

Does “Evidence-Based Policy” Help Protect LGBT Rights? A View from U.S. Social Work

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1 Introduction

Although LGBT activists often focus their efforts on advancing specific legal arguments that seek to enshrine LGBT equality in the law, U.S. courts have generally failed to acknowledge such rights, either because they do not recognize LGBT persons as a legal class or because they rule that no rights are present or applicable at all. In this essay I reflect on ways in which evidence-based policy and practice have helped LGBT populations achieve gains in equality even when equality itself remains unacknowledged as a human or civil right. This paper examines: 1) the potential problems that can come from relying only on a rights approach to advancing LGBT equality; 2) the rise of evidence-based policy as part of the discourse on public and social issues, as contrasted with authority-based or faith-based policy regimes; 3) the history of certain subgroups in certain policy domains under authority-based/faith-based policy regimes, specifically the history of gays and lesbians under policy regimes governing marriage and family formation; 4) the rise of LGBT participation in adoption and foster care even as U.S. public policy and electoral behavior has further restricted LGBT marriage and family formation, 5) how the rising acceptance of evidence-based policy and practice in social work has helped advance and protect the rights of LGBT adoptive and foster parents, and 6) risks of evidence-based policy and an analysis of one policy domain where claims of evidence-based practice had adverse effects on LGBT people, namely altruistic blood donation. The paper concludes that despite clear limitations, evidence-based policy can advance LGBT equality in areas relevant to social work and in ways that a rights approach alone cannot.

2 Problems with Using Rights Approaches Alone to Advance LGBT Equality

Gay activists often employ a rights approach to advancing equality for LGBT people, linking the reduction and elimination of discrimination and harassment to universal civil and human rights. Rights approaches in activist work are seen as the safest way to ensure that gains made will not be eliminated at the ballot box or through subsequent policy decisions, and there is a built-in avenue of redress through the courts if electoral or governmental reverses occur.

However, rights approaches to reducing and eliminating discrimination and harassment against LGBT people also come with risks. They can be time consuming and expensive to undertake, redress can arrive too late to ameliorate the immediate harm experienced by the victims of discrimination and harassment, and lost rights lawsuits can create legal precedents that eliminate LGBT gains made outside a rights approach. For an example of this last phenomenon, when Michigan passed an amendment to its state constitution in 2004 declaring marriage to be a union of one man and one woman, Republican

Attorney General Mike Cox immediately issued Opinion No. 7171 stating that all Michigan cities offering domestic partnership benefits to employees must cease doing so (Cox, 2010). When an American Federation of Labor affiliate, National Pride at Work, filed suit to preserve domestic partnership benefits in the city of Kalamazoo, MI (*National Pride at Work v. Granholm*, No. 05-368-CZ [55th Dist. Ct. September 27, 2005]), they not only lost the case on appeal but received unwelcome judicial clarification that not only could Michigan municipalities not offer domestic partnership benefits, but all public sector employers in Michigan, from county hospitals to the University of Michigan and all other state colleges, which offered any benefits to same-sex partners had to cease doing so (*Pride at Work v. Governor of Michigan*, 481 Mich. 56 [2008]).

Turner (2007) highlights the danger of judicial activism and elasticity in rights approaches. The Michigan Supreme Court’s ruling against Pride at Work hinged on the justices’ notion that the constitutional amendment forbade recognition of any union “similar to” marriage, and this loose language permits a great deal of judicial flexibility in decision-making. By recognizing domestic partnership registration, public sector employers in the view of Michigan’s Supreme Court were recognizing quasi-marriages. Turner (2007) argues that the justices’ ontological assumptions and philosophically worded tastes and preferences allowed them to ignore the plain meaning of the constitutional amendment in favor of their own beliefs, and highlights the oddity of a higher court not simply overturning a lower court but adopting wholesale a particular philosophical and linguistic argument that is simply not present in the constitutional amendment itself.

In short, while rights approaches can be valuable for locking in legal precedent that safeguards equal treatment for LGBT people, they can be harmful when they lock in unequal treatment. State universities in Michigan filed an amicus curiae brief to the Pride at Work lawsuit noting that 196 LGBT adults at the University of Michigan alone and eight of their children were put at risk to be affected by the withdrawal of same-sex benefits. With the loss of the case an entire architecture of same-sex benefits were dismantled, at the University of Michigan and at universities and hospitals across the state.

3 The Rise of Evidence-Based Policy and Practice

Given the magnitude of what can be lost alongside lost lawsuits for LGBT rights, questions emerge as to what else can be done that advances LGBT rights even if what is gained is not legally seen or accepted as a right. In this context comes “evidence-based policy,” which largely emerged in the mid-1990s (House of Commons Science and Technology Committee, 2006) out of concern at how the British government handled the policy problems generated by bovine spongiform encephalopathy or mad-cow disease. Political and financial concerns to protect the British beef industry were seen as having taken precedence over open, transparent, and accurate investigation and even over public safety. The development and expansion of the internet in this same period encouraged new information sharing by policymakers and also rapidly gave policymakers new abilities to receive and make use of research findings and scientific advice.

Calls for “evidence-based policy” and “evidence-based practice” are often greeted with suspicion. There are concerns that evidence-based policy and practice becomes a mechanism for the covert exercise of power, and that “evidence-based” services and interventions merely serve to provide political cover for cost-benefit analysis and cost-cutting (Gibbs & Gambrill, 2002). There are also fears that successful but difficult-to-evaluate public

programs and services will be displaced by more rigid and narrow but “evidence-based” services that will have a very different and reduced effect on the ground.

However, advocates of evidence-based policy and practice have suggested that it is the only clear alternative to authority-based or faith-based practice, in which some less evaluated decision-making process, such as professional expertise, clinical judgment, or electoral preferences, legitimizes an inferior set of outcomes when a more robust, evidence-based approach could do better (Gambrill, 1999). These advocates often suggest that faith-based or authority-based practice is pervasive in social and public services and that only a scientific commitment to evidence-based evaluation can be truly fair and equitable for all (Gambrill, 2001).

4 How LGBT People Have Fared Under Authority-Based Family Formation Policies

Certain subgroups may fare worse under authority-based or faith-based policy regimes than others. Members of the LGBT community historically have fared poorly in the arenas of U.S. public policies that regulate marriage and family formation, as evidenced by the massive electoral backlash in recent years to outlaw same-sex marriage via “Defense of Marriage” Acts in many U.S. states.

However, in recent decades growing numbers of U.S. gays and lesbians have become members of the adoption and foster care community, parenting orphaned and relinquished children and becoming somewhat prominent as a group for their frequent willingness to parent “special needs” children who are ill or face serious disabilities. While U.S. public policies and services have continued to discriminate against gays and lesbians, members of the LGBT community have often formed strong relationships with state child welfare departments and foster care agencies and have regularly served as foster care and adoptive parents.

The issue of same-sex marriage and civil unions has undergone striking and rapid changes in the U.S. in recent years. Within the past year, an examination of U.S. states that allow either marriage equality or gay civil unions suggests that almost 30% of states in the United States have some formal recognition of gay unions. For the first time in 220 years, the 2010 Census counted not only all legal same-sex marriage as marriages, but also advised LGBT partners to answer the marital status question based on how they define their own relationship, whether or not marriage equality is legal in their state (U.S. Census, 2010, p. 2).

However, the expansion of marriage equality and civil unions still exists alongside far more numerous Defense of Marriage Acts that directly prohibit marriage equality and even gay civil unions across much of the country (Godoy and National Public Radio, 2009). Of the eight U.S. states that moved to ban marriage equality by 2006, six of them (75%) actually experienced an increase in the number of same-sex couples (Gates, 2006), so it seems likely that these legal bans are not merely symbolic gestures in regions with a low LGBT population but rather are happening in states where the LGBT population is growing and thus actively harmed by such legislation. The distribution of legal regulation of gay partnering has become increasingly u-shaped in the past few years; a growing number of U.S. states permit gay partnering, while a large number of states have moved to disallow formal recognition of gay partnering, with fewer and fewer states in the middle “doing nothing.”

5 How LGBT Adoption Has Fared as Social Work Becomes More Evidence-Based

Marriage equality and gay civil unions might have less influence on foster care and public sector adoption by gays and lesbians than it might first appear. Adoption and fostering by gays and lesbians is subject to separate legislation in the U.S., and while there has been recent change in this area, it has been slower and on a smaller scale than the prominent national U.S. debate over marriage equality, possibly due to how fragmented and variable existing adoption and fostering laws are and the private nature of the adoption process (Ruggeri, 2008). Adoption and fostering laws affecting gay parents also have a u-shaped distribution, but with the majority of U.S. states, approximately 35, in the middle with no real adoption legislation concerning gay parents (Ruggeri, 2008). Only Florida directly prohibited adoption by gays and lesbians until this law was finally ruled unconstitutional in 2010. Mississippi bars same-sex couples from adopting together but not as gay individuals, while Arkansas and Utah bar any unmarried couples from jointly adopting (Ruggeri, 2008). At the other end of the distribution, 12 states and the District of Columbia directly allow second-parent adoptions by a same-sex parent (Perry, 2007; Ruggeri, 2008), while approximately 22 states remain ambiguous about whether a second parent adoption by a same-sex parent is possible (Ruggeri, 2008), and this ambiguity suggests that some same-sex second parent adoptions are happening in these 22 states.

The relatively small influence the expansion of marriage equality has on the legal availability of adoption for gay and lesbian parents in the U.S. is explained in large part due to the judicial determination that no one—married or single, gay or straight—has a right to adopt, to be adopted, or to apply for adoption (McMillin, 2007). The U.S. Supreme Court has refused to hear gay adoption cases for this reason (*Lofton v. Secretary, Florida Department of Children and Families*, 543 U.S. 1081), and attempts to make gay adoption a constitutional issue under First Amendment grounds of privacy and intimate association, or Fourteenth Amendment grounds of equal protection and due process, have thus far largely failed (Smith, 2003; McMillin, 2007). Moreover, given the success of anti-marriage equality initiatives in the aftermath of the first marriage equality victory in Massachusetts, there might be some hesitation among U.S. gay rights activists to push too hard for adoption equality given that very few jurisdictions negatively impact gay and lesbian adoption and any publicity might stir up vastly increased opposition with resultant adverse changes to adoption policy (Perry, 2007). In this case, without formal legal rights adoption by gays and lesbians has been able to continue under the political radar while adoption researchers produce study after study finding that LGBT adoption is good for children and good for society.

As suggested above, evidence-based practice as an alternative to authority-based practice (Gambrill, 1999) has gained increasing prominence in social work and in child welfare as a way to treat stakeholders in adoption and fostering as fairly as possible by looking at the outcomes of scientific research and changing practices accordingly if the evidence is clinically relevant (Magill, 2006). In this arrangement, adoption agencies that engage in evidence-based practice become learning organizations that change past practices that resulted in harm or disenfranchised stakeholders (Gambrill, 2006). Because decades of research synthesized by the American Academy of Pediatrics has demonstrated that gay parents cause no harm to their children (Perrin, 2002), and because families with gay parents are certainly themselves harmed by discriminatory practices, there is no evidence to support opposing gay adoption. At least a dozen U.S. states have requirements that public services for children be evidence-based (Cooper & Aratani, 2009).

6 Risks of Evidence-Based Policy

With the rise of interest in evidence-based policy and practice in health and human services, however, come specific risks and potential consequences. One risk is simply that evidence-based jargon will enter the discourse without the scientific standards of evidence-based practice being met. Gambrill (2006) notes that there is often a preference for authority-based practice in social service agencies even when lip service is paid to the notion of being evidence-based. Agencies that have an established, top-down, hierarchical structure can be highly resistant to the “deeply participatory, antiauthoritarian paradigm” (Gambrill, 2006, p. 352) that was conceptualized by the originators of evidence-based practice, in which stakeholders are encouraged and empowered to challenge the status quo. Evidence-based practice arose in part because of “overenthusiastic adoption of interventions of unproven efficacy or even of proven ineffectiveness” as well as the habit of “continuing to offer interventions or services demonstrated to be ineffective” (Gambrill, 2007, p. 452). Adoption and fostering is still full of such examples of excess, relying on literary rather than scientific theory (Barth, Crea, John, Thoburn & Quinton, 2005), non-theoretical heuristics (Bath & Haapala, 1994), or simply not delivering services as designed (Kirk & Griffith, 2004). These authority-based practices can be maintained even when the jargon of evidence-based practice is in common use or referenced in daily practice, and this is a clear risk of any turn to evidence-based policy. Employing the terminology and specialist vocabulary of evidence-based policy with no demonstrable, substantive guidance by evidence can be a way to reclothe authority-based practices in more politically acceptable forms.

Another risk involves the organizational temptation to engage in policy-based evidence-making. This phenomenon involves leveraging research in support of a predetermined policy even when the scientific strength of the evidence marshaled is thin, and when present can have adverse effects on LGBT rights and status. The risk of HIV infection through AIDS meant that policies to police altruistic blood donation would be needed, but the growing number of successes enjoyed by LGBT rights activists as well as public awareness of stigma and discrimination already suffered by gay men made ensuring blood safety a politically challenging issue (Bayer & Feldman, 1999; Pawson & Tilley, 2001). Discrimination on the basis of sexual orientation or class membership was recognized as problematic (Bayer & Feldman, 1999; Pawson & Tilley, 2001; Hochberg, 2002) and epidemiological attention to actual sexual behavior was seen as crucial to stopping the spread of AIDS.

However, initial policy responses to the risk of HIV infection through donated blood heavily emphasized blanket discrimination against LGBT donors on the de facto basis of sexual orientation rather than empirical data collection of actual sexual behavior analyzed in meaningful categories. In the UK and the USA, men who had sex with men even once were lumped into the same category as men who had dozens of same-sex sexual partners per year; both groups were permanently barred from ever donating blood. These blood donor policies were often justified through data cuts to population-level health data that created crude dichotomous variables and then used these unsophisticated variables to find statistical differences across large groups of people across several decades; in this way, U.S. men who have had sex with men since 1977 were found to have much higher risk of having HIV (U.S. Food and Drug Administration, 2006), even though this dichotomous category is too broad and historical to give a meaningful measure of actual risk in the present.

This statistical choice was made even though HIV remains undetectable by blood donor screening for only very short periods after transmission, approximately 9-15 days (UK

Department of Health, 2011), suggesting that an empirically calculated deferral period for donors who met explicit behavioral risk criteria was more strongly supported by the evidence than a lifetime ban encompassing highly diverse donors (Saletan, 2011). These donor exclusion parameters were over-inclusive and over-target high risk individuals, likely resulting in the discouragement of low risk individuals as well (Hochberg, 2002) such as heterosexuals with any history of same-sex sexual activity and monogamous gay couples. In this way an “evidence-based” policy reliant on crude and irrelevant statistics was used to create an authority-based policy reminiscent of the Jim Crow racial segregation laws that relied on “one drop of blood” to define the category of black race, with long-term adverse effects on LGBT people

Lastly, while evidence-based policy may claim to seek to expand openness and transparency, it remains unclear how systematically this is done and how consistently the voice of the marginalized is heard under the evidence-based regime of social care. Shaw (2005) notes that the U.S. social work scholars most associated with evidence-based practice have not often been clearly associated with social justice-centered or stakeholder models of evaluation. Evidence-based policy has often been associated with moderate, centrist politics in the U.S., and some advocates have explicitly framed their work as having centrist appeal (e.g., Schuck & Zeckhauser, 2006). The rightward drift of policy frontiers over the past four decades suggests that what is “centrist” in the second decade of the twenty-first century can sometimes look a great deal like what was considered radically right wing in the 1960s and 1970s. Grundy and Smith (2007) express concern that when LGBT activists engage in evidence-based policy, they run the risk of “reproducing dominant forms of knowledge production, neoliberalizing social movement activism and reducing the sphere for advocacy and democratic politics” (p. 295). Although some scholars have explicitly discussed possible connections between evidence-based social work, social justice, and stakeholder participation (Brocato & Wagner, 2003; Briggs & McMillin, 2012), the extent to which progressive politics and evidence-based policy are easily compatible remains open to question.

7 Conclusion

Grundy and Smith (2007) acknowledge that LGBT use of and participation in evidence-based policy may provide a way for LGBT “entry into policy discourse. Expertise, research and calculative technologies may provide a means of producing and enacting citizenship for marginalized groups” (p. 295). In this view, LGBT use of evidence-based practice and policy is a participation in dominant politics that still remains an act of resistance that furthers contestation and gives voice to marginalized groups. Two disadvantages follow: first, that such participation reinforces systems of dominant knowledge that are seen as silencing many other marginalized groups, and second, that within the LGBT community only certain subgroups and viewpoints are privileged (e.g., the subset of gays and lesbians interested in adopting or fostering children). The primary advantage is that a historically marginalized group is able to break into existing power structures and create new avenues of resistance and contestation.

This last point is the primary concern of this essay. Simply put, by appealing to evidence-based policy and practice, gays and lesbians are able to win in the U.S. where they have previously lost. Where Grundy and Smith (2007) express concern that LGBT participation in evidence-based policy and practice may ultimately work to depoliticize and delegitimize other avenues of resistance and protest, this essay’s motivating concern is the potential effect repeated losses in resistance and contestation may have on other dimensions of LGBT life.

Black (2001) suggests that researchers commonly do not understand the policy process well enough to really engage in or accept the notion of evidence-based policy, instead expecting their research findings to have dramatic and immediate effects on policy which is rarely the case. But surely evidence-based practice and policy is commonly subject to the vicissitudes of other policy processes; John Kingdon’s (1995) notion of multiple policy streams can be applied to the rise of specific forms of evidence-based practice and policy, which no matter how strong their scientific support will emerge only when an open policy window makes their emergence possible.

Furthermore, as Donald (2001) points out in her rejoinder to Black (2001), no one should logically anticipate that evidence-based policy always works or automatically sweeps aside all doubt as to what should be done in a policy context. Donald (2001) cautions us to remember that the value in evidence-based policy is not simply that policy outcomes might be improved, but that policy processes are held to higher standards of transparency and accountability even when policy outcomes are not demonstrably improved. Of course authority-based practice and faith-based policy still exist, but at least now the pressure is on for them to be identified as such when they are active and have shut evidence out.

This essay has examined changes in U.S. social policy that made the rise of adoption and foster care by members of the LGBT community possible, as well as the policy maintenance that continues to include large numbers of gays and lesbians in the U.S. adoption and foster care community even when there is a wide ranging backlash against marriage equality and other LGBT family formation policies. The rise of evidence-based policy and increasing expectations that child and family social work should be based on scientific evidence have helped protect and strengthen the practical opportunities for gays and lesbians to foster and adopt children in the U.S.

While there may be political dangers associated with evidence-based policy and practice, especially those that allow a covert exercise of power and engage in only lip service to evidence, it seems likely that a turn to evidence-based policy in social work has helped protect the rights of LGBT minorities in the U.S. when judicial and rights-focused remedies failed. Advocates of evidence-based policy and practice are challenged to devise solutions to the political and social abuses and excesses associated with a rigid and narrow notion of evidence. But those scholars and policy advocates who dismiss notions of evidence-based policy and practice out of hand are also challenged to account for how to better protect minority rights under dominant policy regimes in the U.S. where legal advocacy is a high risk strategy with serious consequences for failure.

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