

PUBLIC AND PRIVATE RECOGNITION OF THE FAMILIES OF LESBIANS AND GAY MEN

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“This is not prejudiced legislation It is a preemptive measure to make sure that a handful of judges, in a single State, cannot impose an agenda upon the entire Nation.”¹ — Senate Majority Leader Trent Lott (R-Miss.), in support of the Defense of Marriage Act,² which denies federal and interstate recognition to same-sex marriages.

Senator Lott—and many of those who agree with him — would doubtlessly be disappointed to learn that despite the enactment of the Defense of Marriage Act (DOMA), the legal recognition of gay and lesbian families is not just the radical social agenda of a few isolated judges, but is in fact an emerging reality in multiple states. The simple truth is that DOMA notwithstanding, over the past couple of decades the gay rights movement has achieved a measure of success in its consistent aspiration to gain legal and social recognition for gay and lesbian families.³ Although the majority of jurisdictions do not legally recognize gay and lesbian families, and the majority of employers do not provide private recognition either, there have nevertheless been significant gains for gay and lesbian families in some states and localities. This article analyzes the various ways in which gays and lesbians have succeeded in gaining public (that is, legal)

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1. 142 CONG. REC. S10101 (daily ed. Sept. 10, 1996) (Statement of Sen. Lott); See also Linda Bowles, *A Case Against Same-Sex Marriages*, CHICAGO TRIB., Sept. 18, 1996, at 23 (quoting Senator Trent Lott).

2. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996).

3. See generally Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 929-30 (1994) (arguing that “significant advances have been made toward the acknowledgement of lesbian and gay families as social structures worthy of social recognition and support”); William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POLITICS 89 (1991) (discussing the successes and limitations of achieving legal and social recognition of gay and lesbian families through the judiciary). Cf. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-95) (discussing the controversy within the gay legal community about the proper means of gaining legal recognition for gay families).

and private recognition for their families.

The patterns that have emerged after countless cases and numerous employer actions are simple. Public actors, whether courts or legislative bodies, *if* they are willing to grant legal recognition to gay and lesbian families, generally do so *only* indirectly. They grant legal recognition to unmarried couples as a whole and allow gays and lesbians to benefit derivatively from their membership in this larger class of unmarried people. The breakdown of traditional concepts of family in the past several decades has led to increased legal recognition that unmarried couples can be "family" in the legal sense of that term.⁴ Indirectly, this recognition has benefited gays and lesbians. If a court today is faced with a statute that allows members of a decedent's "family" to collect workers' compensation benefits for the death of the decedent,⁵ or if a court is faced with a statute that permits a dead tenant's "family members" to remain living in a rent-controlled apartment after the death of the tenant,⁶ it is possible that the court will construe the term "family" to include long-term cohabitants and not merely spousal or blood relations. This changing notion of the legal family has obvious implications for gay rights. The instant a court is willing to say that "family" does not mean "married," the path is open to gays and lesbians to have their relationships recognized too. This is the *public* method of recognizing gay and lesbian families. When courts and legislatures have disconnected a legal consequence from the fact of being married and have permitted that legal consequence to attach also to unmarried relationships, gays and lesbians have been able to gain some legal recognition of family status. However, it is usually *only* through membership in this larger class of unmarried people that gays and lesbians have attained any degree of *legal* or public recognition of their family status.

Private employers, on the other hand, have largely taken a different approach to recognizing gay and lesbian families in the private sector. The principal means is by attaching employee benefits—such as health insurance, membership in a dental plan, or some other kind of benefit—to an employee's status of being in a relationship.⁷

4. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), discussed *infra* at note 47; Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family"*, 29 J. FAM. L. 497, 497-98 (1991) (analyzing the inadequacy of traditional legal definitions of family in a time when increasing numbers of people live in alternative arrangements that do not fit within the traditional definition).

5. See *Department of Indus. Relations v. Workers' Compensation Appeals Bd.*, 156 Cal. Rptr. 183 (Cal. Ct. App. 1979), discussed *infra* at note 27 & accompanying text.

6. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989), discussed *infra* at note 44.

7. See Samuel Goldreich, *Partner Benefits Tougher Issue For Small Firms*, WASH. TIMES, Oct. 4,

Traditionally, employers have tied such benefits to marriage, and eligible employees have received some form of spousal benefits. Recently, however, there has been a dramatic growth in the number of employers who tie certain employee benefits to domestic partnership, that is, a committed relationship in which the partners are not married.⁸ What is interesting is the way in which private employers have defined domestic partnership. The majority of private employers who give such benefits allow only same-sex couples to register as domestic partners; opposite-sex couples must be married to qualify for the benefits.⁹ The *private* approach, then, is not to grant recognition to unmarried couples generally and to gay couples only incidentally, but rather to recognize heterosexual couples in the traditional way (marriage) and to recognize unmarried couples only when they are homosexual.

The private approach is a stark contrast to the public approach. It suggests an equivalence between same-sex and opposite-sex relationships, and in that sense is a more radical challenge to the marriage laws. In another sense, however, it is less radical than the public approach, for in denying benefits to unmarried heterosexual couples, it seems to preserve the idea that marriage ought to mean something and that domestic partnership ought to simulate marriage to the extent possible.

This article analyzes these public and private approaches to recognizing gay and lesbian families. The first section discusses the public method. It considers the various means some courts have used to recognize gay and lesbian families, including dynamic statutory interpretation, second parent adoption, the common law, and adult adoption. It also discusses the creation of domestic partnership registries by municipalities and a few other legislative bodies. The second section discusses domestic partnership in the private sphere and

1996 at B8 (discussing the trend among large corporations of offering health insurance to same-sex partners of employees; often employees must fill out forms attesting to the long term nature of their relationship); Jennifer Steinhauer, *Increasingly Employers Offer Benefits to All Partners*, N.Y. TIMES, Aug. 20, 1994 at A25 (citing the example of the Village Voice in New York City, which offers insurance benefits to all unmarried partners, but requires couples to prove they have lived together a year, as only one of many companies offering benefits to unmarried couples, heterosexual and homosexual).

8. See HEWITT ASSOCS., DOMESTIC PARTNERS AND EMPLOYEE BENEFITS, (1994 & Supp. 1996), discussed *infra* at Part II. See also Steinhauer, *supra* note 7, at A25 (discussing the growth of domestic partnership packages).

9. See HEWITT ASSOCS., *supra* note 8; Goldreich, *supra* note 7, at B8 (discussing IBM's policy of covering only homosexual employees under their domestic partnership plan because, quoting an IBM spokesperson, "They [heterosexual couples] can go down to city hall and get a marriage license"); Steinhauer, *supra* note 7, at A25 (citing insurance experts who have found that the majority of "companies and universities limit domestic partnership programs to same-sex couples, reasoning that heterosexuals have the option to marry").

attempts to explain why public and private actors behave so differently in this area. Finally, the third section considers the theoretical and practical implications of these different approaches to the social recognition of gay families.

I. THE PUBLIC RECOGNITION OF GAY AND LESBIAN FAMILIES

Marriage is the traditional way in which the legal system has recognized private sexual/loving relationships.¹⁰ This "recognition" takes the form of the attachment of legal consequences to the fact of being married. Many states permit only married couples to adopt children, to file joint income tax returns, or to sue each other for financial support upon dissolution of the relationship.¹¹ Marital status sweeps broadly, however, and is not confined to these areas. Zoning laws often distinguish between related and unrelated cohabitants.¹² Most states permit physically unharmed bystanders to sue for the negligent infliction of emotional distress upon witnessing an accident only if the bystander is married to the victim.¹³ Testacy laws permit automatic inheritance only between married people, other legal relations, or blood relatives.¹⁴ The list goes on indefinitely. Rather than address each and every consequence of marriage, for convenience I will refer to all of the legal consequences collectively as the "institutionalization" of marriage. This institutionalization is what transforms marriage from symbolism to legal reality.

This institutionalization is also what makes opposite-sex-only marriage laws a powerful source of inequality between heterosexuals and homosexuals. As long as any legal consequence is attached to marriage—and *only* to marriage—it is necessarily denied to gays and lesbians. As a consequence, the legal recognition of gay families has depended crucially on the untying of legal benefits from marital status.¹⁵ This section discusses the three general ways in which

10. Cf. Melton, *supra* note 4, at 497-98 (discussing the failure of the legal system to keep pace with the changing realities of American family structures).

11. See Melton, *supra* note 4, at 497-98 (discussing benefits that are often denied to partners, parents and children living in alternative family arrangements).

12. See Melton, *supra* note 4, at 498.

13. See, e.g., *Coon v. Joseph*, 237 Cal. Rptr. 873, 875-78 (Ct. App. 1987) (dismissing a claim of negligent infliction of emotional distress brought by a homosexual man who witnessed an assault on his life partner); *Reynolds v. State Farm Mutual Ins. Co.*, 611 So. 2d 1294, 1297 (Fla. Dist. Ct. App. 1992) (dismissing a woman's emotional distress claim based upon the death of her six-year boyfriend because she had no legally cognizable relationship with the deceased); *Ramirez v. Armstrong*, 673 P.2d 822, 825 (N.M. 1983) (holding that the close relationship required for bystander recovery requires an intimate familial relationship limited to husband and wife).

14. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 52-53 (N.Y. 1989).

15. See Melton, *supra* note 4, *passim* (arguing that the legal benefits attendant to marriage

courts have separated legal benefits from marital status, it discusses the way in which some legislative bodies have begun to do the same, and it concludes by noting what all these legal approaches have in common.

A. *Dynamic statutory interpretation*¹⁶

Perhaps the most straight-forward way in which courts have begun to de-institutionalize marriage is to read the word "family" to refer to unmarried as well as married couples.¹⁷ The leading case in this area in *Braschi v. Stahl Assocs. Co.*,¹⁸ in which the New York Court of Appeals held that the word "family" in the noneviction provision of New York City's rent-control laws includes the longtime partners of tenants.¹⁹ The plaintiff in that case, Miguel Braschi, had lived with his male partner Leslie Blanchard in a rent-controlled apartment in New York City.²⁰ When Blanchard died of AIDS, the landlord attempted to evict Braschi.²¹ Braschi sued for injunctive relief, arguing that he was entitled to stay in the apartment pursuant to a regulation that provided that upon the death of the tenant, the landlord could not evict "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant."²² The court rejected the landlord's contention that only marriage or blood relations constituted family:

The determination as to whether an individual is entitled to non-eviction protection should be based upon an objective examination of the relationship of the parties... . [I]t is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.²³

Braschi's approach of extending the meaning of family to commit-

should be extended to groups of people who live in certain "alternative family" arrangements).

16. To read statutes "dynamically" is to interpret them "in light of their present societal, political, and legal context." William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987). Such an approach regards the present social context of laws "as most important when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law." *Id.* at 1484.

17. For a comprehensive survey of cases that have engaged in "dynamic statutory interpretation" in this manner, see Heidi A. Sorensen, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2121-28 (1993).

18. 543 N.E.2d 49 (N.Y. 1989).

19. *Id.* at 52-54 (noting in addition that the term "family" was undefined in the New York Rent and Eviction Regulations).

20. *Braschi*, 543 N.E.2d at 50-51.

21. See Rubenstein, *supra* note 3, at 95 (stating that Blanchard died of AIDS, a fact not included in the opinion of the New York Court of Appeals).

22. *Braschi*, 543 N.E.2d at 50.

23. *Id.* at 55.

ted couples, whether married or not (and thereby indirectly benefiting gays) is not unique. In *State v. Hadinger*,²⁴ an Ohio appeals court took the same approach in holding that the crime of "domestic violence" includes violence between unmarried cohabitants, including (in that case) two lesbians.²⁵ In *Donovan v. County of Los Angeles & State Compensation Ins. Fund*,²⁶ a California Worker's Compensation Appeals Board held that the same-sex partner of a worker who was killed in an industrially caused death was a member of the worker's household for purposes of the Workers' Compensation statute because neither "household" nor "family" were limited to marriage or a heterosexual relationship.²⁷

We might take these representative cases together and term this approach the *Braschi* approach: A court interprets the word "family" not to require marriage between a couple, and this allows gay and lesbian couples to qualify as family. Conceptually, the *Braschi* approach should be understood as an alternative to another approach, which has been adopted by no court in this country, where "family" means married couples and unmarried same-sex couples, but not unmarried opposite-sex couples. At a purely logical level, there is no reason why a court need prefer the *Braschi* approach to this alternative. *Braschi* itself purported to perform a realistic assessment of the couple's relationship to see if it constituted "family." The court might easily have said that since marriage is always an option for opposite-sex couples, those opposite-sex couples who have not chosen to marry have not committed themselves to each other sufficiently to be termed "family." However since same-sex couples can never be married no matter how committed the two men or two women might be to each other, marital status indicates absolutely nothing for them, so the court should instead perform a realistic assessment of their relationship to determine if they are "family." Instead, *Braschi* and every case like it have refused to equate a gay relationship with a married-straight relationship. Generally, gay rights come in through the back-door of rights for unmarried couples.

This back door is not merely theoretical, but legal as well. Before *Braschi* was decided, earlier New York cases had construed the term

24. 573 N.E.2d 1191 (Ohio 1991). The statute at issue in *Handinger* defined "person living as a spouse 'as one who is living ... with the offender in a common law marital relation, [or] who otherwise is cohabitating with the offender ...'" OHIO REV. CODE ANN. § 2919.25(E)(2) (Anderson 1996). The court construed this definition to include all persons who are cohabitating, regardless of their sex. *Handinger* 573 N.E.2d at 1193.

25. *Id.* at 1193.

26. 73 LA 385-107, slip op. (Cal. Workers' Comp. Appeals Bd., Nov. 3, 1983).

27. See *Donovan*, at 3-4.

"family" in a variety of contexts to include unmarried couples, who, on the facts of those cases, happened to be heterosexual.²⁸ *Braschi* simply took that approach and applied it to a gay couple. *Donovan* also followed an earlier decision that applied the same rule of law to the factual scenario of an unmarried straight couple.²⁹ In some sense, *Hadinger* reflected this chronology as well, as the statute the court was interpreting expressly allowed for "cohabitants" to be covered, and the only question was whether same-sex cohabitants also qualified.³⁰ This strand of cases, then, illustrates how lawsuits by unmarried heterosexual couples can pave the way for later suits by gay and lesbian couples. As an historical matter one can take this thesis farther, in that to date, no court has construed a statutory reference to "family" to include a same-sex couple unless there was *already* precedent in that jurisdiction construing "family" to include unmarried couples. Gay and lesbian families gain legal recognition in this area only when all unmarried couples do.

This choice by courts to read statutory definitions of "family" broadly has been particularly significant for gays and lesbians in the context of second-parent adoption.³¹ Because the two partners in a same-sex relationship obviously cannot both be the biological parents of the same child, gays and lesbians must use some method of adoption in order for both partners to have a legal relationship to

28. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (relying on prior cases as determining "family" to be defined by the "reliance placed upon one another for daily family services").

29. See *Department of Indus. Relations v. Workers' Compensation Appeals Bd.*, 156 Cal. Rptr. 183, 186 (Cal. Ct. App. 1979) (holding that a woman who was living with a man to whom she was not married at the time of his death could be considered a member of his household for purposes of worker's compensation benefits due to the "good faith" nature of their relationship).

30. See OHIO REV. CODE ANN. § 2919.25 (Anderson 1996); *State v. Hadinger*, 573 N.E.2d 1191, 1192 (Ohio Ct. App. 1991) (basing their decision on a combination of legislative intent and the ordinary meaning of cohabitation as "the act of living together," which is not sexually specific, thus finding that same-sex partners should not be excluded from protection under the Domestic Violence Statute at issue).

31. An attempt to gain this type of legal recognition is generally referred to as a second parent adoption. For a general discussion of courts' approach in this area, see Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233 (1995) (presenting legal arguments that were accepted by a Texas court that permitted a second parent adoption by the child's lesbian co-parent); Julia F. Davies, Note, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055 (1995) (discussing traditional obstacles to second parent adoption in lesbian families and explaining the significance of granting legal status to lesbian co-parents and their children); Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 238-39 (1995) (discussing the manner in which parenthood becomes an option for gay men through surro-gay arrangements); Recent Case, *Massachusetts Allows Biological Mother and Her Lesbian Partner to Adopt a Child*, 107 HARV. L. REV. 751 (1994) (examining the decision of the Supreme Judicial Court of Massachusetts in *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993), in which the court allowed a second parent adoption in a lesbian-mother family).

the child. One option is where one partner is the biological parent of the child, and her partner seeks to become a "second parent" by adoption. This second-parent adoption can pose legal problems for gay and lesbian couples. Many state adoption statutes contain a "cut-off" provision providing that if a child is adopted, the biological parents automatically lose parental rights over the child.³² The cut-off provision is typically accompanied by a step-parent exception, which provides that the biological parent does not lose parental rights if the new adoptive parent is the spouse of the biological parent.³³ The hurdle for gays and lesbians is getting a court to accept that the same-sex partner of the biological parent is a "spouse" within the meaning of the adoption statute.

Notwithstanding the textual difficulties (which vary state by state) with the argument that a same-sex partner is a spouse, numerous courts, including three state supreme courts, have allowed gay and lesbian second-parent adoption.³⁴ Despite the differences in language between the various state adoption statutes, the reasoning in these cases is essentially the same. In each case, the court refers to the overriding intent of the legislature that adoption is intended to be in the best interest of the child.³⁵ The court then notes the policy

32. See Bryant, *supra* note 31, at 233-35 & n.6.

33. See Bryant, *supra* note 31, at 235.

34. See *In re Adoption of A.O.L.*, No. 154-85-25 P/A (Alaska Super. Ct., Juneau 1985); *In re Adoption of a Minor Child*, No. 1 Ju-86-73 P/A (Alaska Super. Ct., Juneau 1987); *In re Adoption Petition of Carol*, No. 18573 (Cal. Super. Ct., San Francisco Co. 1989); *In re Adoption Petition of Roberta Achtenberg*, No. AD 18490 (Cal. Super. Ct., San Francisco Co. 1989); *In re Adoption Petition of Nancy M.*, No. 18744 (Cal. Super. Ct., San Francisco Co. 1990); *In re Petition of L.S. and V.L.*, Nos. A269-90 and A270-90, 17 F.L.R. (BNA) 1523 (D.C. Super. Ct. Fam. Div. 1991) (holding that statutory language requiring termination of a natural parent's rights to effectuate an adoption is directory and not mandatory, and that the language may be waived in cases where an adoption is in the best interest of the child); *Adoption of Susan*, 619 N.E. 2d 323 (Mass. 1993) (finding that a statute governing adoptions does not prohibit a probate court from considering an adoption petition brought jointly by a biological mother and her lesbian partner); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (determining that the Massachusetts adoption statute does not preclude same-sex cohabitations from jointly adopting a child); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (holding that a statute requiring termination of a biological parent's parental rights before an adoption may occur does not apply to a biological mother when her lesbian partner petitions to adopt her child); *In re Adoption of Camilla*, 620 N.Y.S. 2d 897 (Fam. Ct., Kings Co. 1994) (stating that stepparent exemptions from provisions that require a prospective adoptive parent to obtain preplacement certification also apply to adoption by a lesbian partner of the biological mother); *In re Adoption of Evan*, 583 N.Y.S. 2d 997 (Surrogate Ct., N.Y. Co. 1992) (stating that New York law does not prohibit an adoption of a six-year-old boy by his mother's lesbian partner); *In re Child #1 and Child #2*, No. 89-5-0067-7 (Wash. Super. Ct., Thurston Co. 1989); *In re E.B.G.*, No. 87-5-00137-5 (Wash. Super. Ct., Thurston Co. 1989); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (holding that "when the family unit is comprised of the natural mother and her [lesbian] partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and unnecessary"). Cf. *In re M.M.D. and B.H.M.*, 662 A.2d 837 (D.C. App. 1995) (allowing second-parent adoption where the first parent was the adoptive, not biological, parent of the child).

35. See *In re Adoption of Tammy*, 619 N.E. 2d at 318 (finding that the "primary purpose of the

reasons behind the step-parent exception,³⁶ considers the conflict between the best interest of the child and the rigid enforcement of the cut-off provision,³⁷ and reads the cut-off provision out of the statute.³⁸ Often the adoption statutes in question are very old laws, and the court expresses an interest in interpreting the statute in light of changing social circumstances in a manner that best fulfills the intent of the legislature, in other words, promoting the best interest of the child.³⁹

One primary constant in almost all of these second-parent adoption cases is that the cut-off provision is read *completely* out of the statute, not just as to same-sex couples. The benefit that same-sex couples receive derives from the court's recognition that unmarried couples in general can be in committed, responsible relationships. To date, no court has held that the step-parent exception includes the partners of same-sex couples on the ground that their relationship is the equivalent of a married one, or that the cut-off provision should not apply to them for the same reason. The only possible ex-

adoption statute ... is ... the advancement of the best interests of the subject child"); *In re Jacob*, 660 N.E. 2d 397, 399 (N.Y. 1995) (noting that their "primary loyalty must be to the statute's legislative purpose—the child's best interest"); *In re Adoption of Camilla*, 620 N.Y.S. 2d 897, 903 (Fam. Ct. Kings Co. 1994) (noting that the historical analysis of the adoption statute involved centered on the "best interest" of the child"); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271, 1273 (Vt. 1993) (stating that an adoption statute must be interpreted in light of the fact that the "state's primary concern is to promote the welfare of children.").

36. *See id.* at 1274 (discussing the intent of the legislature to "protect the security of family units" and the interest of a child who finds herself "in circumstances that do not involve two biological parents"); *In re Jacob*, 660 N.E. 2d at 403 (finding that intra family adoptions where the biological parent is a party, do not require the same procedural safeguards meant to protect the adoptive parent for example, when the biological parent is not a party to the adoption and is waiving their rights as parents); *In re Adoption of Evan*, 583 N.Y.S. 2d 997, 1000 (Surrogate Ct., N.Y. 1992) (noting that New York law does "not require a destructive choice between the two parents," adoptive and biological, where they are co-parents).

37. *See id.* (concluding that where a narrow reading of the statute would "terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner" it would be "unreasonable and irrational" to allow the narrow construction to prevail over the best interest of the child); *Adoption of Tammy*, 619 N.E. 2d at 321 (finding that in considering the adoption statute as a whole and the purpose of protecting the interest of the child, the termination provision must be read as only applying when the natural parent is not a party to the adoption); *In re Adoption of Evan*, 583 N.Y.S. 2d at 1000 (arguing that to strictly enforce the cut off provision would be an "absurd outcome which would nullify the advantage sought by the adoption").

38. *See id.* at 1273-76 (holding that by "allowing same-sex adoptions to come within the step-parent exception ... we are furthering the the purposes of the statute as was originally intended" to protect the best interest of the child); *In re Jacob*, 660 N.E. 2d at 405 (rejecting the cut off provision in light of the specific circumstances of the adoption on the principle that "[w]here the language of a statute is susceptible to two constructions, the courts will adopt that which avoids injustice ...") (citations omitted).

39. *See id.* at 1275 (noting that statutes must be interpreted so as to "not frustrate the purposes behind their enactment"); *In re Adoption of Camilla*, 620 N.Y.S. 2d at 901 (noting the evolving nature of the nuclear family since the adoption statute was enacted).

ception is a case before the Vermont Supreme Court,⁴⁰ in which the court focused heavily on the fact that although the legislature might not have foreseen the application of the cut-off provision to same-sex couples when they drafted 15 V.S.A. § 448 of the Vermont State Code,⁴¹ the intent of the legislature was clearly in favor of the best interest of the child. Legislative intent would thus be violated if the courts denied the same-sex partner of a biological parent the right to adopt the child without terminating the rights of the biological parent.⁴² However, the court failed to specify whether its allowance of second-parent adoptions extended only to same-sex couples or to all unmarried couples, and the dicta can be read either way.⁴³ The Vermont case notwithstanding, the general pattern in second-parent adoption follows the *Braschi* approach of interpreting the word "family."⁴⁴ Legal recognition of same-sex families does not purport to equate same-sex families with married relationships, but rather allows them some measure of recognition through their membership in the class of all unmarried couples. The only real difference between the second-parent cases and the *Braschi* cases is that in the former there is sometimes no heterosexual court precedent for the gay plaintiffs to build upon. That is, the first time a court reads the cut-off provision out of the adoption statute may be when a same-sex couple is before it. In *Braschi*, the court had the support of lower court decisions which had already carried out the notion of looking beyond the formalities of a relationship to other factors including the "exclusivity and longevity of the relationship" and how the parties have "held themselves out to society" in order to make an objective analysis of the parties relationship.⁴⁵ Even with this difference, however, the same conceptual model is at work in both approaches. Courts increasingly recognize gay and lesbian couples as a subset of the class of unmarried people in long-term relationships deserving of legal recognition.

B. *The Common Law Power to Contract*

A second way in which courts have untied legal benefits from marriage is through the common law power of individuals to contract. A

40. Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993).

41. *See id.* at 1274.

42. *See id.* at 1276.

43. *See id.*

44. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y. 1989) (holding that the term "family" should be based on the reality of family life and not limited to those who have a formalized relationship by virtue of adoption or a marriage certificate).

45. *Id.* at 55.

handful of courts have allowed gay couples to simulate a particular aspect of marriage through the creation of a private contract and thereby to gain some legal recognition of their status as a family.⁴⁶ As with the *Braschi* approach and second-parent adoption, these cases allow gay and lesbian couples to walk in the door opened by unmarried heterosexuals.

Palimony suits are one *entrée* in this field. In its famous 1976 decision *Marvin v. Marvin*,⁴⁷ the California Supreme Court recognized the legal validity of an oral contract for mutual support and division of property made by an unmarried heterosexual couple.⁴⁸ The popular press quickly dubbed the claim in that case a "palimony" suit,⁴⁹ reflecting the view that the court had effectively bestowed two traditional aspects of marriage—the division of property between the spouses and the payment of alimony upon divorce—upon unmarried couples.⁵⁰ The logic of *Marvin* was clearly beneficial for same-sex couples, and in the 1988 decision *Whorton v. Dillingham*,⁵¹ a lower court allowed a palimony suit arising from the dissolution of a gay male couple's relationship.⁵² The Supreme Court of Georgia recently allowed a very similar suit in *Crooke v. Gilden*.⁵³ The five-paragraph opinion does not disclose that the couple in question was same-sex, nor does it specify what the allegedly "immoral" actions were that the lower court felt voided the written contract that the parties had for the "mutual contribution toward improvement of real estate and sharing of expenses and assets."⁵⁴ However, this too was

46. See *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988) (holding that an oral cohabitation agreement between a same-sex couple was enforceable based on consideration independent of sexual services); *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992) (holding that a contract for "mutual contribution toward improvement of real estate and sharing of expenses and assets" is not void on the basis of parol evidence showing an "illegal and immoral relationship between parties"); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (holding that agreement between a same-sex couple to raise a child was not per se unenforceable and the most important element in a custody settlement is the best interest of the child).

47. 557 P.2d 106 (Cal. 1976).

48. See *id.* at 109-10.

49. See LaBarbara Bowman, *From Altar to Palimony*, WASH. POST, July 3, 1979 (discussing a suit between a same sex couple for breach of a verbal agreement similar to Marvin palimony suit); Alexandra Jacobs, *How Palimony Began*, ENTERTAINMENT WEEKLY, Feb. 16, 1996, at 76 (discussing the *Marvin v. Marvin* suit and its groundbreaking precedent); Eileen Keerdoja & Jeff B. Copeland, *The Trials of Unmarriage*, NEWSWEEK, Oct. 8, 1979 (discussing the court award of \$104,000 to Michelle Marvin arising out of the *Marvin v. Marvin* "palimony" suit).

50. In fact, the court's decision in *Marvin* was that the partners' reasonable expectations of support in a long standing relationship should not be discounted merely because the parties are unmarried. *Marvin*, 557 P.2d at 122.

51. 248 Cal.Rptr. 405 (Cal. Ct. App. 1988).

52. See *id.* at 406.

53. 414 S.E.2d 645 (Ga. 1992).

54. *Id.* at 646.

essentially a gay palimony suit like the one in *Whorton*.

Another method of using a common law contract to bypass the inability to legally marry is through a co-parent visitation agreement. In *A.C. v. C.B.*,⁵⁵ a New Mexico appeals court held that under New Mexico law, a visitation agreement between a biological parent and her same-sex partner specifying the partner's rights to visit the child was enforceable even after the same-sex relationship ended.⁵⁶ The court built on the best interest of the child theory and on New Mexico precedent that upheld a custody agreement between a natural mother and a stepfather.⁵⁷ The court also referred to a California case, *Nancy S. v. Michele G.*,⁵⁸ in asserting that based on the relationship that the nonparent had with the child, she had standing to pursue enforcement of the visitation agreement.⁵⁹

The point of this section, as with this entire article, is not to survey the status of the laws governing gay and lesbian families in all fifty states, but to analyze the pattern of successes. The three cases mentioned here—*Whorton v. Dillingham*, *Crooke v. Golden*, and *A.C. v. C.B.*—represent the high point in attempts to use the common law of contract to attain legal recognition of gay and lesbian families. It is striking that these cases follow a pattern analogous to that of the *Braschi* approach and second-parent adoption. In each case, the courts permitted the recognition of gay families by fitting the couples into pre-existing options created for unmarried heterosexuals. The path from *Marvin* to *Whorton* is paradigmatic: Courts permit legal recognition of same-sex families as an incidental effect of the larger recognition of unmarried families generally.

C. Adult Adoption

A third way in which courts have untied legal benefits from marriage is by permitting the adoption of one adult by another for purposes of establishing inheritance.⁶⁰ While adoption is commonly thought of as a means for creating a legal parent-child relationship

55. 829 P.2d 660 (N.M. Ct. App. 1992) *cert. denied*, 827 P.2d 837 (N.M. 1992).

56. *See* 829 P.2d at 664 (recognizing that New Mexico law allows for agreements between a biological parent and another person regarding custody of children and that the sexual orientation of the parties involved does not, as a matter of law, render such an agreement unenforceable and is only one of many factors in determining the best interest of the child).

57. *See* 829 P.2d at 663-664 (citing *In re Adoption of Doe*, 98 N.M. 340, 346, 648 P.2d 798, 804 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982)).

58. 279 Cal. Rptr. 212 (1991).

59. *See* 829 P.2d at 665.

60. *See In Re Adoption of James A. Swanson*, 623 A.2d 1095, 1096 (Del. 1993) (approving an adult adoption between two men made for the express purpose of formalizing their relationship and "to facilitate their estate planning").

between an adult and a minor child, the adoption of adults has been held to be permissible under a state's adoption statute in twenty-three states.⁶¹ The Uniform Adoption Act of 1994 also provides for adult adoption.⁶² In those states where this is permissible, the requirements for adult adoption vary. Some require an age difference between the adopter and the adoptee, while others require an inquiry into the motive for adoption, and still others forbid adoptions between adults engaged in illegal or immoral relationships.⁶³

In most of the jurisdictions that permit adult adoption, the statutes guarantee inheritance, a traditional legal benefit of marriage.⁶⁴ It is not surprising that gay and lesbian couples have made use of adult adoption as a method for obtaining this traditional benefit, given the well-established inheritance rights of adult adoptees and the relative ease of securing an adult adoption when it is provided for by statute.⁶⁵ Some courts have been relatively receptive to the idea of adult adoption between same-sex partners.⁶⁶ This attitude may be attributed simply to the fact that courts do not need to address the parties' homosexuality or the family status of same-sex couples to approve an adoption.⁶⁷ Adoption in the United States is exclusively a statutory creation, as the English common law never recognized the power to adopt.⁶⁸ Consequently, many adult adoption statutes are clear on their face, leaving the courts little room to maneuver.⁶⁹ Long before the gay rights movement began, well-established precedent in several jurisdictions settled that no pre-existing filial relationship between the adults is required to secure an adoption, and that the motive of effectuating inheritance is proper

61. See H. Larson, Annotation, *Adoption of Adult*, 21 A.L.R.3d 1012, 1016-19 (1968) (enumerating all the states that recognize adult adoption, including California, New York, and Virginia).

62. UNIF. ADOPTION ACT art. 5 (1994).

63. See Larson, *supra* note 61, at 1025-34.

64. See Larson, *supra* note 61, at 1016.

65. See Larson, *supra* note 61, at 1016.

66. See *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993) (permitting two adult males with 17 years of companionship to "formalize the close emotional relationship" through Delaware's adult adoption statutes).

67. Cf. *In re Adoption of Robert*, 471 N.E.2d 424, 426-27 (N.Y. 1984) (holding that despite the statutory allowance of adult adoption, to use adoption as a means of achieving legal status for a homosexual relationship "would be a cynical distortion of the function of adoption") (citations omitted).

68. See Larson, *supra* note 61, at 1016.

69. See *In re Adoption of Swanson*, 623 A.2d at 1097 (conceding that regardless of the court's personal views, and because of the clarity of the adult adoption statutory language involved, the role of the court "is limited to applying the statute objectively and not revising it").

in securing an adoption.⁷⁰ In general, adult adoption is not an adversarial process. Thus, in any proceeding there is unlikely to be a party interested in proving that the proposed adoption is not for a legitimate purpose, such as an attempt to simulate a same-sex marriage, which might contravene public policy. As a result, in some jurisdictions if one gay man petitions to adopt another and states that his purpose is to secure the latter's inheritance as against claims from the former's relatives, there is no reason why the adoption should not be permitted.⁷¹

Two defects are apparent with adult adoption. The first is that state law differs dramatically — what may be easily effected in Delaware may be impossible in Texas.⁷² The second is a conceptual defect. The few courts that have directly addressed the issue of adult adoption between same-sex couples have stated that the desire to give legal recognition to the sexual relationship or to simulate marriage through the adoption laws is *not* a permissible purpose for adult adoption.⁷³ In effect, gay and lesbian couples must “closet” themselves—or at least their motives—in securing the adoption. This discomfort becomes a hurdle when state law also requires that an adoption be in the best interest of the adoptee, as this latter requirement also necessitates an inquiry into the motives for adoption.⁷⁴ At least one court that performed this inquiry ended up concluding that the adoption was intended to simulate gay marriage, and it voided the adoption.⁷⁵ On the other hand, at least one state has no statutory requirement to look into the motives for the adoption; and it appears that gay couples may secure valid adoptions merely by proper pleading, for example, by claiming that the adoption is intended to secure inheritance rights rather than to legitimate their sexual relationship.⁷⁶ Since the legal recognition of gay relationships *includes* the goal of securing automatic inheritance, this proper pleading will presumably be true and not merely a cover for securing a “quasi-marriage” legal relationship.

70. See Larson, *supra* note 61, at 1016-17.

71. See *In re Adoption of Swanson*, 623 A.2d at 1099.

72. See *id.* at 1095 (upholding adoption of one adult gay man by another). Cf. Grant v. Marshall, 280 S.W.2d 559 (1955) (holding that state law forbids adult adoptions).

73. See *In re Adoption of Swanson*, 623 A.2d at 1099; *In re Adoption of Robert*, 471 N.E.2d at 425.

74. See *In re Adoption of Robert*, 471 N.E.2d at 426 (noting that an adult adoption must still be in the “Best Interest of the Child” and the social and emotional status of the adoptive parent are relevant inquiries).

75. See *id.* at 425 (arguing that the adult adoption statute “is plainly not a quasi-matrimonial vehicle to provide nonmarried partners with a legal imprimatur for their sexual relationship”).

76. See *In re Adoption of Swanson*, 623 A.2d 1097-99.

To place adult adoption into the larger picture of the public recognition of gay and lesbian families, one should compare it to the other two methods used by courts. Because adoption is statutory in nature, adult adoption seems analogous to the dynamic statutory interpretation of *Braschi* or the second-parent adoption cases. The difficulty here is that the statutory interpretation in the adult adoption cases is strikingly *undynamic*. Gay couples are relying on firmly established, and often quite old, precedents of adult adoption. In many ways the biggest danger for gay couples is precisely that courts may be tempted to engage in dynamic statutory interpretation and read the adoption laws “in light of their present societal, political, and legal context.”⁷⁷ Courts that have done so have been hostile to the idea that adoption laws are used to gain legitimacy for same-sex relationships. Thus, an attempt to modernize the law to account for non-traditional families would probably make it more inaccessible. The statutes and precedent on adult adoption, as in second-parent adoption statutes, largely date from a time when legislators and courts did not realize that gay people existed, and therefore did not design the law to avoid helping them.⁷⁸ Ironically, gay and lesbian litigants have no incentive to bring the law up to date.

Alternatively, adult adoption may be likened to the common law right of contract. It is tempting to say that the use of adult adoption as a means of insuring inheritance rights between same sex couples, though technically an act of statutory interpretation, is an offspring of *Marvin v. Marvin*, since it tends to arise in non-adversarial legal proceedings and is at some level a creature of consent. However, again one would be ignoring the fundamental difference between adult adoption and the other means by which courts have given gay and lesbian couples legal recognition. Adult adoption between same-sex partners is a modern use of an old legal method for a new purpose, which differentiates it from both dynamic statutory interpretation and the innovative use of contract.

Nonetheless, adult adoption is another means by which public entities legally recognize same-sex relationships. The key to adult adoption is its complete desexualization of the gay relationship: a same-sex couple that overtly attempts to use this legal form to gain recognition of the gayness of their relationship is unlikely to have the adoption approved.⁷⁹ Courts do not follow the private path of

77. Eskridge, *supra* note 16, at 1479.

78. *See In re Adoption of Swanson*, 623 A.2d at 1097 (noting that the adoption statute at issue has existed “in equivalent form since 1915”).

79. *See id.* at 1099 (indicating that had the couple involved stated their intention to use adult adoption to legitimate a sexual relationship, it would be barred on public policy grounds).

using a separate form (i.e., domestic partnership instead of marriage) with the express intent of validating the romantic relationship. Instead, adult adoption permits gay and lesbian couples to use rules of general applicability to create an incidental recognition of a relationship which in their particular case happens to be homosexual. Certainly, the model here is different from the other methods of public recognition of same-sex couples in that the rule of general applicability was not intended to legitimate unmarried opposite-sex sexual relationships in the way that, say, *Marvin v. Marvin* did. But it is close enough to support the notion that public institutions recognize gay and lesbian families only through the incidental application of a rule that applies to non-marriage relationships generally.

D. Public Domestic Partnership

Courts are not the only public institutions that recognize gay and lesbian families. Legislative entities have also taken some limited steps toward recognizing same-sex couples in different arenas. This recognition surfaces in primarily two forms: the creation of domestic partnership registries, and the extension of domestic partnership benefits to public employees.⁸⁰ Domestic partnership registries serve as an alternative to marriage by allowing unmarried couples to declare themselves as a couple and thereby to gain at least some form of legal recognition.⁸¹ The real legal implications of domestic partnership vary considerably with the jurisdiction, ranging from pure symbolism to entitlement to bereavement leave and visitation rights in state prisons and hospitals.⁸² Currently, Massachusetts is the only state that has some form of domestic partner registry.⁸³ The United States House of Representatives allows members of the House and their staff to register their unmarried partners (regardless of sex) as "significant others" for purposes of House Rule 52, which prohibits them from accepting gifts from anyone besides family and personal

against incest which makes sexual intercourse between parent and child a crime "without regard to ... relationships by adoption").

80. Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and others)*, 51 OHIO ST. L.J. 1067, 1069 n.11 (noting that the definition of "domestic partner" varies according to state and program but generally includes "any two persons who reside together and who rely on each other for financial and emotional support").

81. See Eblin, *supra* note 80, at 1068-69 (noting that "domestic partner provisions lessen the economic discrimination that results from the ban on same-sex marriages").

82. See LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL OVERVIEW OF JURISDICTIONS AND COMPANIES THAT RECOGNIZE AND/OR PROVIDE BENEFITS TO DOMESTIC PARTNERS OF EMPLOYEES [hereinafter LAMBDA OVERVIEW] 1-2 (1996).

83. See LAMBDA OVERVIEW, *supra* note 82, at 1.

friends.⁸⁴ All other domestic partner registries are municipal, and currently at least 21 municipalities have such registries.⁸⁵

Another way in which cities or states can recognize same-sex families is by providing domestic partnership benefits to public employees. As with domestic partner registries, the legal implications of these benefits vary with jurisdiction.⁸⁶ Some public employers provide only sick leave and bereavement leave, but a number provide medical benefits as well.⁸⁷ Currently, Massachusetts, New York, Vermont, and at least 52 municipalities or divisions thereof provide some form of domestic partnership benefits.⁸⁸

Although data is difficult to obtain, it appears that every domestic partner registry in this country permits both same-sex and opposite-sex couples to register.⁸⁹ The overwhelming majority of public employers who provide domestic partnership benefits allow both same-sex and opposite-sex couples to use them; few exceptions exist.⁹⁰ Here again we note the public approach to recognizing gay and lesbian families: domestic partnership is an untying of certain benefits (e.g., medical, bereavement leave) from marriage, and it is made accessible to same-sex couples only because it is made accessible to unmarried couples generally.

II: THE PRIVATE RECOGNITION OF GAY AND LESBIAN FAMILIES

Compared to the many ways in which government institutionalizes marriage, private entities have a relatively constrained hand. Thus, the discussion of how private entities have altered traditional practices to recognize same-sex families is less involved than the discussion of how public entities have done so. The principal means by which private organizations have begun to accept the legitimacy of a gay or lesbian relationship is the granting of employee benefits by private employers to same-sex couples in ways similar to the tradi-

84. See LAMBDA OVERVIEW, *supra* note 82, at 1-2.

85. See LAMBDA OVERVIEW, *supra* note 82, at 1. See Eblin, *supra* note 80, at 1072-77 (discussing several municipal plans).

86. See HEWITT ASSOCS., *supra* note 8, at 26-29.

87. See HEWITT ASSOCS., *supra* note 8, at 26-28; LAMBDA OVERVIEW, *supra* note 82, at 2-3.

88. See HEWITT ASSOCS., *supra* note 8, at 2-3, 26-28.

89. See HEWITT ASSOCS., *supra* note 8, at 2-3, 26-28. The study by the Hewitt Associates, cited here, is the most comprehensive to date on the issue of domestic partnership, but even it is incomplete.

90. See HEWITT ASSOCS., *supra* note 8, at 26-27. The City of Denver, Colorado, recently added itself to this list of exceptions. See James Brooke, *Denver Extends Health Coverage to Partners of Gay City Employees*, NEW YORK TIMES, Sept. 18, 1996, at A17 (summarizing Denver Mayor Wellington Webb's signing of an ordinance granting health insurance to gay partners).

tional granting of benefits to married couples.⁹¹ The past fifteen years saw the birth of private domestic partnership benefits, which appeared slowly at first but began a dramatic increase in the last five years.⁹²

Empirical data on private domestic partnership plans are extremely scarce. A 1994 research paper by the Hewitt Associates and its subsequent 1996 update represent the most comprehensive surveys presently available.⁹³ The survey and the update together enumerate 173 private U.S. employers that provide some form of domestic partnership benefits.⁹⁴ This number is less than the total number of such employers. However, if one assumes that the Hewitt Associates' survey and update are methodologically honest, and that their informational incompleteness did not bias the results to favor certain kinds of employer benefit systems, one may take the studies as *representative* of actual trends in the workplace. The studies indicate that the average annual increase in the number of employers giving domestic partnership benefits to their employees during the 1994-96 period was 460% of the average annual increase in the 1982-1994 period.⁹⁵ Therefore the conclusion that domestic partnership is on the rise can readily be made. These studies also indicate that during the 1982-1994 period, a slight majority of private employers who began to give such benefits allowed only same-sex couples to register, while the 1994-96 period saw a great increase.⁹⁶ The studies, however, do not indicate whether any employers changed that eligibility requirement. In short, today a solid majority of private employers that provide domestic partnership benefits allow only same-sex couples to register, and this majority is increasing.

The private approach to domestic partnership clearly differs from the public approach. Public entities will recognize gay and lesbian couples only as a subclass of unmarried people, whereas the majority of private employers who provide domestic partnership benefits distinguish between gay and straight unmarried couples. The private

91. This refers to family health insurance, medical benefits, or any form of benefit that is extended to an employee as a member of a couple.

92. See *infra* note 94 and accompanying text.

93. See Raquel Santiago, *Survey: Employers Save Significantly with HMOs*, CRAIN'S CLEV. BUS., Jan. 13, 1997, at 6 (recounting the thoroughness of Hewitt Associates' survey on employee benefits).

94. See HEWITT ASSOCS., *supra* note 8, at 1-2, 20-25.

95. Private employers first began to provide domestic partnership benefits in 1982. See Elbin, *supra* note 80, at 1078 (noting that the Village Voice, a newspaper company, provided medical and dental benefits beginning in 1982); See also *supra* note 7.

96. According to the Hewitt study, 94% of employers who began to provide such benefits allowed only same-sex couples to register.

approach uses domestic partnership as a gay alternative to marriage, not as a generalized sub-marriage status for a relationship.

III: THE IMPLICATIONS OF THE DIFFERENCE BETWEEN THE PUBLIC AND PRIVATE APPROACHES

The public and private approaches represent very different ideas of what it means to legitimate gay and lesbian relationships. On a theoretical level, the private approach appears to be an attempt by private citizens to undo some of the discriminatory effects of the marriage laws. By extending employer recognition to married opposite-sex couples and same-sex domestic partners, but not to unmarried opposite-sex couples, an employer is in a sense equating the same-sex relationship with the married relationship. This is a very strong validation of the legitimacy of gay and lesbian couples.⁹⁷ Conversely, the public approach creates a two-tiered system of relationships. Marriage brings the highest degree of legal recognition and is available only to heterosexuals. Only the lesser status of domestic partnership is open to gays and lesbians. This scheme provides for unequal treatment of gay and straight relationships: It equates gay relationships with unmarried straight couples, thereby emphasizing the homophobic view that same-sex relationships are impermanent and unworthy of the legitimation that marriage brings to straight relationships.

A. *Explanations for the Difference*

It may be that the public and private approaches are actually motivated by the symbolism they create. There may be only a few public officeholders in the country willing to risk the political backlash from placing same-sex relationships on a par with marriage. They accept the fact that gays and lesbians may be allowed to have the same entitlements as heterosexual unmarried couples only because such an approach does not *really* legitimate same-sex families. This political fear of endorsing gay marriage is hardly unreasonable. When the Supreme Court of Hawaii indicated a few years ago that Hawaii's constitution might require same-sex marriages,⁹⁸ the federal government quickly acted to prevent Hawaii's law from forcing other

97. See generally Mary Curtius & Larry B. Stammer, *Archbishop Challenges S.F. Domestic Partners Law Religion: He Vows to Sue if Catholic Charities is [sic] Not Exempted From Giving Spousal Benefits to Employees' Companions. Mayor Says There Will Be No Exceptions*, LOS ANGELES TIMES, Feb. 4, 1997, at A3 (affirming San Francisco's legal recognition of gay relationships).

98. See *Baehr*, 852 P.2d at 68 (holding that Hawaii's opposite-sex marriage law discriminated on the basis of sex and was therefore subject to strict scrutiny).

states to recognize such marriages.⁹⁹ Employers, however, may have contrary motivations. One may speculate that more liberal corporations and firms will be the ones that provide domestic partnership benefits, and they may affirmatively desire to equate same-sex relationships with marriage.

Additionally, compelling institutional explanations exist. Public recognition of unmarried couples often takes the form of legal entitlements that do not cost the government anything, such as inheritance rights, hospital visitation rights, or a claim to a rent-controlled apartment. As a result, there is no real incentive for the government to restrict those benefits to a narrow class of people, such as gays and lesbians, assuming it desires to make certain legal benefits available to gay and lesbian couples. From a political point of view, it seems advantageous to make any benefits that are available to gays and lesbians also available to unmarried heterosexuals. Such an expansion of benefits to the entire class of unmarried people fulfills the twin goals of allowing same-sex couples certain legal benefits without triggering conservative political responses from equating gay and married couples. Its only cost is symbolism. This explanation, obviously, does not work as well in accounting for medical benefits that some public employers provide to unmarried couples, since those do cost the government money. The political problem remains, however, we might expect that political institutions would be more sensitive to political influences than economic considerations.

On the other hand, private employers are likely to have the opposite preferences. Notwithstanding the occasional homophobic public attacks on corporations that grant domestic partnership benefits,¹⁰⁰ most employer policies go unnoticed by the public at large. Moreover, the public has little control over them. Economic incentives, however, are likely to influence private employers, particularly because private employers, unlike the government, usually recognize couples only in ways that usually carry costs.¹⁰¹ Therefore, it is reasonable to expect that an employer interested in treating heterosexual and homosexual employees equally, yet still wishing to remain cost-conscious, will restrict domestic partnership benefits to same-sex

99. See Defense of Marriage Act, *supra* note 2.

100. The Walt Disney Corporation, for example, was the target of a boycott by Christian conservatives after it decided to extend domestic partnership benefits to its gay and lesbian employees. See Mike Clary and James Bates, *Moral Crusading: Conservative Christians Shun Disney over Gay-Partner Policy*, LOS ANGELES TIMES, December 25, 1995, at D1 (noting the irony that Disney was criticized by other Hollywood studios for changing its domestic partnership policy too slowly).

101. See HEWITT ASSOCS., *supra* note 8, at 7.

couples. Indeed, one study has indicated that cost is the single biggest concern employers voice about domestic partnership benefits.¹⁰²

B. CONSEQUENCES OF THE DIFFERENCE

The legal consequences of the different public and private approaches to gay and lesbian families are striking. Given that courts are willing to recognize gay and lesbian families *only* by way of their membership in the class of unmarried people, a certain civil rights litigation strategy follows from this observation. A lawsuit seeking legal recognition of a same-sex couple as family, regardless of whether it is a suit to adopt, or to gain unemployment benefits, has a good chance of success only if an unmarried heterosexual couple could file an exactly identical suit.¹⁰³ In fact, it may be strategically preferable for an unmarried heterosexual couple to file such a suit *first*, for as we have noted, such suits can pave the way for later suits by gays and lesbians.

Another consequence of the public approach to recognizing same-sex families is that over time, it threatens to destroy the institution of marriage entirely. When private employers grant benefits to same-sex couples as they do to married couples, they continue to preserve the sharp distinction between being married and being single *for heterosexuals*. When public entities detach a benefit from marriage and give it to *all* unmarried couples, however, they water down the significance of marriage for everyone. Marriage loses certain legal consequences and gradually becomes more of a symbolic status. Some gay and lesbian civil rights activists might applaud this complete destruction of marriage as the final liberation of private relationships from governmental control.¹⁰⁴ Another viewpoint is that the attainment of legal marital status for same-sex couples is undermined by this trend. That is, if one day gays and lesbians get the legal right to marry, that right may not be worth anything anymore. Indeed, if one motivation of the public approach is to provide gays and lesbians *some* equality without taking the politically dangerous step of, for

102. See HEWITT ASSOCS., *supra* note 8, at 7.

103. Indeed, at least one gay rights advocacy group appears to have adopted this strategy. The Gay and Lesbian Advocates and Defenders filed an amicus curie brief in *Reep v. Commissioner of Dept. of Employment and Training*, 593 N.E.2d 1297 (Mass. 1992), a Massachusetts case involving a claim for employment benefits by the unmarried *opposite-sex* partner of an employee.

104. Cf. Wolfson, *supra* note 3, *passim* (discussing the variety of views that gay rights activists have on marriage; for instance, some contend that "marriage simply represents an expression of love and commitment that was neither heterosexual or homosexual," and others assert that marriage is "inherently problematic").

instance, striking down the marriage laws as unconstitutional, the public approach will in the long run amount to a social decision to destroy marriage rather than let gays and lesbians have it.

From the gay rights perspective, the public approach is probably a mistake. It may be the only politically viable way to get some legal recognition of gay and lesbian families in the short term, but it is hardly a long-term path to true equality for same-sex couples. Courts and legislatures might prove themselves willing to significantly water down the legal significance of marriage, but there will always be some benefits that adhere to marriage that are denied to unmarried couples. As a consequence, the public approach will forever exclude gays and lesbians from these benefits. Furthermore, no matter how many of the traditional benefits of marriage are decoupled from marriage (under the public approach) and made available to unmarried couples generally, the symbolic significance of marriage remains strong in this country. As long as same-sex couples cannot be married, they will not have the same rights as opposite-sex couples.

The proper path for government is to do as private employers have done and simply equate same-sex couples with married opposite-sex couples. To date, only one court in the country has indicated a willingness to go down such a path. In *Baehr v. Lewin*,¹⁰⁵ the Hawaii Supreme Court held that Hawaii's marriage law (which, like all marriage laws, allows only opposite-sex couples to marry) discriminates on the basis of sex, and the court remanded for a determination of whether there was a compelling state interest to justify that discrimination.¹⁰⁶ If the Hawaii Supreme Court ultimately holds that the state's marriage law violates the state constitution, that decision will be the first one to open up every legal entitlement of marriage to same-sex couples. Gay and lesbian couples will finally walk in the front door to legal recognition of their families, instead of having to rely on the granting of legal benefits to unmarried couples generally. This would amount to transplanting the private approach into the public realm.

IV: CONCLUSION

Public and private entities have taken different approaches to recognizing gay and lesbian families. While the majority of public entities do not recognize gay and lesbian families at all, those that do, view them as unmarried families generally. By contrast, private enti-

105. 852 P.2d 44 (Haw. 1993).

106. *See id.* (involving same-sex couples, who were denied marriage licenses; these plaintiffs argued that the denial constitutes a violation of their right of privacy and equal protection).

ties tend not to recognize unmarried heterosexual couples. Those employers that grant some recognition to gay and lesbian families by and large recognize them as a gay alternative to marriage. Even when same-sex couples do not receive the full employee benefits that married couples do, when they receive any benefits at all, they tend to receive benefits from which heterosexual unmarried couples are completely excluded. Moreover, these different mechanisms for recognizing gay and lesbian families have implications for civil rights litigation strategies and for the future of marriage generally. While the institutional explanations for public and private behavior generally help explain why public and private entities behave in these ways, one significant public entity (the Hawaii Supreme Court) seems to have adopted the private approach to recognizing gay and lesbian families. Hopefully, more courts will follow this path, as it is the only long-term guarantee of equal rights for gay and lesbian families.

