence the child’s developing sexual identity.”<sup>270</sup> However, because it was “in the familial context that the theory of learned sexual preference is more likely to be true,” the court held that the bill’s attempt to ban homosexuals from operating day care centers was unconstitutional.<sup>271</sup> Expanding the ban beyond the immediate family context was too broad to be rationally related to the role model theory. The dissent, on the other hand, emphasized the lack of scientific evidence supporting the role model theory, arguing the legislature did not receive any “meaningful evidence” because “apparently the overwhelming weight of professional study on the subject concludes that no difference in psychological and psychosexual development can be discerned between children raised by heterosexual parents and children raised by homosexual parents.”<sup>272</sup> This same judicial debate over the role modeling of homosexuality would continue to be a central point of argument in gay rights matters, especially in the marriage equality cases.<sup>273</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> Clay Wirestone, *In 1987, the New Hampshire Legislature Targeted Gay People as Unfit for Parenting*, CONCORD MONITOR, June 30, 2013. On the same day the Senate passed the ban, it also rejected legislation making Martin Luther King Day a state holiday, with one member denouncing King as an “evil” and “immoral” man. Steve Sakson, *King Holiday Falls 5 Votes Short in Senate: Bill to Ban Gay Foster Parents OK’d*, NASHUA TELEGRAPH, Mar. 13, 1987, at 1, 12.

<sup>270</sup> *In re* Opinion of the Justices, 530 A.2d 21, 24–25 (N.H. 1987).

<sup>271</sup> *Id.* at 26.

<sup>272</sup> *Id.* at 28.

<sup>273</sup> See CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW 108–09 (2014).

After receiving the court's opinion, the New Hampshire House voted 202 to 155 in favor of the bill, ignoring the opposition of the civil servants who would be responsible for implementing the law.<sup>274</sup> In the wake of the ban, two gay foster fathers who voluntarily disclosed their homosexuality lost their licenses.<sup>275</sup> Herman, the gay foster parent who sparked the debate in New Hampshire, also lost his license. However, DCYF allowed the teenager whom Herman was fostering to remain in the home, since the youth was almost eighteen years old.<sup>276</sup>

Despite the new law, civil servants continued to approve gays and lesbians as foster parents, nullifying the law because they believed doing so best served the needs of New Hampshire's children. Practical considerations also played a role in the decision to nullify the ban. After the legislature approved the ban, DCYF circulated questionnaires to foster parents about their sexual orientation; however, ten percent of recipients refused to answer, objecting to the intrusion on their privacy.<sup>277</sup> Since New Hampshire was facing a "critical shortage of foster homes," Bundy announced that the state would not necessarily remove children from the homes of foster parents who had declined to sign the form inquiring about their sexuality.<sup>278</sup> Instead, social workers would take action only if they learned of a foster parent's homosexuality. Because there was "no support for the law" among DCYF employees, social workers did not ask foster parents about their sexual orientation when conducting home studies, thereby nullifying the ban.<sup>279</sup> As Bundy later described the situation, "we came up with 'don't ask, don't tell' way before Clinton."<sup>280</sup> Few gays or lesbians in New Hampshire were open about their homosexuality in the mid-1980s; covering was a common aspect of LGBT life, despite gay liberationists' call to come out of the closet.<sup>281</sup> As a result, those who wanted to foster or adopt children simply remained silent about their sexual orientation.<sup>282</sup> Social workers' nullification allowed gay men and women to become parents, albeit at the cost of hiding their sexual identity. The state's official policy condemned gays and lesbians as im-

<sup>274</sup> See Donn Tibbetts, *Homosexuals Banned in House Bill from Adopting Kids*; *Senate OK Sure*, UNION LEADER, May 8, 1987, at 1, 16.

<sup>275</sup> See *Two NH Foster Parents Lose Licenses Over Homosexual Ban*, UNION LEADER, Nov. 21, 1987, at 3.

<sup>276</sup> See Interview by Wendell Ricketts with Tom Herman, at 4 (Aug. 4, 1988) (Ricketts Papers, Box 2, Folder 12); Interview by Wendell Ricketts with Ellen Musinsky, at 1 (Aug. 9, 1988) (Ricketts Papers, Box 2, Folder 12).

<sup>277</sup> Ben Stocking, *State May Relent for Some Foster Parents*, CONCORD MONITOR, Nov. 24, 1987, at A1, A6.

<sup>278</sup> Pat Hammond, *Foster Parents Crisis Feared*, UNION LEADER, Sept. 27, 1987, at 1; Ben Stocking, *Lawmakers Split Over Enforcement of Gay Ban*, CONCORD MONITOR, Nov. 25, 1987, at B1, B12.

<sup>279</sup> Interview by Ricketts with Musinsky, *supra* note 276, at 2.

<sup>280</sup> Telephone Interview, *supra* note 224.

<sup>281</sup> See SELF, *supra* note 22, at 220–21, 385–86; Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 816–20, 823–24 (2002).

<sup>282</sup> See Telephone Interview with Musinsky, *supra* note 231.

proper role models and harmful to children—an idea that social workers countered with individual placements. Their actions, and the families they helped form, slowly chipped away at a social vision of parenthood that excluded gays and lesbians, helping to erode public support for the law.

The ban remained in place until 1999, when the legislature repealed the law.<sup>283</sup> By then, not only did DCYF and the New Hampshire chapter of the NASW support the repeal, but so did state Republicans.<sup>284</sup> During the 1990s, an increasing number of New Hampshire citizens and state representatives had come out, rendering the law incongruous for many who now understood homosexuality as a benign variation in sexual orientation.<sup>285</sup> Although Ray Buckley, the Democratic Minority Leader of the New Hampshire House of Representatives, introduced the repeal measure so that his lesbian sister could adopt a child, much of the support for the bill came from heterosexual couples who could not foster or adopt because their gay relatives lived at home or visited during holidays.<sup>286</sup> In reviewing the proposed law, the Judiciary Committee requested scientific studies showing that parental homosexuality had no impact on children, determining the bill “ought to pass” based on the evidence it heard.<sup>287</sup> The House of Representatives passed the bill by a significant majority and without a floor debate, underscoring how dramatically public opinion had shifted in twelve years.<sup>288</sup>

State bureaucrats at DCYF had attempted to prevent a ban on gay and lesbian foster and adoptive parents by issuing regulations that did not mention sexual orientation as a placement factor. When the legislature overruled the agency, a number of social workers circumvented the law by simply omitting any inquiry into prospective parents’ sexual orientation.<sup>289</sup> In doing so, these civil servants engaged in agency nullification, a practice that advocates rarely discuss when strategizing for legal change. Additionally, by refusing to ask about sexual orientation, social workers signaled that sexual orientation was not a factor in parenting ability. As experts in the field of child welfare, these social workers’ actions helped contribute to a new norm

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<sup>283</sup> Act of May 3, 1999, 1999 N.H. Laws 18.

<sup>284</sup> See Letter from Rogers Lang to Edward Moran (Jan. 27, 1999) (NHSA, House of Representatives File for H.B. 90 (1999)); Letter from Thomas W. O’Connor to Patricia A. Dowling (Mar. 9, 1999) (NHSA, House of Representatives File for H.B. 90 (1999)); Telephone Interview, *supra* note 241.

<sup>285</sup> See Telephone Interview, *supra* note 241.

<sup>286</sup> See *id.*; Telephone Interview with Musinsky, *supra* note 231; see also, e.g., *Hearing on An Act Removing the Prohibition on Adoption and Foster Parenting by Homosexual Persons Before the H. Comm. on Children & Fam. Law* (N.H. 1999) (NHSA, House File for H.B. 90 (1999)).

<sup>287</sup> Interview, *supra* note 248; see also Am. Psychological Ass’n, *Lesbian and Gay Parenting* (NHSA, Senate File for H.B. 90 (1999)).

<sup>288</sup> See Telephone Interview, *supra* note 241. The House of Representatives voted 226 to 130 to allow gay and lesbians to serve as adoptive parents, and 223 to 123 to allow gays and lesbians to foster children. *Hearing on An Act Removing the Prohibition on Adoption and Foster Parenting by Homosexual Persons Before the Sen. Comm. on Public Institutions/Health Human Servs.* (N.H. 1999) (NHSA, Senate File for H.B. 90 (1999)).

<sup>289</sup> Interview by Ricketts with Musinsky, *supra* note 276, at 2.

that identified gays and lesbians not only as parents, but also as integral members of American society.

## V. USING THE COURTS TO SUBVERT AGENCY POLICY IN CALIFORNIA

New Hampshire social workers, however, were not alone in nullifying foster care and adoption regulations; their counterparts in California took similar actions in the face of a strict agency prohibition. Like in New Hampshire and Massachusetts, California debated gay and lesbian adoption in the mid-1980s, causing a schism between social workers and the governor. The development of a formal policy preventing California Department of Social Services (“CDSS”) employees from placing children in the homes of gay and lesbian couples was contentious, with both social workers within and courts outside of CDSS undermining its implementation.

The battles in California began in 1986, when California became the first state to allow a lesbian couple to jointly adopt a child.<sup>290</sup> Although gays and lesbians had fostered and adopted children before, they did so as individuals, not couples.<sup>291</sup> CDSS employees selected Mary Gardiner, an occupational therapist at Stanford University Medical Center, and Sarah Jones, who managed Hewlett-Packard’s Research and Development Group, from a pool of nine potential placements.<sup>292</sup> Social workers identified the couple as the best possible family for five-year-old Jenny, who had been sexually abused, and believed that a home free of men would provide a safe and nurturing environment for the girl.<sup>293</sup> However, Gardiner and Jones were also one of the last same-sex couples whom CDSS social workers approved for adoption until the late 1990s, as the department adopted a policy of opposing adoptions by unmarried couples in 1986. Part V first examines how the anti-gay adoption policy came about before turning to the ways in which social workers nullified the ban.

### A. *Creating and Resisting the Policy*

In 1986, two events spurred CDSS to implement a policy of refusing to recommend adoptions by unmarried couples, a rule aimed at preventing same-sex couples from adopting. In June, a male couple beat to death their fourteen-month-old foster child, Nathan Moncrieff, after having him in their

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<sup>290</sup> Interview by Wendell Ricketts with Mary Gardiner and Sarah Jones, at 1–2 (Feb. 27, 1988) (Ricketts Papers, Box 2, Folder 12). Given the sensitive nature of the adoption, I have used pseudonyms for the adoptive mothers and the child.

<sup>291</sup> Gay couple Aubert and Jim Dykes adopted an infant in 1979, but only Aubert was listed as the adoptive parent. The court granted Jim guardianship rights. See Denise Sudell, *Gay Couple Adopts Child: Believed a First*, GAY NEWS, Mar. 1979 (NGLTF, Box 71, Folder 43).

<sup>292</sup> Interview, *supra* note 290, at 2.

<sup>293</sup> See *id.* at 1–2.

home for one month.<sup>294</sup> Gregory T. Rogers and Alvin Woodard had presented themselves to the adoption agency as a heterosexual married couple, with Rogers dressing as a woman throughout the process.<sup>295</sup> The agency conducted at least four interviews of the couple, requested several medical tests, and verified the couple's claim that they had been legally married four years before.<sup>296</sup> The couple admitted they had "actively tried to deceive the adoption agency into believing they were husband and wife" to ensure they would receive a child.<sup>297</sup> In the wake of the tragedy, CDSS was widely criticized for failing to conduct sufficient background checks on potential adoptive and foster parents, and the department was subjected to a full-scale investigation that led CDSS to revise its policies.<sup>298</sup>

The second event triggering the CDSS policy review began a few months before Moncrieff's death, when a lesbian couple sought to formalize their family through a second-parent adoption.<sup>299</sup> That case involved Donna Hitchens, a founder of the Lesbian Rights Project, who had adopted a four-year-old child in 1984, and her partner, Nancy Davis, who filed a petition to also adopt the child two years later.<sup>300</sup> In the year and a half during which Davis' petition was pending, CDSS developed at least eleven drafts of its policy on unmarried couple adoptions.<sup>301</sup> The final version, issued on June 15, 1987, stated: "The best interests of these children are served by placement in homes where the couple demonstrates a deep commitment to permanency. Couples who have formalized their relationship through a legal marriage reflect this desired commitment."<sup>302</sup> CDSS' veneration of marriage was discordant with its statement that single petitioners were not affected by the new policy and could continue to adopt.<sup>303</sup> The reason for this incon-

<sup>294</sup> Wendell Ricketts & Roberta Achtenberg, *Adoption and Foster Parenting for Lesbians and Gay Men*, 14 MARRIAGE & FAM. REV. 83, 108-09 (1989); *Foster Care Doesn't Guarantee Safety*, CHRISTIAN SCIENCE MONITOR, Sept. 27, 1988, at B2.

<sup>295</sup> See Mark A. Stein, *Probe Begun in Adopted Baby's Death*, L.A. TIMES, June 19, 1986, at 3.

<sup>296</sup> See *id.*

<sup>297</sup> *Id.*; see also *Agencies Hit in Infant Boy's Beating Death*, L.A. TIMES, Aug. 28, 1996, at SD28.

<sup>298</sup> Ricketts & Achtenberg, *supra* note 294, at 108-09.

<sup>299</sup> Second-parent adoptions involve different legal questions than other adoptions, because the partner's parental rights will remain intact; however, the process is otherwise the same. For a discussion of the legal issues involved in second-parent adoptions, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 522-27 (1990), and see also Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 204-06 (2009).

<sup>300</sup> Brief for Petitioner, *In re Adoption Petition of Nancy L. Davis*, No. 18086 (Super. Ct. S.F. Cty. Sept. 21, 1987) (on file with Carl A. Kroch Library, Cornell University, Paula L. Ettelbrick Papers, Collection No. 7644, Box 1, Folder 31) [hereinafter *Ettelbrick Papers*].

<sup>301</sup> *Id.* at Exhibit J.

<sup>302</sup> Cal. Dep't of Soc. Servs., All-County Letter No. 87-80 (June 15, 1987) (on file with author).

<sup>303</sup> See Memoranda attached to Brief for Petitioner, *supra* note 300.

gruity was that CDSS sought to prevent gay and lesbian adoptions, but the department was unwilling to justify its negative recommendation on the basis of sexual orientation.<sup>304</sup> According to Hitchens, California Attorney General John Van de Kamp prohibited CDSS from referring to sexual orientation in defending its position, likely to prevent equal protection challenges to the rule.<sup>305</sup> As a result, CDSS employed marriage as a proxy for heterosexuality.

The CDSS policy took advantage of a legal loophole left by prior gay rights litigation. In the early 1980s, LGBT rights lawyers had challenged benefits policies that excluded same-sex partners on the basis of sexual orientation discrimination, but courts rejected their arguments because the policies applied equally to unmarried persons.<sup>306</sup> Given this precedent, an adoption ban that applied to all unmarried couples would pass constitutional scrutiny. In addition, the policy had the benefit of “push[ing] the responsibility off onto the courts, rather than on the [C]DSS for *granting* gay adoptions.”<sup>307</sup> Although CDSS insisted that its policy was strictly a matter of marital status, it was clear that the department promulgated its new rules in response to Davis’ adoption petition. During the discovery process of the Hitchens and Davis case, the women found “that every document that came through the CDSS—every internal memorandum discussing the policy—had ‘Lesbian Adoption’ stamped all over it.”<sup>308</sup> These documents belied the claim that the policy was anything other than an effort to prevent same-sex couples from adopting. Of course, the policy would not have prevented Nathan Moncrieff’s death, as the adoptive parents presented themselves as a heterosexual, married couple. Despite CDSS’ opposition, the court granted Davis’ second-parent adoption, as well as hundreds of second-parent and joint adoptions by gays and lesbians in the years that followed.<sup>309</sup>

In order to encourage courts to grant the adoptions that CDSS employees could not formally endorse, social workers stressed the suitability of the parents and explained that their negative recommendation was solely due to the departmental policy. In the Davis case, the social worker had recommended the second-parent adoption before being overruled by the department heads.<sup>310</sup> Likewise, in a 1989 case, lesbians Millie Jessen and Sue

<sup>304</sup> Interview by Wendell Ricketts of Donna Hitchens, at 4 (July 14, 1988) (Ricketts Papers, Box 2, Folder 12).

<sup>305</sup> *Id.*

<sup>306</sup> See *Norman v. Unemp’t Ins. Appeal Bd.*, 663 P.2d 904, 908–10 (Cal. 1983); *Hinman v. Dep’t of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Cal. Ct. App. 1985); see also NeJaime, *supra* note 9, at 122–25; cf. *Elden v. Sheldon*, 758 P.2d 582, 586–90 (Cal. 1988).

<sup>307</sup> Interview, *supra* note 304, at 10; Ricketts & Achtenberg, *supra* note 294, at 108–09.

<sup>308</sup> Interview, *supra* note 304, at 4; Ricketts & Achtenberg, *supra* note 294, at 108–09.

<sup>309</sup> *The Homefront Battle: The Radical Right’s Assault on Lesbian and Gay Families*, NAT’L CTR. FOR LESBIAN RTS. NEWSL. (Nat’l Ctr. for Lesbian Rights, S.F. Cal.), Spring 1995, at 10 (Ricketts Papers, Box 1, Folder 34); see also CHAPTER NEWSL. (Lesbian & Gay Rights Chapter of the Am. Civil Liberties Union of S. Cal., L.A., Cal.), Oct. 1996, at 3 (ACLU CLGR, Box 18, Folder 6); Virginia Ellis, *Bitterly Opposed Adoption Rule Died Quiet Death*, L.A. TIMES, Nov. 29, 1998, at 1.

<sup>310</sup> Brief for Petitioner, *supra* note 300, at Exhibits A, D, F, G.

Pavlik sought to jointly adopt the two-year-old boy with AIDS whom they had fostered since he was released from the hospital at five weeks old. Although the social workers involved were uniformly supportive of the couple, CDSS did not recommend the joint adoption.<sup>311</sup> Because CDSS had approved the couple's foster care application, placed the boy in their care, and recommended that one of the women be approved to adopt the child, it was clear that the negative report on the joint adoption was solely due to the CDSS policy.<sup>312</sup> CDSS social workers took a similar approach in other cases, repeatedly making clear to courts that the only reason for their negative recommendation was the agency rule.<sup>313</sup>

Despite social workers' consistent efforts to subvert the policy, CDSS refused to change it, claiming in 1989 that any revisions could come only from the legislature.<sup>314</sup> Five years later, however, CDSS rescinded the policy, claiming that it was improper because officials had failed to follow rulemaking procedures when they initially instituted the regulation.<sup>315</sup> CDSS also concluded that the policy was "not appropriate and should be discontinued."<sup>316</sup> This shift came about as a result of internal debates over mounting social science evidence that showed no psychological differences between the children of homosexual and heterosexual parents.<sup>317</sup> By 1994, over thirty studies had been published demonstrating no disparities with respect to gender roles, gender identity, social relationships, or sexual orientation.<sup>318</sup> In addition, LGBT advocates in California had worked to change public perceptions of gay and lesbian families, lobbying city councils and the state

<sup>311</sup> See Dexter Waugh, *Lesbian Pair Adopt Child with AIDS: Judge Ignores State Agency's Objections*, S.F. EXAMINER, Nov. 16, 1989, at A10.

<sup>312</sup> See Nat'l Ctr. for Lesbian Rights, Current Case Docket (1989) (NGLTF, Box 88, Folder 63); Report of the Alameda Cty. Soc. Servs. Agency, *In re* Adoption Petition of Jessen, Petition No. 18380 (Super. Ct. Alameda Cty. July 3, 1989) (Ricketts Papers, Box 2, Folder 9).

<sup>313</sup> See, e.g., Report of the State Dep't of Soc. Servs., *In re* Adoption Petition of Carol, No. 18364 (Super. Ct. S.F. Cty. Dec. 18, 1987) (Ettelbrick Papers, Box 1, Folder 31); Report of Pamela Webb, *In re* Adoption Petition of Lipetzsky, Petition No. 18536 (Super. Ct. Alameda Cty. Feb. 15, 1990) (Ricketts Papers, Box 1, Folder 1); Brief for Petitioner, *In re* Adoption Petition of David (Super. Ct. L.A. Cty. Jan. 28, 1991) (Ettelbrick Papers, Box 1, Folder 1); Gayle Green, *Hannah Has Two (Legal) Mommies: A Growing Number of Lesbians Are Using Adoption to Strengthen Their Family Ties*, LESBIAN NEWS, Sept. 1993, at 55 (ONE, Lesbian Mothers Subject File); see also *Adoption Options for Same-Sex Couples: An Interview with California Adoption Lawyer Emily Doskow*, 20 FAM. ADVOC. 40, 44 (1997).

<sup>314</sup> See Interview, *supra* note 304, at 10.

<sup>315</sup> Cal. Dep't of Soc. Servs., All-County Letter No. 94-104 (Dec. 5, 1994) (on file with author); JESSICA LLOYD-ROGERS, DENYING THE RIGHT TO PARENT: CHANGES TO STATE ADOPTION POLICY FIND FEW FRIENDS 6 (Lyon/Martin Papers, Box 105, Folder 14); *The Homefront Battle*, *supra* note 309, at 10.

<sup>316</sup> See sources cited *supra* note 315.

<sup>317</sup> See Press Release, Children of Lesbians & Gays Everywhere, Gov. Wilson Attacks Kids' Best Interests (Mar. 13, 1985) (on file with GLBT Historical Society, COLAGE (Children of Lesbians and Gays Everywhere), Collection No. 2001-04, Box 1, Folder labeled Adoption/CA Gov Pete Wilson, 1995-96) [hereinafter COLAGE].

<sup>318</sup> See Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOC. ISSUES 29, 36-37, 39-43 (1996).



legislature for domestic partner recognition, participating in government task forces on the family, and mounting a series of legal challenges asserting the custody rights of lesbian co-parents.<sup>319</sup>

Through these efforts, it became clear not only that gays and lesbians formed families and raised children, but also that the “traditional family” enshrined in the 1989 adoption policy existed more in theory than in practice. In 1987, the California legislature established the Joint Select Task Force on the Changing Family, which issued its report in 1989.<sup>320</sup> In the report, the Task Force “acknowledged that ‘[t]he profile of California’s families has changed dramatically in the last three decades,’ and that ‘[f]ewer than one in ten families presently fits the “traditional family” model—breadwinner father, homemaker mother, and two or more children.’ ”<sup>321</sup> In a world of changing family structures, gay rights advocates had shown that gay and lesbian parents were not as anomalous as many believed.<sup>322</sup> To the contrary, gays and lesbians sought out the responsibilities of marriage and parenthood that an increasing number of heterosexual men and women avoided.<sup>323</sup>

### B. Agency Nullification

The CDSS decision to rescind the policy set the stage for another conflict between the agency’s head and bureaucrats. When California Governor Pete Wilson learned of it, he called the rescission “a huge overstep” and instructed Social Services Director Eloise Anderson, whom he had appointed in 1992, to reinstate the 1987 policy.<sup>324</sup> In taking this position, Wilson had support from conservative leaders, including Reverend Louis Sheldon, the head of the Traditional Values Coalition.<sup>325</sup> Sheldon explained that the policy was necessary for children to learn appropriate gender roles from their parents: “When [children] see father committed with the paycheck. When they see mother committed with the grocery list. When they see these things, they are learning the socialization process.”<sup>326</sup> Opponents of marriage equality later echoed this argument in explaining the need to prohibit same-sex marriages.<sup>327</sup>

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<sup>319</sup> See NeJaime, *supra* note 9, at 114–46; NeJaime, *supra* note 39, at 1196–1200, 1201–08, 1212–19.

<sup>320</sup> NeJaime, *supra* note 9, at 132.

<sup>321</sup> *Id.* at 133.

<sup>322</sup> NeJaime, *supra* note 39, at 1193–96.

<sup>323</sup> *Id.*

<sup>324</sup> Press Release, *supra* note 317; Lynn Smith, *The Queen of Responsibility*, L.A. TIMES, Nov. 10, 1996, at 1.

<sup>325</sup> See Dan Morain, *Governor Overturns Policy for Adoptions Politics*, L.A. TIMES, Mar. 14, 1995, at 3.

<sup>326</sup> David Reyes, *Adoption Proposal Sparks Sharp Debate*, L.A. TIMES, Sept. 6, 1996, at 3 (alteration in original).

<sup>327</sup> See BALL, *supra* note 273, at 76.

CDSS made it seem as if it were complying with Wilson's directive, holding hearings to reinstate the 1987 policy as a formal regulation in accordance with the administrative rulemaking process.<sup>328</sup> More than forty citizens testified, including social workers, adoption agency representatives, lawyers, teachers, adoptive parents, and adults who had been adopted as children.<sup>329</sup> While all but two argued in favor of unmarried couples' ability to serve as adoptive parents, Wilson nevertheless insisted that the 1987 policy be instituted as an agency rule. Like Dukakis during the Massachusetts controversy, Wilson was contemplating a presidential run and used the adoption debate to appeal to the right wing of the Republican Party.<sup>330</sup>

In an odd twist that reveals the extent to which civil servants operate without oversight, top CDSS officials defied the governor's directive. They secretly refused to file the necessary paperwork and therefore prevented the policy from becoming an administrative law. Although CDSS followed the administrative procedures by creating a formal proposal for the 1987 directive and holding public hearings, Anderson never finalized the process.<sup>331</sup> Instead, she allowed the proposed rule to languish until the deadline for its implementation passed.<sup>332</sup> CDSS claimed that the measure garnered so much opposition that it was impossible to respond to all of the comments in time to meet the one-year deadline.<sup>333</sup> However, one former official gave a different explanation: "Eloise didn't believe in what the governor was asking[,] . . . so she just didn't do it."<sup>334</sup> The governor, as well as many legislators and activists, had assumed that CDSS implemented the measure in 1995, with the truth only coming to light in 1998.<sup>335</sup> In 1999, CDSS' legal division circulated an all-county letter identifying the policy against unmarried couples as "an underground regulation inconsistent with the Administrative Procedure Act."<sup>336</sup> With this statement, CDSS acknowledged that the department had never completed the rulemaking process.

Anderson's decision to violate the governor's directive was extreme, but it represents the extent to which agency rules are dependent on civil servants' willingness to execute them. Even before Anderson defied the governor, social workers had undermined the executive policy by crafting home stud-

<sup>328</sup> See Cal. Dep't of Soc. Servs., All-County Letter No. 95-13 (Mar. 11, 1995) (on file with author).

<sup>329</sup> LLOYD-ROGERS, *supra* note 315, at 6.

<sup>330</sup> See Ellis, *supra* note 309, at 1. Wilson's campaign for the Republican presidential nomination was divisive from its inception and lasted only one month and one day. See George Skelton, *Looking for the Lazarus in Pete Wilson*, L.A. TIMES, Oct. 2, 1995, at 3; Paul Taylor & Dan Balz, *Gov. Wilson Quits Presidential Campaign: GOP Nomination Bid Amassed Big Debt, Angered Some Californians*, WASH. POST, Sept. 30, 1995, at A1.

<sup>331</sup> Ellis, *supra* note 309, at 1.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Cal. Dep't of Soc. Servs., All-County Letter No. 99-100 (Nov. 15, 1999) (on file with author).

ies that emphasized the ways in which gay and lesbian applicants were ideal parents. Social workers provided judges with the evidence that they needed to approve adoptions by gay and lesbians, despite the agency policy requiring social workers to oppose such cases. In doing so, the bureaucrats subtly voiced their opposition to the CDSS rule and helped normalize the notion of gay and lesbian foster and adoptive parents.

California was not the only state in which executive agency officials defied rulemakers. In 1987, Gloria Walker, the director of the Florida Department of Health and Rehabilitative Services' adoption service, admitted that the agency had not been enforcing the statutory ban on homosexual adoption.<sup>337</sup> Walker told reporters that "she knew little about the law or why it passed the Florida Legislature" and that Florida's adoption forms did not ask applicants about their sexual orientation.<sup>338</sup> As a result, Walker stated, "homosexuals may be able to adopt children despite the law."<sup>339</sup> Although Walker did not enforce the ban, gay men and women throughout the state were still prohibited from adopting children, their applications blocked by social workers who deviated from their profession's norms and judges who applied the law.<sup>340</sup> The administrative nullification of California's ban and the uneven application of Florida's both demonstrate the extent to which the implementation of laws depends on the civil servants responsible for their execution.

## VI. LESSONS FOR ADVOCACY

The ways in which civil servants responded to bans on gay and lesbian foster and adoptive parents in Massachusetts, New Hampshire, and California illustrate how much influence bureaucrats have on the law. Even without defying executive orders outright, agency employees could and did work to change the rules and regulations. In Massachusetts, social workers joined in a lawsuit that ultimately reversed the executive policy to which they objected. In New Hampshire, civil servants attempted to shape the legislative process by promulgating rules that permitted gay and lesbian adoptive and foster parenting, despite the legislature's clear opposition. When the legislature instituted a ban that agency employees saw as harming the interests of children, social workers simply did not execute the law. In California, before Anderson refused to file the rule with which she disagreed, social workers had formally upheld the agency policy against placing children with unmarried couples while undercutting it by presenting positive home studies

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<sup>337</sup> See Ben Stocking, *Official's Task: Defining Homosexuality*, CONCORD MONITOR, July 18, 1987, at 18.

<sup>338</sup> *NH Will Be First State to Enforce Law Banning Homosexual Foster Parents*, UNION LEADER, July 24, 1987, at 3.

<sup>339</sup> *Id.*

<sup>340</sup> See *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 808 (11th Cir. 2004).

that helped gay men and women create the families they so deeply desired. These public servants, who were not elected and not accountable to the public, were instrumental in shaping law through its implementation. Agency nullification raises important legal questions, which Section VI.A addresses. This Part then turns to the lessons that this history teaches for rights advocates, with Section VI.B analyzing how activists were able to shape the values of social workers, and Section VI.C extending the model to other LGBT rights issues.

### A. *The Contested Validity of Nullification*

Parts III to V illustrated how civil servants in executive agencies subverted and nullified the law, actions that raise serious questions as to whether bureaucrats should have such influence. This Article has focused on the implications of agency nullification's existence and the potential role of administrative agencies in fostering social and legal change, rather than making a normative claim about the desirability of the practice. Recent events reinforce this Article's argument that bureaucrats' power to effectuate legal change is an important consideration for rights advocates, while demonstrating the potentially harmful consequences of civil servants' autonomy. Whereas the non-conforming social workers featured in this Article nullified laws to grant gays and lesbians privileges they were formally denied, recent nullifiers have denied them rights that courts have formally granted.<sup>341</sup> A prime example is Kentucky clerk Kim Davis, who made headlines in August 2015 after she refused to issue marriage licenses to same-sex couples, defying the Supreme Court's decision in *Obergefell v. Hodges*<sup>342</sup> and explicitly violating a federal district court order.<sup>343</sup>

While this Article has adopted a neutral stance toward agency nullification as a normative practice, it nevertheless recognizes that agency nullification can be problematic. Scholars have debated the constitutionality and ethics of agency nullification, raising objections that the practice violates the

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<sup>341</sup> Nullification has also been used to subvert civil rights claims; officials' opposition to *Brown v. Board of Education* is perhaps the most notorious example. Shinar, *supra* note 6, at 603. However, as Michael Klarman has shown, the backlash this defiance generated ultimately promoted civil rights. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 83 (1994).

<sup>342</sup> 135 S. Ct. 2584 (2015).

<sup>343</sup> Sheryl Gay Stolberg, *Kentucky Clerk's Defiance Tests Boundaries of Gay Marriage Ruling*, N.Y. TIMES, Aug. 13, 2015, at A15. The marriage equality movement has also seen instances of agency nullification that benefited gays and lesbians. For example, at the urging of San Francisco Mayor Gavin Newsom, the county clerk's office issued permits to same-sex couples in 2004, despite California law limiting marriage to one man and one woman. Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24. Likewise, the Department of Justice announced in 2011 that it would no longer defend the federal Defense of Marriage Act. Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>, archived at <https://perma.cc/X2UT-BFY6>.

separation of powers and undermines democratic legitimacy.<sup>344</sup> At first blush, the arguments against agency nullification are quite powerful, given that bureaucrats are unelected officials whose very purpose is to execute the law. Nullification also undermines the ideals of predictability, certainty, uniformity, and fairness by letting civil servants' personal views shape how and when the law is applied.<sup>345</sup>

Although legal positivists insist on separating law and morals, there are compelling reasons for executive agencies to disobey duly enacted legislation and lawful regulations.<sup>346</sup> Adam Shinar has argued that nullification may in fact promote the rule of law, as overt and visible nullification may place contested social questions on the national agenda, resulting in policy changes that citizens prefer.<sup>347</sup> Additionally, "granting absolute status to the rule of law has its price," namely justice.<sup>348</sup> Agency bureaucrats are sometimes the only people in a position to challenge unjust policies. Heather Gerken has likewise argued that agencies resisting the law may advance democratic government because they may be giving voice to minority perspectives that are lost in policymaking.<sup>349</sup> As a result, agency nullification can be understood as "an alternative strategy for institutionalizing channels for dissent within the democratic process."<sup>350</sup> Finally, agency nullification may also make the enforcement of laws more efficient when compliance with one law thwarts other governmental objectives.<sup>351</sup> In the adoption and foster care context, social workers were balancing a lack of available homes with a ban on gay and lesbian parents. Since their foremost consideration was the best interests of children, social workers had to decide which factors to prioritize. This of course does not mean that all forms of agency nullification are principled.

Two other agency non-enforcement practices—discretion and categorical non-enforcement—help clarify when agency nullification is consistent with rule of law principles. Courts have recognized that criminal prosecutors and administrative agencies have the authority to select which laws to enforce, and have been reluctant to interfere with the executive branch's ex-

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<sup>344</sup> See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Gerken, *supra* note 16; Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); Shinar, *supra* note 6.

<sup>345</sup> Shinar, *supra* note 6, at 617.

<sup>346</sup> *Id.* at 646–47.

<sup>347</sup> *Id.* at 650–51.

<sup>348</sup> *Id.* at 652–53.

<sup>349</sup> See Gerken, *supra* note 344, at 1749 (referring to state dissent from federal policies); Gerken, *supra* note 16, at 1372, 1375 (describing state actors who dissent from federal policies as "loyal opposition" and noting that their "decisions ensure that national policymaking reflects the heterogeneity of the national polity").

<sup>350</sup> Gerken, *supra* note 344, at 1749.

<sup>351</sup> Shinar, *supra* note 6, at 643, 653.

ercise of discretion in this regard.<sup>352</sup> More controversial is whether executive agencies can explicitly refuse to enforce an entire category of laws, with courts and scholars divided on the constitutionality and normative benefits of the practice.<sup>353</sup> The difference between the two systems turns on whether agency officials are undertaking an individualized exercise of discretion or making a blanket statement that a law will not be enforced. In the case of gay and lesbian foster and adoptive parenting bans, social workers' nullification combined elements of both. Agency officials did not implement an overt policy of nullification, but rather nullified the laws when doing so was in the best interests of the children. In that way, their actions were akin to the exercise of prosecutorial discretion. However, social workers consistently nullified one particular law, effectively engaging in non-enforcement.

When compared to Kim Davis' refusal to issue marriage licenses, the nullification of foster and adoptive parenting bans described in this Article appears closer to discretion than non-enforcement. Much of the value of bureaucracy lies in the apolitical expertise that civil servants bring to their work, which requires executive agency staff to have discretion in implementing laws.<sup>354</sup> In the context of gay and lesbian foster and adoptive parents, social workers were exercising their professional judgment as to the best interests of the children. Their expertise—the very basis for their role as bureaucrats—was what gave rise to the conflict and resulted in agency nullification. This is distinctly different from Davis' situation, as her per-

<sup>352</sup> Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 682–85 (2014). While courts have repeatedly upheld the practice, prosecutorial discretion is controversial and the subject of extensive scholarly criticism. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); Heller, *supra* note 17, at 1328–41; Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 673–74 (1992); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546, 1548, 1555–56 (1981); see also Wadhia, *supra* note 17, at 268–78 (comparing prosecutorial discretion in criminal and immigration law). Prosecutorial discretion is also often justified based on separation of powers concerns, with the judiciary refusing to encroach on the prerogative of the executive to determine how to enforce the law. Heller, *supra* note 17, at 1338–39.

<sup>353</sup> See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 174 (2015) (characterizing the executive's categorical non-enforcement of laws as promoting several rule of law values, including transparency, accountability, and justice); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 836–56 (2013) (identifying the circumstances in which the executive may decide to not enforce the law as those where the statute is unconstitutional, equity in individual cases require non-enforcement, the agency has insufficient resources, and Congress has delegated policy-making authority); Price, *supra* note 352, at 705–07 (arguing that an executive non-enforcement policy usurps Congress' function and undermines the deterrent effect of law). See generally Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119 (2014) (claiming that the transparency, clarity, and centralized control of non-enforcement undermines the rule of law).

<sup>354</sup> Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (“[B]ureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview.”).

sonal religious beliefs were irrelevant to her job as county clerk. Additionally, Davis imposed her view on all same-sex couples, without distinction, making it clear that she was engaging in categorical non-enforcement. This difference between the two situations may provide a means of distinguishing different forms of nullification and help advocates determine when they should embrace agency nullification as a means of promoting legal change.

While the legal basis for nullification is a subject of debate, it is clear that the executive bureaucracy does engage in nullification and that whether and how agencies implement laws matters. Agency nullification has not always been beneficial for gay rights or other civil rights movements, and therefore it is all the more important for lawyers to consider how bureaucrats will respond to legal developments.

### B. *The Importance of Non-Legal Actors*

The history of gay and lesbian foster and adoptive parenting demonstrates the importance of non-legal actors and extra-legal advocacy to social movements. Constitutional law theorists have emphasized this point, arguing that non-legal actors create and shape discourse around law, giving legal principles new meanings and applications.<sup>355</sup> Lani Guinier and Gerald Torres have gone so far as to claim that “social movement activism is as much a source of law as are statutes and judicial decisions.”<sup>356</sup> It is clear from the work of social movement scholars that mobilized citizens, working in conjunction with legal professionals, can effectuate legal change, because political contestation influences how the law is understood both normatively and prescriptively. However, it is equally clear from the history presented in this Article that the efforts of social movements must extend beyond legislative lobbying, litigation, and other forms of legal advocacy. Social workers defied prohibitions on gay and lesbian foster and adoptive parents not because they were taking a stance in favor of gay rights, but rather because they believed that the bans ran counter to the best interests of the children. These views were a product of conversations within the social work profession that began before 1973, when gay liberation activists convinced the American Psychiatric Association to declassify homosexuality as a mental illness.<sup>357</sup>

Gay rights advocates not only changed mental health professionals’ understandings of homosexuality, but also pushed scientists to take an active stance in favor of gay and lesbian rights. By engaging in conversations with professionals and shaping the way in which these groups understood how

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<sup>355</sup> See, e.g., Guinier & Torres, *supra* note 12, at 2760.

<sup>356</sup> *Id.*

<sup>357</sup> See generally BAYER, *supra* note 54 (detailing the 1973 declassification debates); HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* (2002) (discussing the collaboration between homosexual activists and scientific authorities prior to 1973).

scientific knowledge influenced civil rights, gay rights proponents fostered professional norms that supported gay and lesbian rights. A decade later, these norms substantially influenced social workers who evaluated potential gay and lesbian adoptive and foster parents. Although the gay rights activists advocating for the declassification of homosexuality as a mental illness were not thinking specifically about foster and adoptive parenting rights, they recognized that the diagnostic change would have substantial and widespread effects.<sup>358</sup> As these advocates hoped, the declassification prompted reforms in immigration, federal employment, and federal security clearance policies, all of which had discriminated against gay men and women.<sup>359</sup> In the terms of social movement theory, the impact of the declassification highlights the extent to which advocates who change discourse in non-legal arenas can effectuate legal change.

The efforts of these advocates had a broad impact because they targeted what Claudia Haupt has termed “knowledge communities,” or “network[s] of individuals who share common knowledge and experience as a result of training and practice[,] . . . [as well as] shared notions of validity, intersubjective understanding, and a common way of knowing and reasoning.”<sup>360</sup> Like psychiatrists and psychologists, social workers share a set of professional ideals. Because of the work of gay rights advocates in the 1970s, these values include a refusal to discriminate on the basis of sexual orientation. Advocates’ involvement in the conversations of professionals shaped the perspectives of civil servants and administrators who did not directly interact with gay rights groups, demonstrating the efficiency of interacting with knowledge communities to influence their policies and norms. Knowledge communities extend beyond the mental health professions, and their members interact with a range of laws in administrative agencies. Sometimes, advocates may even be able to promote legal change more effectively by focusing on knowledge communities than by engaging in litigation or legislative lobbying. The history of gay and lesbian foster and adoptive parenting thus suggests that legal education and advocacy among professional associations can have significant effects on the implementation of policies—an often overlooked avenue for legal change.

### C. *Beyond Adoption and Foster Care*

The effects of working with knowledge communities can be far-reaching, as the history of gay and lesbian foster and adoptive parenting shows. Social workers’ decisions, beyond helping same-sex couples adopt and form families, undermined discriminatory policies and had a substantial impact on

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<sup>358</sup> See D’EMILIO, *supra* note 53, at 154, 162; Kameny, *supra* note 55, at 198–99.

<sup>359</sup> See CANADAY, *supra* note 13, at 249–53; see also *Hill v. INS*, 714 F.2d 1470, 1472 (9th Cir. 1983); D’EMILIO, *supra* note 53, at 154, 162; Kameny, *supra* note 55, at 194, 202–03.

<sup>360</sup> Claudia E. Haupt, *Professional Speech*, 125 *YALE L.J.* 1238, 1250–51 (2016) (citations omitted).



gay rights more broadly. Their work helped change public opinion about gay rights by reshaping the image of gays and lesbians from stereotypical “destructive pleasure seekers and child molesters” to nurturing and loving parents.<sup>361</sup> With the law granting legal standing to both same-sex parents, social and cultural institutions also had to recognize gays and lesbians as parents.<sup>362</sup> As openly gay and lesbian parents volunteered at schools, served on the PTA, and coached soccer teams, gay families became woven into the social fabric of everyday life.<sup>363</sup> By 2000, 22% of gay couples and 34% of lesbian couples were raising children, their families having been formed through surrogacy, alternative reproduction, and adoption.<sup>364</sup> As gay families became more common, fears about the impact of parental homosexuality on children receded. Americans subsequently became more supportive of gay and lesbian rights. In 1977, only 14% of Americans believed that gays should be legally permitted to adopt children. Support for adoption rose to 29% in 1992 and to almost 50% in 2000.<sup>365</sup>

In addition, as gay and lesbian families became increasingly common, it became harder to justify denying gay and lesbian couples the right to marry.<sup>366</sup> Although the gays and lesbians who sought to foster or adopt children likely did not do so with the intent of promoting marriage equality, that was one of its effects. As a Massachusetts legislator told a gay rights proponent, “Once you guys got adoption, then it was all over. . . . How do we deal with this? Whether I like it or not, this is where we are at in society. . . . It’s time to move past my own personal views.”<sup>367</sup>

The reality of gay and lesbian families challenged the arguments of same-sex marriage opponents, which were rooted in child welfare and the claim that “children do best when raised by married mothers and fathers who are biologically related to them.”<sup>368</sup> Gay rights advocates countered these assertions with mounting evidence that parental homosexuality did not impact child development; social science studies established no difference in the psychological adjustment, social functioning, gender role development, or sexual orientation of children raised by homosexual as opposed to heterosexual parents.<sup>369</sup>

Marriage equality proponents also argued that same-sex marriage promoted the interests of the many children of gays and lesbians, a point that resonated with the Supreme Court. When, in *United States v. Windsor*,<sup>370</sup> the

<sup>361</sup> GALLAGHER & BULL, *supra* note 7, at 217.

<sup>362</sup> See CHAUNCEY, *supra* note 39, at 111.

<sup>363</sup> See *id.*; KLARMAN, *supra* note 10, at 51; DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE 51 (2006).

<sup>364</sup> See KLARMAN, *supra* note 10, at 201.

<sup>365</sup> See *id.* at 72; see also CHAUNCEY, *supra* note 39, at 150.

<sup>366</sup> See KLARMAN, *supra* note 10, at 51.

<sup>367</sup> PINELLO, *supra* note 363, at 51.

<sup>368</sup> BALL, *supra* note 273, at 114.

<sup>369</sup> See *id.* at 87–110.

<sup>370</sup> 133 S. Ct. 2675 (2013).

Supreme Court struck down § 3 of the federal Defense of Marriage Act (“DOMA”),<sup>371</sup> the Court emphasized that DOMA “humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>372</sup> The Court echoed this sentiment in *Obergefell*: “Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This [statistic] provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”<sup>373</sup> By facilitating the formation of these families, social workers in the late 1980s and early 1990s helped create a social context that would later promote same-sex marriage. Although marriage equality was not the goal of social workers at the time, their push for non-discriminatory foster and adoptive parenting policies set the stage for broader rights claims.

Now that the Supreme Court has ruled on marriage equality, LGBT rights groups will be turning to other items on their agenda. High on their list is the welfare of LGBT youth, who are often marginalized by teaching staff and bullied by fellow students; their welfare is a legal issue that would benefit from work with knowledge communities.<sup>374</sup> By reaching out to educators through the National Education Association and state teachers organizations, LGBT advocates may be able to effectuate widespread change. Not only would this work improve the classroom and campus environments for individual students, but by enlisting school superintendents, principals, and teachers to push for curricular revisions, LGBT groups also might change state-mandated educational policies to require instruction in gay history.<sup>375</sup> In teaching students that their homosexual peers are not outliers, these curricular changes would foster greater tolerance for the LGBT community.

Such an approach could similarly benefit the campaign for transgender rights, which LGBT legal groups have recently made a more concerted effort to address. Much like gay rights, transgender rights have been stymied by stereotypes that transgender people are dangerous to children.<sup>376</sup> In November 2015, Houston residents voted to repeal the city’s non-discrimination ordinance amid a campaign that exploited prejudices against transgender in-

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<sup>371</sup> Pub. L. No. 104–199, § 3, 110 Stat. 2419, 2419–20 (codified at 1 U.S.C. § 17 (2012)).

<sup>372</sup> *Windsor*, 133 S. Ct. at 2694.

<sup>373</sup> 135 S. Ct. 2584, 2600 (2015).

<sup>374</sup> See, e.g., *Hatcher v. DeSoto Cty. Sch. Dist. Bd. of Educ.*, 939 F. Supp. 2d 1232, 1239 (M.D. Fla. 2013), *aff’d sub nom.*, *Hatcher ex rel. Hatcher v. Fusco*, 570 F. App’x 874 (11th Cir. 2014); *L.W. v. Toms River Reg’l Sch. Bd. of Educ.*, 915 A.2d 535, 540–44 (N.J. 2007).

<sup>375</sup> In 2011, California became the first state to require schools to teach gay history. See Ian Lovett, *California to Require Gay History in Schools*, N.Y. TIMES, July 14, 2011, at A16.

<sup>376</sup> Esseks, *supra* note 8 (“Transphobia is built on the same lies that prevented gay rights for decades.”).

dividuals.<sup>377</sup> Similarly, the Traditional Values Coalition has lobbied against the federal Employment Non-Discrimination Act (“ENDA”),<sup>378</sup> arguing the statute would harm children.<sup>379</sup> Its campaign, entitled “ENDA Hurts Kids,” claims that ENDA would force schools to hire “she-male activists and cross-dressing teachers,” who would “indoctrinate our children into accepting these ‘alternative lifestyles’ as normal and good.”<sup>380</sup> To promote transgender rights, LGBT advocates must dispel these stereotypes, much as they did to further gay rights, and the history of gay and lesbian foster and adoptive parenting provides a model for doing so. Transgender individuals engage with a range of civil servants who are members of knowledge communities, including social workers, psychiatrists, and other medical professionals.<sup>381</sup> Developing these groups’ understandings of transgender people and urging professionals to promote transgender rights could have a profound impact on how American society views and treats transgender individuals.<sup>382</sup>

Working with knowledge communities not only has proven invaluable for gay rights activists in the past, but has also illuminated a path for future advocacy. The efforts of gay rights advocates of the late 1960s and early 1970s, which targeted knowledge communities and shaped their views, influenced the professional norms and values of social workers. This collaboration provides a model for current social justice projects, demonstrating the utility of incorporating the education of civil servants into legal advocacy that extends outside the traditional confines of law. Gaining the support of

<sup>377</sup> *Id.*; Manny Fernandez & Mitch Smith, *Houston Voters Repeal Measure Ensuring Rights*, N.Y. TIMES, Nov. 4, 2015, at A1.

<sup>378</sup> ENDA would prohibit employment discrimination based on sexual orientation or gender identity. Employment Non-Discrimination Act, S. 815, 113th Cong. (2013). In 2015, gay rights supporters introduced the broader federal “Equality Act” to prohibit discrimination on the basis of sexual orientation or gender identity not only in employment, but also in education and public accommodations. Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 3185, 114th Cong. (2015).

<sup>379</sup> Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 622 (2013).

<sup>380</sup> *Id.* at 622–23; see also TRADITIONAL VALUES COALITION, ENDA HURTS KIDS: THE IMPACT ON CLASSROOMS 6 (2013), available at [http://traditionalvalues.org/data/sites/73/pdfs/\\_WPapers/070713\\_TVCELI\\_ENDA2013\\_FINAL.pdf](http://traditionalvalues.org/data/sites/73/pdfs/_WPapers/070713_TVCELI_ENDA2013_FINAL.pdf), archived at <https://perma.cc/26FL-PJ4W>. This rhetoric and slogan bears a striking similarity to Anita Bryant’s 1977 anti-gay campaign. See BRYANT, *supra* note 29, and accompanying text.

<sup>381</sup> This is true in a number of circumstances, including foster care, adoption, prisons, and schools. See, e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* ch. 4 (Duke Univ. Press rev. ed. 2015).

<sup>382</sup> In 2013, the American Psychiatric Association replaced the diagnostic category “Gender Identity Disorder” with “Gender Dysphoria” in its Diagnostic and Statistical Manual. AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1 (2013), available at <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>, archived at <https://perma.cc/LQ5L-SVKC>. Transgender rights advocates had lobbied for the change, arguing that “Gender Identity Disorder” stigmatized transgender individuals and indicated that they were pathological. Esinam Agbemenu, *Medical Transgressions in America’s Prisons: Defendant Transgender Prisoners’ Access to Transition-Related Care*, 30 COLUM. J. GENDER & L. 1, 30–32 (2015); see also Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 30–32 (2003) (discussing the ethical quandary of representing transgender clients, whose legal claims depend on a strategic use of the “medical model of transsexuality,” when transgender rights more broadly would benefit from a disaggregation of rights and medical procedures).

knowledge communities can impact how laws are implemented; they help foster a social environment more favorable to rights projects, which in turn supports legal change. The history of gay and lesbian foster and adoptive parenting illustrates how social change occurs through non-traditional means and how bureaucrats have been central to the transformation of rights.

#### CONCLUSION

Social workers—backed by social science research studies, the position statements of their professional organizations, and their personal political views—often supported, protected, and promoted the rights of gays and lesbians.<sup>383</sup> They countered the views of a hostile public, swaying the decisions of elected officials and chipping away at the prejudiced notion that gays and lesbians were inherently harmful to children. Meanwhile, by opposing categorical bans on homosexual foster and adoptive parents, social workers asserted their special competence as trained professionals to determine the best placements for children, reinforcing their position as experts. These claims to authority allowed social workers to expand their role beyond casework and to become involved in lawmaking to protect the interests of the children they served. The history of gay and lesbian foster and adoptive parenting reveals how the administrative state can create civil rights in the face of widespread opposition, adding a new dimension to scholarship on administrative constitutionalism.

By illustrating the extent to which civil servants have room to maneuver within regulations and to engage in agency nullification, this history of gay and lesbian foster and adoptive parenting bans identifies a significant avenue of advocacy and legal change. Advocates affected the way in which the law was applied by influencing the opinions of agency administrators. This history confirms the important role of non-legal actors in setting legal standards and promoting rights claims, indicating the extent to which legal advocates must expand their work beyond courtrooms and legislative lobbying. The influence of civil servants in the struggle for rights highlights the importance of the executive branch beyond its role in implementing the legal victories that advocates have secured through the legislatures and courts. In shaping and executing the law, bureaucrats have been key to the transformation of gay rights, rendering the executive branch a central part of legal change.

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<sup>383</sup> See LINDA CHERREY REESER & IRWIN EPSTEIN, PROFESSIONALIZATION AND ACTIVISM IN SOCIAL WORK: THE SIXTIES, THE EIGHTIES, AND THE FUTURE 62 (1990) (noting that seventy-seven percent of social workers in 1984 identified as Democrats and that four percent “had left-wing commitments outside the Democratic Party”); Mitchell Rosenwald & Cheryl A. Hyde, *Political Ideologies of Social Workers: An Under Explored Dimension of Practice*, 7 ADVANCES SOC. WORK 12, 15 (2006) (analyzing social workers’ political ideologies as generally liberal).