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Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States

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*Nancy D. Polikoff**

This symposium appropriately honors Art Leonard for his contribution over the last 20 years to the law affecting lesbians and gay men. I have written elsewhere about the growth since the early 1970s of one discrete area of the law — lesbians and gay men as parents.[1] I note that in the early years legal strategies and court decisions were passed largely by word of mouth among a handful of lawyers.[2] I specifically credit Art's Lesbian/Gay Law Notes as one of the developments that, by the end of the 1980s, had significantly improved the ability of advocates to communicate successes, failures, and strategies, thus enabling more lawyers in more states to fight for the parenting rights of lesbians and gay men.[3]

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* Professor of Law, American University Washington College of Law. I would like to thank Tracy Davis, WCL class of 2001, for her extensive research contribution to this article. I would also like to thank Dean Claudio Grossman for the summer research grant that facilitated my work. I presented an early version of this article at the Tenth World Conference of the International Society of Family Law in Brisbane, Australia and at a staff seminar at the Faculty of Law, University of Melbourne in Melbourne, Australia, both in July, 2000. I am especially appreciative of the many comments I received from the University of Melbourne law faculty, and I am grateful to Professor Kris Walker who arranged for my presentation there. Numerous lawyers and law professors in the European countries have made it possible for me to write about the situation in their countries. These include Francois Baur, Daniel Borillo, Carolyn Forder, Rainier Hiltunen, Kees Waaldijk, Robert Wintemute, and Hans Ytterburg. Mark Agrast has been a constant source of information on international adoption, and Joan Hollinger has generously shared her vast knowledge and considerable insights on all aspects of adoption. Thank you all.

1 *See* Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the* Courts, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 305 (John D'Emilio et al. Eds., 2000) [hereinafter CREATING CHANGE]. For a condensed version of that book chapter *see* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523 (1999).

2 *See* CREATING CHANGE, *supra* note 1, at 322.

3 *Id.*

My contribution to this symposium takes on an international dimension, and for that, as well, I owe my thanks to Art. In the 1990s Art began including international developments in Law Notes. When I decided to compare recognition of lesbian and gay families in Europe with those in the United States, I turned to Art to provide me with the names and email addresses of his European contacts. Art alerted me to the International Conference on Legal Recognition of Same-Sex Partnerships, at which I met many of the advocates who continue to communicate with me about developments in their countries.[4]

Even before attending that conference, I had noticed a profound disjunction between the European and American attitudes towards gay and lesbian families. Several European countries had enacted, or were in the process of enacting, laws concerning Registered Partnerships, a status creating rights and responsibilities almost identical to those of married couples. The "almost" nature of the status, however, was significant; the one area remaining unavailable to lesbian and gay couples was the joint adoption of children.

The European legislation signaled a total separation of the approval of lesbian and gay couples as partners from the approval of lesbian and gay couples as parents. In the United States, meanwhile, trial courts had approved joint adoptions in more than half the states,[5] with six states having appeals court decisions approving

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[4] Legal Recognition of Same-Sex Partnerhsips: A Conference on National, European and International Law at King's College, University of London (July 1–3, 1999). *See* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenæs eds., forthcoming 2001) [hereinafter LEGAL RECOGNITION] (containing updated versions of the papers delivered at the conference). An excellent source of information about the legal status of lesbians and gay men around the world may be found in the International Lesbian and Gay Association World Legal Survey at http://www.ilga.org. For the EuroLetter, a monthly publication highlighting current European developments relevant to lesbians and gay men, see http://www.steff.suite.dk/eurolet.htm.

[5] *See* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, ADOPTION BY LESBIANS AND GAY MEN: AN OVERVIEW OF THE LAW IN THE 50 STATES (1996). The Lambda Legal Defense and Education Fund website is located at http://www.lambdalegal.org. *See also* National Center for Lesbian Rights, *Adoption by Lesbian, Gay and Bisexual Parents: An Overview of Current Law* (2000) *at* http://www.nclrights.org/publications/pubs_adoption.html.

the practice.[6] On the other hand, no state provided the extensive partnership recognition found in Europe. America, too, seemed able to compartmentalize its attitude towards partnership and parenting, but in this instance parenting received legal sanction, not partnership.

One presentation at the conference highlighted the distinction between Europe and the United States. Dutch law professor Kees Waaldijk presented a topography of the progression of legal equality for lesbians and gay men in Europe, finding a "clear pattern of *steady progress* according to *standard sequences*."[7] He showed that countries began by decriminalizing same-sex sexual behavior, then moved on to equalize the age of consent for sexual conduct, and then to outlaw discrimination based on sexual orientation.[8] The second to last development on his graph was recognition of same-sex partnerships; the final development was joint adoption of children. Under Professor Waaldijk's theory, partnership recognition was easier to obtain and more acceptable than parenting recognition. Indeed, by making acceptance of joint parenting the final step, Professor Waaldijk suggested that before such a step could occur, lesbians and gay men would have to achieve all of the previous steps, including partnership recognition.

Professor Waaldijk's analysis of the progression in Europe is wholly inapplicable to the United States. Some of the difference

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[6] *See In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995); *In re* Petition of K.M., 653 N.E. 2d 888 (Ill. 1995); *In re* Adoption of Tammy, 619 N.E. 2d 315 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A. 2d 535 (N.J. 1995); *In re* Jacob, *In re* Dana, 660 N.E. 2d 397 (N.Y. 1995); *In re* Adoptions of B.L.V.B. & E.L.V.B., 628 A. 2d 1271 (Vt. 1993).

[7] *See* Kees Waaldijk, *What Legal Recognition of Same-Sex Partnership Can Be Expected in EC Law, and When?: Lessons from Comparative Law*, Presented at Legal Recognition of Same-Sex Partnerships: A Conference on National, European and International Law, (on file with author); Kees Waaldijk, *A Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* LEGAL RECOGNITION, *supra* note 4 (emphasis in original).

[8] In fact, Professor Waaldijk also argues that each step in the sequence is in fact a sequence itself, according to "the law of small changes." Thus, the age of consent for same-sex sexual relations might be lowered before it was equalized with that of opposite-sex relations, or discrimination in some areas of employment might be banned before all employment discrimination would be banned. Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62 (2000). *See also* Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J. FAM. L. 371 (2000).

can be attributed to the role of the judiciary in the American context. All of the changes charted by Professor Waaldijk occurred in legislatures, guided by large-scale policy and political considerations. In the United States, on the other hand, judicial review of legislation under the federal and state constitutions has resulted in some progress,[9] while statutory interpretation has produced many gains, especially in the family law area.[10] This is particularly true under the customary "best interests of the child" standard that focuses on the well-being of the individual child before the judge rather than on any vast pronouncements about the well-being of children generally.

Two other differences between the United States and Europe may help explain their divergent paths. European governments are typically more concerned about contributing to the economic well-being and security of their people than is the American government, which is more likely to view economic status as a private matter. Registered partnership status contributes to the economic stability of the partners; European governments were motivated, at least in part, to ensure equal access to economic security for their lesbian and gay citizens. It is possible to be committed to this form of equality while believing that lesbians and gay men do not make optimal parents.

An additional difference is the relative frequency of adoption in the United States and in Europe. In the United States there is a critical shortage of adoptive parents for a substantial number of children in the foster care system.[11] Federal legislation has taken

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[9] For example, courts in Arkansas, New York, Kentucky, Georgia, Montana, and Tennessee have thrown out their states' sodomy laws on state constitutional grounds. *See* Picado v. Jegley, No. CV 99-7084 (Ak. 2001); Powell v. State, 510 S.E. 2d 18 (Ga. 1998); Commonwealth v. Wasson, 842 S.W. 2d 487 (Ky. 1992); Gryczan v. Montana, 942 P. 2d 112 (Mont. 1997); People v. Ronald Onofre et al., 415 N.E. 2d 936 (N.Y. 1980); Campbell v. Sundquist, 926 S.W. 2d 250 (Tenn. App. 1996). The Supreme Court invalidated on federal equal protection grounds a Colorado constitutional amendment disallowing any legislative, executive, or judicial action at the state or local level designed to prohibit discrimination on the basis of sexual orientation. *See* Romer v. Evans, 517 U.S. 620 (1996).

[10] *See, e.g.*, Braschi v. Stahl Assoc., 543 N.E. 2d 49 (N.Y. 1989) (interpreting the word "family" in New York City rent control statute to cover a deceased tenant's gay life partner).

[11] Voluntary Cooperative Information System, *Analysis of State Child Welfare Data: Survey Data from 1990 to 1994*, *available at* http://www.acf.dhhs.gov/programs/cb/dis/vcis/maintoc.htm.

several steps to facilitate adoption,[12] and local government agencies often promote adoption through news stories, public service announcements, and other outreach campaigns.[13] In this context, to entirely exclude any group of people from adopting is undesirable. Mainstream child welfare organizations routinely oppose a ban on gay and lesbian adoption.[14] The public discussion of gay and lesbian parenting in the United States is often one in which the couple wishes to adopt and raise a special needs child within the public agency system. Once gay men and lesbians are acceptable parents in some circumstances it is difficult to maintain a categorical position that children are harmed when they are raised by gay and lesbian parents.

By contrast, the amount of domestic adoption in many European countries is negligible. Public discussion of gay and lesbian parenting, therefore, is more likely to occur within the context of assisted reproduction. Within that framework the issue can be solely whether children should be deliberately conceived to be

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[12] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997), Title 2, §§ 103, 201–203 (codified in various sections of 42 U.S.C.). *See also Clinton Makes Push for Adoption*, UNITED PRESS INT'L, Dec. 14, 1996 (summarizing President Clinton's comments in his weekly radio address in which he outlined his plans to increase the number of adoptions of children in foster care).

[13] Rita Giordano, *Finding Permanent Homes for Special-needs Children is Difficult*, PHILADELPHIA INQUIRER, Feb. 4, 2001 (detailing efforts to recruit adoptive parents in Pennsylvania); *Foster Care Adoptions Nearly Doubled*, ALBUQUERQUE J., Aug. 5, 2001, at E3 (describing television, radio, and Internet campaigns aimed at reaching potential adoptive parents in New Mexico); Eric Rich, *State Agency Tried to Increase Low Adoption Rate: Looking for Love Connection*, HARTFORD COURANT, Mar. 20, 2000, at A3 (explaining Connecticut's Department of Children Families' adoption fair); *November is National Adoption Awareness Month*, BUS. WIRE, Nov. 12, 1999 (outlining the California Association of Adoption Agencies statewide poster campaign); Ovetta Wiggins, *DYFS Says Campaign is Increasing Adoptions*, THE RECORD, Nov. 18, 1998, at A3 (describing New Jersey's Division of Youth and Family Services advertising campaign); *Giving Foster Kids a Life*, PALM BEACH POST, Apr. 9, 1998, at 18A (detailing Florida's Get-A-Life program, encouraging people to consider adopting foster kids).

[14] In the context of consideration by the House of Representatives of an amendment to the 1999 District of Columbia Appropriations Act that would have prohibited joint adoption of a child by individuals who are not related by blood or marriage, Delegate Eleanor Holmes Norton quoted the Child Welfare League as stating that, "[t]his amendment would unnecessarily limit the pool of families available for these children who desperately need families." *See* 144 CONG. REC. H7381, H7384 (daily ed. Aug. 6, 1998) (statement of Rep. Norton).

raised by gay or lesbian parents, a more controversial proposition than one which focuses on the well-being of children who may otherwise never have families.[15] Furthermore, health care is provided by a largely public system in Europe, as compared with the United States where access to health care is primarily private. European governments can thus regulate who has access to assisted reproduction services in a manner that would be foreign to the American way, which provides access almost entirely based on the medical judgment of individual doctors and the patient's ability to pay.

In addition, as a result of the infrequency of domestic adoption, international adoptions comprise a significantly higher percentage of adoptions in European countries than in the United States. The European nations have been concerned that countries from which children are adopted would be unwilling to send children to a country where they might be raised by a gay or lesbian couple.[16] Closing off the supply of children from countries that cur-

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[15] A recent report from Sweden, recommending approval of adoption and donor insemination for lesbian and gay couples, expressed this distinction as follows:

> There is a difference in principle between children who are adopted and children who are born as a result of assisted insemination. In the first case it is a matter of a child that already exists and who is in need of new parents. In the second case it is a matter of assisting in bringing a child into existence. When society allows an activity that implies that children come into existence by artificial means then society has a particularly great responsibility to ensure that the child grows up under the best possible conditions.

CHILDREN IN HOMOSEXUAL FAMILIES: SUMMARY, Report from the Commission on the Situation of Children in Homosexual families, SOU 2001:10 (available by ordering from the English language portion of http://www.regeringen.se) [hereinafter Swedish Commission Report]. For a complete discussion of this report, see *infra* text accompanying notes 47–55.

[16] This is especially evident in the Kortman report from the Netherlands. *See* Forder, *supra* note 8, at 412–13. The recent Swedish Commission Report on parenting by gay and lesbian couples reached a different conclusion, however. Although it considered that individual adoption organizations might be more restrictive towards Swedish adopters if lesbian and gay couples were permitted to adopt, it concluded that, "[In general], [n]othing has emerged that indicates that Swedish legislation giving homosexuals the possibility of adopting children would adversely affect heterosexual couples' chances of adopting." Swedish Commission Report, *supra* note 15, at 19. The report did note that, with respect to single adopters, countries of origin might require a statement that the applicant was not homosexual. *Id.* at 19–20.

rently send them would be highly undesirable as it would virtually wipe out unrelated adoptions in some countries.

A comparison of data in the United States with that of Sweden, Denmark, and the Netherlands illustrates these points. There are no current, reliable statistics on the total number of adoptions in the United States.[17] In 1992, there were about 120,000 adoptions, and this number is thought to have remained fairly constant throughout the 1990s.[18] Data generally show that one half of all adoptions are by relatives, including step-parents.[19] Thus there are about 60,000 unrelated adoptions each year. From 1995–98 there were a total of about 50,000 international adoptions.[20] If we assume 60,000 unrelated adoptions a year from 1995–98, of which 50,000 total were international, the total number of unrelated domestic adoptions for the four years would be about 190,000.

Statistics from Sweden stand in sharp contrast. From 1995–1998, there were 538 domestic adoptions, of which 74% were step-parent adoptions.[21] This leaves 141 non step-parent adoptions, 77 of which were adoptions of foster children by their foster parents. During the same period of time, there were 3565 international adoptions.[22]

The population of the United States is approximately 30 times that of Sweden. Using the data above, the number of unrelated domestic adoptions during that time in the United States was over 1300 times that of Sweden. International adoptions comprised approximately 21% of unrelated adoptions in the United States but a staggering 96% of unrelated adoptions in Sweden.

Statistics from the Netherlands show an almost identical contrast. In 1998 there were a total of 937 adoptions. Of these, 272

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17 Kathy S. Stolley, *Statistics on Adoption in the United States*, *in* 3 THE FUTURE OF CHILDREN 26 (Spring 1993).

18 *See* National Adoption Information Clearinghouse, *Adoption: Numbers and Trends*, *available at* http://www.calib.com/naic/index.htm. This website is an excellent source of information about adoption in the United States.

19 *See* Stolley, *supra* note 17, at 30 ("[T]hese latest estimates reveal a rather even division between related and unrelated adoptions.").

20 RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS 6 (2000).

21 E-mail from Hans Ytterberg, Ombudsman, Office of the Ombudsman Against Discrimination because of Sexual Orientation (HomO), to Nancy D. Polikoff (Feb. 16, 2001) (on file with author).

22 *Id.*

were by step-parents. Of the 665 adoptions that were not by step-parents, 95% were international adoptions.[23] Thus, there were approximately 33 non step-parent, domestic adoptions in 1998. The population of the United States is approximately 18 times that of the Netherlands. Assuming approximately 45,000 unrelated domestic adoptions in the United States in 1998,[24] the number of unrelated domestic adoptions in the U.S. is also over 1300 times that of the Netherlands.

According to statistics from 1999, there were 688 non-family adoptions in Denmark that year.[25] Of these, 45 children, about 7% of the total, were born in Denmark and 643, about 93% of the total, were born outside of Denmark. Of the 45 born in Denmark, however, 11 were 20 years old or older. Thus, the number of minor children adopted domestically that year by non-family members was 34.[26] The population of the United States is approximately 56 times that of Denmark. Assuming 45,000 unrelated domestic adoptions in the United States,[27] there are also 1300 times more unrelated domestic adoptions in the U.S. than there are in Denmark.

Given these statistics, domestic adoption is hardly an option for anyone in these three countries, let alone for lesbians and gay men. Nor can lesbians and gay men who wish to raise children use their willingness to adopt those otherwise languishing in foster care and institutions to create public support. This difference may go a long way in explaining the profound divergence in the European and the American approaches to gay and lesbian parenting.[28]

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[23] These statistics are *available at* http://www.cbs.nl/nl/nieuws/artikelen/0303k.htm and http://www.cbs.nl/nl/cijfers/kerncijfers/krv0891a.htm.

[24] Although the figure of 60,000 unrelated adoptions in the United States per year is an estimate, the data on international adoptions is known and there were approximately 15,000 international adoptions in 1998. Thus, there were approximately 45,000 unrelated domestic adoptions that year.

[25] *Population and Elections*, STATISTICAL Y.B., at Table 65, *available at* http://www.dst.dk/dst/665.

[26] The data reported includes an age category of 15–19 years. Five of the children adopted were in that category. *Id.* Thus, using the common American age of majority of 18, it is possible that a slightly smaller number of the children adopted that year in Denmark were minors.

[27] Existing data on the number of international adoptions is complete only through 1998; this estimate for 1999 assumes the same number that year as in 1998.

[28] I would like to credit Professor Miranda Stewart and other members of the law faculty at the University of Melbourne for suggesting that I vigorously pursue this possible explanation for the difference in the European and the American attitudes towards lesbian and gay parenting. Although a discussion of the law

In the remainder of this essay I first summarize the laws of several European countries concerning partnership recognition and parenting, thereby demonstrating their ability to validate lesbian and gay relationships while disapproving of lesbian and gay parenting. Next, I demonstrate that approval of lesbian and gay parenting in the United States developed without courts signifying approval of lesbian and gay relationships. This distinction facilitated substantial recognition of the parenting abilities of lesbians and gay men. Finally, I explain that recent developments in the United States signal an end to the separation of the issues of couple recognition and parenting ability. Now, states are commonly defending their prohibition on gay marriage by arguing that gay couples should not raise children, and legislators oppose the joint adoption of children on the ground that joint adoption is a step towards legalizing gay marriage. Future advocacy on behalf of lesbian and gay families in the United States will have to directly confront this changed political and legal landscape.

EUROPE

In 1989, Denmark became the first country to recognize a legal status called "Registered Partnership." This status, available to same-sex couples, created all of the rights and responsibilities of marriage with two exceptions: churches were not required to perform same-sex ceremonies, and registered partners were not eligible for the joint adoption of children.[29] Commentators have speculated that the adoption exclusion represented the belief that children should be raised in a heterosexual, two-parent family.[30] One author noted that it was "easier to grant economic rights than

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in Australia is beyond the scope of this article, Professor Stewart pointed out that adoption had, over the last three decades, become a disfavored institution in Australia, thus making the topic of lesbian and gay parenting in that country largely about access to assisted reproduction.

[29] *Registered Partnership, Domestic Partnership and Marriage, A Worldwide Summary Complied by IGLHRC in Nov. 1998, available at* http://www.iglhrc.org/news/factsheets/marriage_981103.html. The Registered Partnership Act, Act No. 372 (June 1, 1989)(Den).

[30] *See* Linda Nielsen, *Family Rights and the 'Registered Partnership' in Denmark*, 4 INT'L J. L. & FAM. 297, 305 (1990); Craig A. Sloane, Note, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189, 210 (1997); Birgitte Søland, *A Queer Nation? The Passage of the Gay and Lesbian Partnership Legislation in Denmark, 1989*, 5 SOCIAL POLITICS 48, 62 (1998).

familial or personal [ones]."[31] Ten years later, the law was amended to permit one registered partner to adopt the other's child, as long as the child was not originally adopted from a foreign country.[32]

Although the 1999 amendment, which approved joint parenting, signaled a significant advance for lesbian and gay families, some ambivalence remains in Denmark. A 1997 law denies lesbians access to donor insemination through the public health service and in private clinics.[33] Such access is also denied to heterosexual women who are not married or in a marriage-like relationship with a man.[34] Furthermore, the exclusion of children originally adopted from a foreign country reveals a concern, entirely unproven,[35] that no country would send children to Denmark for adoption without such an exclusion. The Danish precedent remains extremely important, as many countries have patterned their own laws on those of Denmark.

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[31] Sloane, *supra* note 30 (quoting Martin D. Dupuis, *The Impact of Culture, Society, and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark*, 9 INT'L J. L. & FAM. 86, 108–109 (1995)). Had the bill creating registered partnerships included access to adoption and donor insemination, it would "have challenged much more deeply held convictions and most likely have met with defeat." Soland, *supra* note 31, at 63.

[32] Act No.360 (June 2, 1999) (Den.). According to data for 1999, during the portion of that year that registered partners were eligible to adopt each other's children, there were 61 such adoptions in Denmark, *available at* http://www.dst.dk/dst/665.

[33] Act No. 460 (June 10, 1997) (Den.).

[34] *Id.*

[35] Indeed, in response to a survey conducted by the Swedish commission, only one of out seventeen countries that send children to Sweden for adoption, Latvia, reported a risk that heterosexual couples in Sweden would be adversely affected in their ability to adopt if lesbian and gay couples in Sweden were permitted to adopt. Swedish Commission Report, *supra* note 15, at 18–19. A detailed examination of the laws governing international adoption is beyond the scope of this essay. The topic, however, is on the agenda of many countries. The Hague Convention Protection of Children and Co-operation in Respect of Inter-Country Adoption was written in 1993 for the purpose of standardizing international adoption practices. The Convention does not provide substantive standards for who may adopt but leaves such standards to the countries sending and receiving children.

NORWAY

In 1991, Norway enacted a Co-Habitation Act that established property rights for unmarried couples who lived together for more than two years. The provisions are equally applicable to opposite-sex and same-sex couples.[36] In 1993, Norway passed a registered partnership law, patterned on Denmark's, with the same exclusions.[37] Registered partners also do not have the right to donor insemination services through either the public or private health systems.[38] Furthermore, neither a single lesbian nor a single heterosexual woman without a male partner may access donor insemination services.[39] In January 2001, however, the Norwegian government introduced legislation that would permit a registered partner to adopt her partner's child.[40]

SWEDEN

Swedish cohabitation law establishing certain property rights has been applicable to same-sex as well as opposite-sex couples since 1988.[41] In 1994, Sweden enacted a registered partnership law, with the same exclusions as those in Denmark.[42] The law denied joint custody, as well as joint adoption, to registered partners and also denied them access to public insemination services.[43] Public in-

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[36] Norwegian Joint Household Act, Act No. 45 (July 4, 1991) (Nor.). *See also* Forder, *supra* note 8, at 442.

[37] Law on Registered Partnerships, Act No. 40 (April 20, 1993) (Nor.), *available at* http://www.france.qrd.org/texts/partnership/no/norway-en.html.

[38] LESLIE ANN MINOT, CONCEIVING PARENTHOOD: PARENTING AND THE RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE AND THEIR CHILDREN 134 (2000); International Lesbian and Gay Association (ILGA), *World Legal Survey: Norway*, *available at* http://www.ilga.org/Information/legal_survey/europe /norway.htm (citing LESBIAN MOTHERHOOD IN EUROPE 169 (Kate Griffen & Lisa A. Mulholland eds., 1997)); *New Norwegian Biotechnology Law*, BIOTECH. BUS. NEWS, Aug. 12, 1994.

[39] *See World Legal Survey: Norway, supra* note 38.

[40] E-mail from Rainer Hiltunen, Secretary-General of SETA (Finnish National Organization for Sexual Equality) and Member of the Finnish Minister of Justice's Expert Commission for Same-Sex Partnership to Nancy D. Polikoff (Feb. 8, 2001) (on file with author).

[41] Homosexual Cohabitees Act, SFS 1987:813 (1988) (Swed.).

[42] Registered Partnership Act, SFS 1994:1117 (1994) (Swed.). *See also* Peter Nygh, *Homosexual Partnerships in Sweden*, 11 AUSTRALIAN J. FAM. L. 11, 11–12 (1997).

[43] Swedish Registered Partnership Act, *supra* note 42, at ch. 3 § 2. A member of a registered partnership also may not adopt as an individual. *Id.*

semination services are only available to married couples or heterosexual couples in marriage-like relationships.[44]

A Swedish commission opposed joint adoption and custody by gay and lesbian couples so that the children would not regard themselves as deviant.[45] Registered partnerships were seen as an expression of equality between heterosexual and homosexual love and of freedom to develop a relationship into a partnership.[46] In February 1999, however, the government appointed a commission to study adoption and access to donor insemination. This report, released in January 2001, recommended complete legal parity between heterosexual couples and gay and lesbian couples in all parenting circumstances.[47] The commission reviewed international studies and initiated studies in Sweden. It found that,

> In the light of what has emerged in the research in the field the Commission considers that the legal differences that exist today regarding homosexual and heterosexual couples' abilities to adopt are no longer objectively justified. The Commission proposes therefore that registered partners, in the same way as married couples, be given the possibility of being jointly considered as adoptive parents.[48]

The Commission further recommended that a registered partner be permitted to adopt the other partner's child on the same conditions applicable to married couples in step-parent adoptions.[49] The Commission also proposed that access to hospital-based insem-

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[44] The Act on Insemination, SFS 1984:1140, § 2 (Swed.); The Act on In Vitro Fertilization, SFS 1988:711, § 2 (1994) (Swed.). Under the Insemination Act, no private medical practitioner in Sweden may perform donor insemination. *See* David Bradley, *Children, Family, and the State in Sweden*, 17 J.L. & SOC. 427, 436 (1990).

[45] DAVID BRADLEY, FAMILY LAW AND POLITICAL CULTURES, SCANDINAVIAN LAWS IN COMPARATIVE PERSPECTIVE 102 (1996).

[46] *Id.* at 103. According to a former Member of Parliament who was a sponsor of the Registered Partnership Act, it would have been impossible to get agreement in Parliament in 1994 to include adoption as part of a registered partnership. Rather the process of achieving equality for lesbians and gay men needed to proceed in a step-by-step fashion, meanwhile collecting information about children in gay and lesbian families. E-mail from Barbro Westerholm, former member, Swedish Parliament, to Nancy D. Polikoff (June 26, 2000) (on file with author).

[47] Swedish Commission Report, *supra* note 15.

[48] *Id.* at 9–10.

[49] *Id.* at 10–11.

ination services, currently available to married couples and cohabiting heterosexual couples, be extended to lesbian couples in registered partnerships or cohabiting relationships.[50] When the mother is in a registered partnership, the partner would be presumed to be the child's other parent.[51] In press reports, Sweden's Justice Minister stated that he favors a change in the law, although opposition Conservatives do not support the reform proposal .[52]

Notably, the commission report acknowledged significant disagreement among the Swedish people concerning the suitability of adoption by lesbian and gay couples.[53] The commission did not regard such disagreement as a reason to back away from its principled positions. The commission found younger people and those who knew gay and lesbian families more supportive of such families.[54] Further, the commission noted that

> [t]he fact that society today does not fully accept the homosexual family formation with regard to parents' legal rights may also affect the attitude of the public to such families in general. Legally acknowledging the homosexual family therefore gives an important signal, not least to the child. It shows that the child's family is just as accepted as other families in society.[55]

If all of the Commission's recommendations are enacted into law, Sweden will have the most supportive legal regime for lesbian and gay parents in Europe.

ICELAND

Iceland's law, enacted in 1996, made registered partnership status, otherwise known as confirmed cohabitation, available to both same-sex and opposite-sex couples.[56] Although the law copied Denmark's exclusion of joint adoption, the law expressly allowed couples to obtain joint custody of each other's children.[57] Donor

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50 *Id.* at 11–16.
51 *Id.* at 14.
52 52 SWEDEN MAY LEGALIZE ADOPTION BY HOMOSEXUAL COUPLES (Agence France Presse, Jan. 31, 2001).
53 Swedish Commission Report, *supra* note 15, at 17–18.
54 *Id.*
55 *Id.* at 10.
56 Law on Confirmed Cohabitation, No. 87 (1996) (Ice.).
57 *Id.*

insemination services are not available to lesbian couples.[58] In May 2000, Iceland followed Denmark's decision to allow a registered partner to adopt his or her partner's child.[59]

THE NETHERLANDS

In 1998, the Netherlands enacted a Registered Partnership Act, creating the status of registered partners for both same-sex and opposite-sex couples.[60] The law did not include the right to adopt, but the simultaneous passage of the Shared Custody and Guardianship Act gave same-sex couples the right to joint custody of their children.[61] Donor insemination is available to lesbian couples in the Netherlands.[62]

In 1998, the Dutch government also began the lengthy process of enacting legislation to permit both same-sex marriage and joint adoption. Such legislation was finalized in late 2000 and officially published in January 2001, with an effective date of April 2001.[63] Under the legislation, same-sex and opposite-sex couples may choose to marry or to form registered partnerships. A child born to a woman in a same-sex marriage will not be considered the child of her spouse; an additional adoption proceeding will be required.

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58 *Id.* at art. 6.

59 Samtökin, *Adoption of Stepchildren in Gay and Lesbian Families in Iceland*, IGLA EuroLetter 80 (June 2000), *available at* http://www.steff.suite.dk/eurolet.htm.

60 Act of 5 July 1997 to amend Book 1 of the Civil Code and the Code of Civil Procedure in Order to Introduce Provisions on Registered Partnership (Registered Partnership Act) (Jan. 1, 1998) (Neth).

61 The Shared Custody and Guardianship Act, Article 1:253t Civil Code (Jan. 1, 1998) (Neth). In a 1997 case, Hoge/Raad, HR 5 September 1997, NJ 1998, the Dutch Supreme Court denied the request of a lesbian couple to adopt each other's child. The children were conceived with semen from the same donor, who had signed an agreement that he would have no rights and responsibilities towards the children. The court ruled that the decision whether to permit the adoptions was political and should be decided by the legislature. *See* Nancy G. Maxwell et al., *Legal Protection for All the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions*, 17 ARIZ. J. INT'L & COMP. L. 309, 327 (2000).

62 *Equality for Lesbians and Gay Men in Europe: A Relevant Issue in the Civil and Social Dialogue*, ILGA-Europe 74 (June 1998).

63 *The Netherlands Approves Gay Marriage Rights*, ILGA Euroletter 82 (Sept. 12, 2000), *available at* http://www.steff.suite.dk/eurolet.htm. Up to date English-language information on the Dutch legislation, including translation of the laws, can be found on Kees Waaldijk's website *at* http://ruljis.leidenuniv.nl/user/cwaaldij/www/.

Joint adoption for same-sex couples is not available for foreign-born children.[64]

GERMANY

In November 2000, Germany's lower-house of Parliament (Bundestag) passed a registered partnership law, which is likely to take effect by the summer 2001.[65] The law contains numerous provisions on matters entrusted only to the Bundestag. An additional bill, concerning taxes, social security, welfare, and civil service, would have required approval by the upper house (Bundesrat). The Bundesrat is a more conservative body, and did not approve the bill.[66] The new law makes registered partners identical to married couples for some purposes, including name-change, immigration, inheritance, tenancy, and health-insurance rights. The law also provides for mutual support obligations.[67] As in the Scandinavian countries, registered partnership is a civil status that can be dissolved only through a divorce proceeding.

With respect to children, the law does grant a partner custodial rights to the child of his or her partner for the purpose of making daily life decisions.[68] It does not grant the right to joint adoption. Under a different provision of German law, lesbians are not allowed access to donor insemination.[69]

FRANCE

The PaCS (Pacte Civil de Solidarité) legislation, enacted in France in 1999, differs from the registered partnership laws discussed above because it confers fewer rights and responsibilities than those incurred through marriage and is not a marital status requiring divorce for termination.[70] A married person cannot enter

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64 *Id.*

65 Rex Wochner, *German Parliament Passes Partners Bill*, ILGA Euroletter 84 (November 2000), *available at* http://www.steff.suite.dk/eurolet.htm.; E-mail from Dr. Helmut Graupner, Vice-President, Austrian Society for Sex Research and President, Rechtckomitee Lambda, to Nancy D. Polikoff (Feb. 15, 2001) (on file with author).

66 *Id.*

67 Wochner, *supra* note 65.

68 Geral Pilz, *The Details of the Registered Partnership in Germany*, ILGA Euroletter 84 (November 2000).

69 E-mail from Dr. Helmut Graupner, *supra* note 65.

70 Loi no. 99-944 du 15 Novembre 1999, Relative au Pacte Civil de Solidarité (1999) (Fr.) *available at* http://www.legifrance.gouv.fr.

a PaCS, but a person in a PaCS is single and therefore may marry, which results in the cessation of the PaCS. A PaCS is a "contract concluded between two adult individuals, of different sexes or of the same-sex, to organize their life in common."[71] A PaCS confers upon the couple certain specified property, tax, inheritance, social security, and other miscellaneous rights and responsibilities.[72]

The legislative debates leading up to the PaCS statute stressed that it was about providing economic security to those who cannot or do not want to marry. The Justice Minister stated explicitly that the statute was not about opening up adoption or medically assisted pregnancies to lesbians and gay men.[73] Donor insemination is available, in France, only to married couples or heterosexual couples who have lived together for at least two years.[74] Not only are lesbian and gay couples unable to jointly adopt children, they are unable to obtain joint parental authority over the child of one person in the couple, a status available to cohabiting heterosexual couples.[75] Furthermore, there are instances in which an individual lesbian or gay man has been rejected as an adoptive parent based on his/her sexual orientation. One such case, in which a gay man was disapproved as an adoptive parent, is currently before the European Court of Human Rights.[76]

OTHER COUNTRIES

Legislation in other European countries is less sweeping than those developments discussed above, either because it affects only a portion of the country or because it confers substantially fewer rights. In Spain, the Parliament of Catalonia, Spain, which controls that province's private law, enacted the Stable Union of De Facto Couples Law in 1998.[77] The law regulates both heterosexual and homosexual couples who form Stable Unions. The law does not import those in Stable Unions into the marriage and divorce law, as

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71 Daniel Borillo, *The "Pacte Civil de Solidarité" in France: Midway Between Marriage and Cohabitation*, *in* LEGAL RECOGNITION, *supra* note 4.

72 *Id.*

73 Jon Henley, *World: French Right Rages Against Couples Law; Plans to Sanction Gay Marriages and Give New Rights to Cohabiting Couples*, OBSERVER, Nov. 8, 1998, at 27.

74 L-94-653 of 1994, The Bioethics Act (Fr.).

75 Borillo, *supra* note 71.

76 *See* Frette v. France, No. 36515/97 (Fr.).

77 Nicolás Pérez Cánovas, *Spain: The Heterosexual State Refuses to Disappear*, *in* LEGAL RECOGNITION, *supra* note 4.

do the Registered Partnerships in Denmark, Sweden, Norway, Iceland, and the Netherlands, but instead creates rights and responsibilities, including upon dissolution, with great similarity to those found in marriage.[78] The economic rights and responsibilities of opposite-sex and same-sex Stable Unions are virtually identical.[79]

With respect to children, the Stable Unions Law dramatically distinguishes between opposite-sex and same-sex couples. A heterosexual Stable Union may jointly adopt children. One member of the couple may also adopt the other's child. Gay and lesbian couples may not adopt jointly, nor can one adopt the other's child. Under Catalan law, a lesbian or gay man is not precluded from adopting as an individual, but married and unmarried heterosexual couples are preferred over single adopters.[80]

Belgium has enacted a Statutory Cohabitation Act, which confers extremely limited rights and responsibilities on those who invoke its provisions.[81] Any two unmarried persons may register under this statutory scheme, which has property consequences but does not affect inheritance, taxes, pensions, or immigration. One commentator has noted that the act creates no provisions that would not be available to the couple by contract.[82] There are no provisions in the act concerning children. In March 2000, however, the federal cabinet approved a bill to extend the ability to adopt children to unmarried heterosexual couples who have lived together for three years.[83]

Registered partnership schemes are currently under consideration in other European countries. In December 2000, the government of Finland introduced into Parliament a Registered Partnership bill. The bill follows the original Danish model and does not permit joint adoption. The government has, however, set up a committee to study the legal and social situation of children in

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78 *Id.*

79 One difference is that for inheritance purposes, the surviving member of a same-sex Stable Union has somewhat greater protection than that available to the surviving member of a opposite-sex Stable Union. This is because a heterosexual Stable Union has intentionally avoided marriage whereas the option of marriage was not available to the same-sex couple. *Id.*

80 *Id.*

81 Forder, *supra* note 8, at 383.

82 *Id.* at 383–84.

83 Martine Vandemeulebroucke, *Les Couples Non Mariés Pourront Adopter un Enfant*, LE SOIR (March 23, 2000).

same-sex families.[84] In October, 2000, the Swiss government announced that it would propose a Registered Partnership bill by the summer of 2001. The bill will not follow the Scandinavian model of incorporating same-sex registered partners into matrimonial law; rather, the bill will establish a free-standing legal regime governing registered partners. It is expected that same-sex couples will be denied the ability to jointly adopt and denied access to donor insemination services.[85]

In September 2000, the Parliamentary Assembly of the Council of Europe approved numerous recommendations calling on European governments to institute equality for lesbians and gay men.[86] One calls for the enactment of registered partnership statutes. The Parliamentary Assembly is composed of members of parliament from 41 European nations. The recommendations are not binding on national governments.

SUMMARY

A review of the European experience reveals one dominant pattern. Partnership rights for gay and lesbian couples reflect a willingness to confer economic and social benefits on gay men and lesbians. Concomitantly, disapproval, or at least, skepticism, concerning gay and lesbian parenting has resulted in explicit denial of joint adoption rights and/or denial of access to donor insemination services. The legislators and other government officials creating such schemes have apparently seen no contradiction in valuing the relationships formed by lesbians and gay men while rejecting one aspect of adult citizenship presumptively available to heterosexuals — the right to parent.

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[84] E-mail from Rainer Hiltunen, Secretary-General of SETA (Finnish National Organization for Sexual Equality) and Member of the Finnish Minister of Justice's Expert Commission for Same-Sex Partnership to Nancy D. Polikoff, (Feb. 8, 2001) (on file with author). *See also Finland Proposes to Legalise Homosexual Unions*, EuroLetter 85 (ILGA-Europe) (January 2001).

[85] E-mail from François Baur, Legal Counsel to the Swiss Office of Culture and President of Pink Cross (Gay umbrella organization of Switzerland) to Nancy D. Polikoff (Feb. 8, 2001) (on file with author). *See also* Martin Abele, *Switzerland: Government for "Light Registered Partnership,"* EuroLetter 84 (ILGA-Europe) (November 2000); François Baur, *Switzerland — The End of a Fairy Tale: Heidi Stays Single: The Legal Situation of Same-Sex Partnerships in Switzerland*, *in* LEGAL RECOGNITION, *supra* note 4.

[86] *Situation of Lesbians and Gays in Counsel of European Member States*, EUR. PARL. ASS. Rec. No. 1474 (Sept. 2000).

Lesbian and gay activists who accepted the compromise inherent in the original registered partnership legislation in Denmark[87] have been vindicated, in part, by recent developments. The joint adoption available in Denmark since July 1999, has been accepted in Iceland; the Netherlands' joint adoption provisions became effective in April, 2001. Proposals in Norway and Sweden promise to extend adoption rights in those countries. Ambivalence about lesbian and gay parenting continues to be reflected, however, in those places, including Denmark, that deny donor insemination services to lesbians.

Perhaps most dramatically, all the European countries, even the Netherlands which has approved marriage for same-sex couples, have enacted a statutory exclusion from joint adoption for any child originally adopted from a foreign country. This approach is not mandated by any international law, treaty, or convention. European nations could have recognized and implemented the policies of countries sending children for adoption while retaining the ability to articulate in international circles their conviction that lesbian and gay couples make good parents. The wholesale exclusion of children born in other countries ensures that none of the countries need even participate in international dialogue on the subject.

Sweden may diverge from this pattern. Its government report, Children in Homosexual Families, does not recommend excluding lesbian and gay couples from adopting foreign-born children. After surveying countries that send children to Sweden for adoption, the commission wrote as follows:

> The Commission's study shows that the countries of origin with which Swedish adoption organizations now cooperate will probably not accept homosexual couples as adopters generally in the near future. But this does not preclude the possibility that the authorities/organizations responsible could in an individual case decide that it would be in a child's best interest to be adopted by a homosexual couple. Moreover, there may be countries other than those from which most children come at present, which have another view of

87 *See* NEIL MILLER, OUT IN THE WORLD: GAY AND LESBIAN LIFE FROM BUENOS AIRES TO BANGKOK 344 (1993).

> homosexual couples as adopters and which could be possible countries of origin in the future.[88]

The Commission fully embraced its conclusion that there is no justification for treating lesbian and gay couples differently from heterosexual couples. If the government adopts its recommendations then Sweden will stand alone on the world stage as an advocate for nondiscrimination in adoption.

THE AMERICAN EXPERIENCE

Until the late 1970s, virtually all lesbians with children became mothers while married, before acknowledging their lesbianism. From the late 1970s on, beginning in San Francisco, lesbians who had always acknowledged their sexual orientation began having children in the context of their lesbian relationships. This phenomenon spread across the country over the next decade. By 1989, the year Denmark enacted the world's first Registered Partnership law, planned lesbian families were so widespread that much of the major U.S. media had reported about them.[89]

Because of the largely private health care system in the United States, lesbians who can find a willing private doctor or sperm bank, and who can afford to pay for the services, have always had access to donor insemination. Furthermore, many sources were available,

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[88] Swedish Commission Report, *supra* note 15, at 19. The Commission recognized that some countries might require disclosure of the sexual orientation of a single person adopting a child if they wished to preclude the possibility that in the future a gay or lesbian parent's registered partner might complete a step-parent adoption of the child. *Id.* at 19–20. The Commission apparently preferred such a result to the Dutch and Danish models of a statutory prohibition on all such adoptions.

[89] *See* Kolata, *Lesbian Partners Find the Means to be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13, col. 1; *Editor's Note*, N.Y. TIMES, Feb. 3, 1989, at A3, col. 1; Hunter, *Lesbian Parents Prove to Be in No Way Inferior (Letter to the Editor)*, N.Y. TIMES, Feb. 13, 1989, at A20, col. 3; Adams, *Gay Couples Begin a Baby Boom*, BOSTON GLOBE, Feb. 6, 1989, at 2, col. 2; *Creating New Families*, SAN FRANCISCO EXAMINER, June 12, 1989, at A17, col. 1; *Two Moms*, SAN FRANCISCO EXAMINER, June 12, 1989, at A18; Gaines-Carter & Stevens, *Gay Pride March to Mark Milestones on Road to Acceptance*, WASH. POST, June 14, 1989, at D1, col. 2; Mandell, *The Lesbian Baby Boom*, NEWSDAY, July 13, 1989, at 8, col. 1; Hagedorn & Marcus, *Case in California Could Expand Legal Definition of Parenthood*, WALL ST. J., Sept. 8, 1989, at B10, col. 1; *20/20: I Have Two Moms* (ABC television broadcast, May 6, 1989); *Phil Donahue Show* (CBS television broadcast, Sept. 19, 1989).

beginning in the late 1970s, explaining how to accomplish self-insemination with semen from a known donor. A small number of gay men became fathers by using a surrogate mother who would give birth to the child and voluntarily turn the child over to the gay couple to raise. In the 1980s, individual gay men and lesbians began adopting children in significant numbers, both domestically and internationally. Often, the adoption agency knew that the adopting parent had a same-sex partner, but only one member of the couple would be permitted to go forward as the adopting parent.

In each of the instances described above, only one member of the gay or lesbian couple would be legally recognized as the child's parent — the one who was biologically connected to the child or the one who had legally adopted the child. Gay and lesbian parents and their advocates found this undesirable. This difference in status did not reflect the reality of the family life, in which both parents planned and cared for the child, and it left vulnerable the relationship between the child and legally unrecognized parent. For example, the child could not be assured child support if the couple split up, could not receive social security benefits if the legally unrecognized parent died, and could not inherit without a will from that parent or his or her relatives. The legally unrecognized parent could be denied access to the child if the couple split up or if the biological parent died.[90]

Lawyers representing gay and lesbian parents created the concept of second-parent adoption to formalize the relationship between the child and both parents. A second-parent adoption would be analogous to a step-parent adoption and would result in the child having two parents of the same-sex. A trial judge in Alaska granted the first second-parent adoption to a lesbian couple in 1985. Numerous similar adoptions were granted throughout the rest of the 1980s in California, Oregon, and Washington, as well as Alaska.[91]

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[90] For an extensive review of the legal significance of the parent-child relationship *see In re* M.M.D & B.H.M., 662 A. 2d 837, 849 (D.C. 1995).

[91] For a review of these early decisions, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 522–527 (1990).

The first reported opinion from a trial court came from the District of Columbia in 1991.[92] In early 1992, the first New York decision granting a second-parent adoption to a lesbian couple was reported in the *New York Times* and applauded on its editorial page.[93] Vermont, in 1993, became the first state whose appellate court approved such adoptions.[94] Appeals courts in Massachusetts, the District of Columbia, New York, New Jersey, and Illinois followed suit.[95] In many states, joint and second-parent adoptions[96] are routinely granted by trial court judges, even in the absence of appellate case law.[97]

Although some state appeals courts have rejected second-parent adoption, all have done so as a matter of statutory interpretation rather than from overt disapproval of lesbian and gay parenting. In Connecticut, the legislature responded to the state supreme court's opinion that a second-parent adoption was not permitted by amending the statute.[98] In Wisconsin, the same court that disapproved second-parent adoption issued one of the first decisions permitting a legally unrecognized lesbian co-parent to obtain visitation rights with a child upon the dissolution of her relationship with the child's legal parent.[99] In Colorado, after the state appeals

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[92] *In re* Adoption of Minor (T. & M.), 17 Fam. L. Rep. (BNA) 1523 (D.C. Super. 1991); Matter of Petition of L.S. & V.L. for the Adoption of Minor (T) & Minor (M), 119 Daily Wash. L. Rptr. 2249 (D.C. Super. Ct. Oct. 21, 1991).

[93] *In re* Adoption of Evan, 583 N.Y.S. 2d 997 (N.Y. Sup. Ct. 1992); Ronald Sullivan, *Judge Lets Gay Partner Adopt Child*, N.Y. TIMES, Jan. 31, 1992, at B1; James D. Marks, *A Victory for the New American Family*, N.Y. TIMES, Feb. 1, 1992, at 21.

[94] *In re* Adoptions of B.L.V.B. & E.L.V.B., 628 A. 2d 1271 (Vt. 1993).

[95] *In re M.M.D. & B.H.M.*, 662 A. 2d 837; *In re* Petition of K.M., 653 N.E. 2d 888 (Ill. 1995); *In re* Adoption of Tammy, 619 N.E. 2d 315 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A. 2d 535 (N.J. 1995); *In re* Jacob, *In re* Dana, 660 N.E. 2d 397 (N.Y. 1995).

[96] Customarily a second-parent adoption refers to a proceeding in which the child already has one legal parent, through birth or adoption, and the couple seeks to add a second parent. Joint adoption refers to a proceeding in which the couple together adopts a child when neither is already the child's parent.

[97] For one of the best sources for up-to-date information on states granting such adoptions see Lambda Legal Defense and Education Fund's website, *at* www.lambdalegal.org.

[98] CONN. ST. ANN. §§ 45a-724, 45a-731, as amended by 2000 Connecticut Legislative Service Public Act 00-228.

[99] *See* Georgina v. Terry M. (In the Interest of Angel Lace M.), 516 N.W. 2d 678 (1994) (affirming denial of petition for second parent adoption); *In re* Custody of H.S. H-K., 533 N.W. 2d 419 (Wis. 1995) (holding that the court may grant visitation "on the basis of a co-parenting agreement between a biological parent and

court ruled that the adoption statute did not permit second-parent adoption, trial judges used the state's Uniform Parentage Act to grant declarations of parentage to a child's non-biological mother.[100]

Advocates for gay and lesbian parents adopted a singular theme in their drive for recognition of planned lesbian and gay families — the best interests of the child. This approach did not require courts to address the adult couple relationship at all. Rather, the only issue before the court was whether the child would have one legal parent or two, a simple question to answer under a "best interests of the child" standard. The Vermont Supreme Court, in the first appeals court decision granting a second-parent adoption, expressed it this way:

> We are not called upon to approve or disapprove of the relationship between the appellants. Whether we do or not, the fact remains that Deborah has acted as a parent of B.L.V.B. and E.L.V.B. from the moment they were born. To deny legal protection of their relationship, as a matter of law, is inconsistent with the children's best interests and therefore with the public policy of this state, as expressed in our statutes affecting children.[101]

When the New Jersey appeals court authorized such adoptions, it quoted the above language with approval.[102]

The New York decision approving second-parent adoptions was actually one opinion written in two consolidated cases, one involving a lesbian couple and the other an unmarried heterosexual couple.[103] By focusing on statutory interpretation when the couple was not married, rather than solely when the couple was gay or

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another when visitation is in the child's best interest" when certain enumerated criteria were established).

100 *In re* G.P.A. Case no. 99-JV-440 (D. Colo. Nov. 10, 1999) (decree and order re determination of parent child relationship) (denying second-parent adoption on statutory grounds). In *In the Interest of* Twin A & Twin B, a Boulder County District Court Judge issued a Decree Affirming Parent and Child Relationship between a lesbian couple and their two unborn children. The court found that under Colorado's version of the Uniform Parentage Act a child can have two legal, natural mothers. Civil Action No. 99 JV (September 30, 1999).

101 *In re* Adoptions of B.L.V.B. & E.L.V.B., 628 A. 2d at 1276.

102 *In re* Adoption of Two Children by H.N.R., 666 A. 2d at 540–541.

103 *In re* Jacob, *In re* Dana, 660 N.E. 2d 397 (N.Y. 1995).

lesbian,[104] the court never had to express any opinion about gay and lesbian partners. Indeed, although some European laws approve of parenting by heterosexual unmarried couples but not by gay or lesbian couples,[105] the American cases all turn on statutory construction arguments that apply equally to all unmarried couples, and no court has found any authority for treating differently unmarried heterosexual couples and gay or lesbian couples.[106] Every American case stresses the paramount importance of interpreting the adoption statute in the best interests of the child.[107] As one court phrased it, "[t]he focus is on how the child shall best thrive, not on what the particular family format shall look like."[108]

Because under principles of federalism family law varies from state to state, there are some states, mostly in the South, that remain hostile to gay and lesbian parenting. Florida prohibits adoption by lesbians and gay men.[109] Utah prohibits adoption by a gay man or lesbian living with a partner.[110] Arkansas prohibits gay men

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104 The court did note that the fact that the legislature did not prohibit adoption by a single gay man or lesbian or by any unmarried person signaled that it would be inappropriate to deny the second-parent adoption in order to encourage marriage or disapprove of homosexuality. *Id.* at 405.

105 *See supra* notes 33–34 and accompanying text (Denmark); *supra* notes 38–39 and accompanying text (Norway); *supra* note 75 and accompanying text (France); *supra* notes 77–80 and accompanying text (Catalonia).

106 *See, e.g., In re Petition of K.M*, 653 N.E. 2d 888. In *In re M.M.D.*, the court's lengthy analysis continually refers to unmarried couples, even though the petitioners in that case were a gay couple. *See In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995).

107 *See, e.g., In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A. 2d at 1275 (explaining that "the interests of children have indeed become the central focus of legislative enactments governing adoption procedures"); *In re* Adoption of Tammy, 619 N.E. 2d 315, 319–320 (Mass. 1993) (stating the primary purpose of the adoption statute to be the advancement of the best interests of the child); *In re Jacob, In re Dana,* 660 N.E. 2d at 399 (describing the adoption statute's legislative purpose as the best interests of the child); *In re Adoption of Two Children by H.N.R.,* 666 A. 2d at 538 (arguing that the statute must be liberally construed to promote the best interests of children); *In re M.M.D. & B.H.M.,* 662 A. 2d at 842–843 (asserting that the best interests of the adoptee are the "paramount concern" of the adoption statute); *In re* Petition of K.M., 653 N.E. 2d 888, 895 (Ill. 1995) (stating that the Illinois Adoption Act of 1874 mandates that the best interests of the person to be adopted shall be of paramount importance).

108 *In Re M.M.D. & B.H.M.,* 662 A. 2d at 859.

109 FLA. STAT. Ch. 63.042 (3) (West 1985 & Supp. 1995).

110 *See infra* text accompanying notes 175–178.

and lesbians from serving as foster parents.[111] Appellate courts in Alabama, Mississippi, and North Carolina have issued opinions in recent years in post-divorce custody cases denying custody to a gay father or lesbian mother living with a partner when the child's heterosexual parent wanted custody.[112] Therefore, to claim complete approval of lesbian and gay parenting in the United States would be inaccurate. Nonetheless, when compared to Europe, legal endorsement of childrearing by gay and lesbian couples, as well as approval by numerous mainstream organizations, remains higher.

Furthermore, the status of parent and child, once created in one state, must be accepted by all states and by the federal government. Although North Carolina courts are not supportive of gay and lesbian parents, in one case a judge rejected an argument that a second-parent adoption granted in Washington state should not be recognized in North Carolina because it was against public policy in that state.[113] Although Mississippi recently enacted a prohibition on adoption by same-sex couples in that state, the legislature rejected a portion of the original proposal that would have denied recognition to such adoptions granted in other states.[114] Federal, state, and private employees who could never cover their partners for purposes of health insurance, family and medical leave, and other benefits routinely obtain those benefits for their children, even if the relationship was established through a same-sex second-parent adoption.

Advocacy on behalf of couple recognition has taken place independently from advocacy on behalf of parenting. After a few

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[111] Child Welfare Agency Review Board, Minimum Licensing Standards, § 230(2). Despite recent attempts, the Arkansas legislature has refused to enact a statute banning adoption by lesbians and gay men. *See* AR H.B. 1026 (defeated in House Committee on Aging, Children and Youth, Legislative and Military Affairs on Jan.26, 2001).

[112] *See* J.B.F. v. J.M.F., 730 So. 2d 1190 (Ala. 1998); Weigland v. Houghton, 730 So. 2d 581 (Miss. 1999); Pulliam v. Smith, 501 S.E. 2d 898 (N.C. 1998).

[113] *See* Starr v. Erez, 97 CVD 624 (Durham County, N.C. General Court of Justice 1997). The trial judge therefore refused to dismiss the custody petition filed by Starr, the nonbiological mother, and set the case for trial. Erez filed an interlocutory appeal to the North Carolina Court of Appeals, and the court dismissed the appeal as premature. Updated information on this case can be found on the website of the National Center for Lesbian Rights, http://www.nclrights.org/cases.html#adoption.

[114] Miss. S.B. 3074 (amending § 93-17-3 of Miss Code) (approved by Governor May 3, 2000); Miss H.B. 49 (introduced January 12, 2000, died on calendar March 16, 2000).

cases in the early 1970s, unsuccessfully challenging the denial of marriage to same-sex couples, the issue of the right to marry lay dormant for almost two decades.[115] The matter was revived with a vengeance, however, in 1993, when the Hawaii Supreme Court, in *Baehr v. Lewin*, ruled that the same-sex marriage exclusion violated the state's equal protection clause.[116] In response to that decision, and the concern that it might lead to legalizing same-sex marriage in Hawaii, Congress enacted the Defense of Marriage Act (DOMA).[117] Under DOMA, no state would have to recognize a same-sex marriage from another state. The statute also defined marriage, for purposes of all federal statutes, as the union of a man and a woman.[118] In the wake of DOMA, 32 states passed laws stating that they would not recognize a same-sex marriage legally performed in another state.[119] It would be hard to imagine a more widespread and resounding rejection of legal recognition of same-sex partnerships.

Meanwhile, the concept of domestic partnership was created in the 1980s as a means of extending a limited number of benefits routinely available to married couples, most importantly employment-linked access to health insurance.[120] Some cities and counties instituted such benefits for their employees beginning in the late 1980s, although in some places courts found that by doing so localities exceeded their authority.[121] When the District of Columbia voted in 1992 to permit registration of domestic partnerships and extension of benefits to the domestic partners of city employees, the U.S. Congress, which has ultimate authority over the District, voted to prohibit the expenditure of any funds for implementation of the

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115 *See* David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE, *supra* note 1, at 281. For a condensed version of that book chapter *see* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523 (1999).

116 *See* Baehr v. Lewin, 852 P. 2d 44 (Haw. 1993).

117 Defense of Marriage Act, Pub. L. No. 104-109, 110 Stat. 2419 (1996) (codified at 28 U.S.C.A. § 1738C (West Supp. 1998) and 1 U.S.C.A. § 7 (West 1997)).

118 *Id.*

119 *See National Overview: The Fight to Win the Freedom to Marry, Marriage Project Fact Sheet*, *available at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=50.

120 *See* Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19 (2000).

121 *See e.g.*, Arlington Count v. White, 528 S.E. 2d 706 (Va. 2000).

law.[122] California, Connecticut, Hawaii, Massachusetts, New York, Oregon Vermont, and Washington currently provide benefits to domestic partners of state employees.[123] Many private employers also extend domestic partner benefits to their employees.[124]

The distinct circumstances of Hawaii and Vermont deserve special mention. The Hawaii legislature responded to *Baehr v. Lewin* by affirming its intent that marriage remain limited to opposite-sex couples.[125] By enacting a "Reciprocal Beneficiaries" statute in 1997, however, the Hawaii legislature reflected some support for gay and lesbian couples.[126] The status is available to any two people who cannot legally marry, thus covering such relationships as mother-son or aunt-niece as well as same-sex couples. Reciprocal beneficiaries are entitled to certain specified rights, including health related benefits, survivorship rights, and the right to sue in wrongful death actions.[127]

The Vermont Supreme Court held in 1999, in *Baker v. State*, that the denial of the benefits of marriage to same-sex couples violated the state constitution's common benefits clause.[128] It left to the legislature the appropriate remedy for this constitutional violation.[129] In 2000, the Vermont legislature enacted a statute creating the status of Civil Union.[130] This status, available only to same-sex couples, encompasses all of the rights and responsibilities of marriage, including the applicability of the state's divorce laws to the dissolution of the relationship. The status closely resembles the European registered partnership laws.

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122 The District of Columbia Appropriations Act, Pub. L. No. 102-382, tit. I, 106 Stat. 1422 (1992).

123 *See Domestic Partnership Benefits Listings: States & Municipalities, available at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=21# states.

124 *Id. See also Domestic Partner Benefits: HRC's Searchable WorkNet Database, available at* http://www.hrc.org/worknet/index.asp.

125 *See* H.B. 2499 (introduced Jan. 25, 1994).

126 HAW. REV. STAT. 572C (Supp. 1997).

127 HAW. REV. STAT. 87-25.5 (Supp. 1997); HAW. REV. STAT. 509-2, 560:2-201, :2-202, :2-208, :2-209, :2-301, :2-711, :2-802, :2-804 (Supp. 1997); HAW. REV. STAT. 663-3 (Supp. 1997). Although the statute requires private as well as public employers to provide health insurance to the reciprocal beneficiary of an employee, that portion of the statute has been struck down. *See* Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE, *supra* note 1, at 293 n.27 (references an attorney general opinion upheld by a federal district court).

128 Baker v. State, 744 A. 2d 864, 885 (Vt. 1999).

129 *Id.* at 886.

130 VT. STAT. ANN. tit. 15 § 1201-07 (Supp. 2000).

Even Vermont's statute, which provides the most far-reaching recognition of gay and lesbian couples in the United States, is limited in scope when compared with the Scandinavian approach. The statute, as well as Hawaii's reciprocal beneficiaries statute, has no impact on those matters governed by federal law, such as social security, disability, veteran's and other federal monetary benefits, federal income and estate taxation, and immigration. A couple may enter into a Civil Union in Vermont, but if one of them is not a United States citizen that person will gain no right to stay in the United States.

Domestic partnership schemes create even fewer rights. The thousands of gay men and lesbians who would otherwise have no health insurance have certainly gained a valuable, tangible benefit. Those schemes that provide hospital visitation privileges for domestic parents ensure that in a time of crisis the couple will not be at the whim of doctors or administrators who might bar access by one member of the couple to the other. But, the status of domestic partner has no property, inheritance, or tax consequences. The status creates no mutual obligations. Domestic partnership may be a step towards recognition in the future, but it is a far tinier step than that which has been taken by many European nations.

THE INTERTWINING OF MARRIAGE AND PARENTING

The positive developments in the law of lesbian and gay parenting, summarized above, continued unencumbered by the issue of marriage or relationship recognition until 1996. The turning point was the trial on remand in *Baehr v. Lewin*,[131] the 1993 case from the Hawaii Supreme Court finding the denial of marriage to same-sex couples a sex-based discrimination and a violation of the state constitution's equal protection clause. The court remanded for trial the issue of whether the state could meet the strict scrutiny standard for maintaining the sex-based discrimination. The state was required to prove that denying marriage to same-sex couples was necessary to achieve a compelling state interest.

The state choose the best interests of children as its compelling state interest and argued that maintaining marriage as an institution for opposite-sex couples was necessary to achieve that interest. The

[131] *See Baehr v. Lewin*, 852 P. 2d 44.

following excerpts from the state's pre-trial brief exemplify their arguments:

> The State has a particularly compelling interest to encourage creation of the family environment in which optimal child development will most likely occur. It would be Orwellian double speak to say on the one hand, that in child custody cases, custody is awarded 'according to the best interests of the child' [citation omitted], but on the other to argue that the State cannot encourage that a child be born into such an environment . . . .
>
> As a matter of public policy, the preferred setting for childrearing is in a home with married parents. This policy judgment reflects the widely held values of the people.[132]
>
> . . . The male-female classification advances a compelling interest. Human beings require long term care following birth. To foster and protect the human race necessarily demands that we encourage creation of the setting where a child will receive long term care and where it is reasonable to believe a child is most likely to reach its optimal development potential.[133]

At trial, the state called expert witnesses to testify about the well-being of children, but none proved the state's assertions. Psychiatrist Dr. Kyle Pruett testified that children were more likely to reach their optimal development when raised by their mother and father and that being raised by a same-sex couple would produce a "more burdened domain" than being raised by opposite-sex parents.[134] Nonetheless, he also testified that gay fathers, lesbian mothers, and same-sex couples do raise happy, healthy and well-adjusted children; become good parents; are as fit and loving as parents as heterosexual persons and couples; and should be allowed to

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[132] Defendant State of Hawaii's Pre-Trial Memorandum at 9, Baehr v. Miike, 92 Haw. 634 (1999) (No. 91-1394-05) *available at* http://www.hawaiilawyer.com/same_sex/ briefs/statbref.txt.

[133] *Id.* at 14.

[134] *See* Baehr v. Miike, 1996 WL 694235 *5 (CIV. No. 91-1394) (Haw. Cir. Ct. 1996).

provide foster care for and adopt children.[135] He said, further, that any burden on a child from having same-sex parents would be outweighed by the quality of the nurturing relationship between the parent and child.[136]

Sociologist David Eggebeen testified that children raised by single parents and step-parents are at heightened risk in comparison to children raised by married couples.[137] Dr. Eggebeen equated a same-sex couple with a step-parent situation because one parent is not the biological parent of the child, although he conceded that the situation of a same-sex couple planning a child together, conceiving the child through assisted reproduction, and raising the child as though they were the biological parents was not analogous to the step-parent scenario.[138] Dr. Eggebeen also testified that gay and lesbian couples can create stable family environments, can raise healthy and well-adjusted children, and should be allowed to serve as foster parents for and adopt children.[139] He further stated that children of same-sex couples would be helped if they received the economic benefits and social status that marriage of their parents would provide.[140]

Psychologist Thomas Merrill testified that, among other factors, a strong and intimate bond between parent and child was one aspect of family necessary for children to reach their optimal level of development, and that the presence of a mother and a father improved the likelihood that such a strong bond would exist.[141] Nonetheless, he also testified that sexual orientation is not an indication of parental fitness, and that children should not be denied benefits on the basis that their parents are a same-sex couple.[142]

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135 *Id.*

136 *Id.*

137 *Id.* at *7.

138 *Id.*

139 *Id.* at *7–8.

140 *Id.* at *8.

141 *Id.* at *10.

142 The state called one additional expert witness, Dr. Richard Williams, a psychologist who reviewed the studies on the well-being of children raised by lesbian and gay parents and in his testimony criticized the methodology of each study. The trial court found Dr. Williams' testimony not credible because he expressed bias against all social sciences; he testified that he would doubt even properly conducted research studies because he does not believe in the value of psychology and other social sciences; and he expressed "severe" views, including the lack of scientific proof that evolution occurred. *Id.* at *8–9.

The state pursued its argument in its post-trial brief, which included the following:

> The State has a compelling interest in preserving the integrity and stability of the nuclear family. It can implement this interest by preferring male-female marriage. It can do this to protect children by prohibiting same-sex marriage which is inherently destructive of the natural family unit and procreation in a marital setting.[143]
>
> . . . The only means available to the State to encourage that procreation, when it occurs, takes place within a marital setting is by granting benefits to married couples in order to induce others to commit to marriage. The legislature's refusal to extend benefits to same-sex couples is based, in part, on the absence of a belief that similar benefits are warranted.[144]
>
> . . . The State's objective for the marriage law is to encourage formation of male and female families for procreation and child rearing. This is the only reasonable and objective means available to the state to discourage and hopefully prevent out of wedlock births and their attendant social harms. Same-sex unions are at odds with this objective . . .[145]

In his extensive findings of fact the judge found that the state had "failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage."[146]

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[143] Defendant State of Hawaii's Post Trial Brief at 7, Baehr v. Miike, 92 Haw. 634 (1999) (No. 91-1394-05) *available at* http://www.hawaiilawyer.com/same_sex/briefs/samesexb.txt.

[144] *Id.* at 17.

[145] *Id.* at 26.

[146] *See Baehr*, 1996 WL 694235 at *17–18. The extensive findings included the following:

> 120. There is a public interest in the rights and well-being of children and families . . . .
>
> 121. A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.

122. Further, an intact family environment consisting of a child and his or her mother and father presents a less burdened environment for the development of a happy, healthy and well-adjusted child. There certainly is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress free home.

123. However, there is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, step-parents, grandparents, adopted parents, hanai parents, foster parents, gay and lesbian parents, and same-sex couples . . . .

125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child. More specifically, it is the quality of parenting . . . which is the most significant factor that affects the development of a child.

126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.

127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.

128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.

129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted.

130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.

131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.

133. While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop in a normal fashion.

134. Significantly, Defendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children.

135. As noted herein, there is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress-free home. However, in this case, Defendant has not proved that allowing same-sex marriage will probably result in sig-

The decision of the state of Hawaii to highlight this particular justification for restricting access to marriage appeared an odd choice. The state did offer several other justifications, but did not try to prove them.[147] With two decades of legal developments supportive of lesbian and gay parenting, Hawaii's strategy seemed doomed to failure from the outset, especially with the state's own witnesses refusing to condemn the ability of lesbians and gay men to raise healthy children. At the time, it seemed likely that Hawaii's coupling of arguments against partner recognition and parenting would remain an anomaly.

This prediction proved wrong, and the next example of the joining of the two issues hit me particularly close to home. In 1995, I was successful appellate counsel in *In re M.M.D.*, the case that established the right of unmarried couples, gay and straight, to jointly adopt children in the District of Columbia.[148] Because the United States Congress wields the ultimate legislative authority over the District of Columbia, this victory was vulnerable to Congressional tampering. Each year, beginning in 1995, members of the House of Representatives tried to enact, as an amendment to the District of Columbia budget, a statute that would have prohibited joint adoption by unmarried couples. For three years the amendment failed in committee and was not debated on the floor of the House.

In 1998, however, Representative Steve Largent introduced the measure on the House floor. The ensuing debate elicited the

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> nificant differences in the development or outcomes of children raised by gay or lesbian parents and same-sex couples, as compared to children raised by different-sex couples or their biological parents . . . .
>
> 136. Contrary to Defendant's assertions, if same-sex marriage is allowed, the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage . . . .
>
> 137. In Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving and committed relationships . . . .

Id.

147 The other justifications were assuring recognition of Hawaii marriages in other jurisdictions; protecting the public fisc from the effects of same-sex marriage; and protecting traditional marriage as a fundamental structure of society. The trial court found that the state had presented insufficient evidence and had failed to establish these claims. *Id.*

148 *In re M.M.D. & B.H.M.*, 662 A.2d 837.

reasoning of those members supporting the bill. The amendment would not have banned individual lesbians and gay men from adopting, and Largent explicitly stated that if a judge found a gay petitioner suitable to adopt a particular child then the adoption would proceed, even if the petitioner was living in a committed relationship with another man.[149] He continued, however, with the following rationale for banning lesbian and gay couples from adopting together:

> But [the ability to adopt as an individual is] not enough for some of the spokesmen of the gay movement. They think it's unfair that people of the same-sex cannot be married to each other. Well, they are entitled to think that's unfair, and they are entitled to work to change the law. But meanwhile, that is the law and it is public policy, and I think we have a pretty strong consensus in this country in favor of that policy. But since they can't get same-sex marriage written into law, their next strategy is to try to find other areas of public life in which they can enact policies in which gay couples would be treated as if they were married or almost married or just as good as married, and so they work for things like domestic partner benefits. Well, they are entitled to do that, too, and sometimes they win, sometimes they persuade political majorities or corporate managers that treating live-in lovers on the same level as spouses is good policy. I don't agree with that conclusion, but it's a fair issue to debate.
>
> But on joint adoption of children, we have to draw the line. Sure, it might give some gay rights activist a warm feeling to see gay couples treated just as if they were married. But these are real kids we are talking about here . . . . Those kids have a right to a family. It is simply wrong to turn them into trophies from the culture war, to exploit them in order to make some political point.[150]

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149 144 CONG. REC. H7381, H7383 (daily ed. Aug. 6, 1997) (statement by Rep. Largent).

150 *Id.*

Largent continued by praising a lesbian or gay man who would adopt a child, saying "there is probably nothing finer that you will ever do with your life," but decried turning a child into a "political prank," exploiting a child "to make a point about how persecuted you are."[151]

From the perspective of the best interests of the child, the reasoning of Largent and his colleagues[152] was nonsense. Joint adoption would provide the child with two legal parents, each responsible for his or her support and care.[153] Arguments in favor of joint adoption had always focused on the importance of the parent-child relationship. Joint adoption had never been seen as some surreptitious means of gaining partner recognition.

Indeed, joint adoption confers no new status on the couple raising the child. Largent's insistence that joint adoption was a back door form of partner recognition designed to treat the couple as "married or almost married or just as good as married"[154] introduced anti-gay and pro-marriage ideology into the joint adoption arena for the first time. Largent and his supporters ignored the benefit to the child from having two parents in order to make the ideological point that lesbian and gay couples are disfavored family units. Although the Largent amendment failed, its underlying arguments presaged future legislative debates.

In 1999, another case challenging the exclusion of lesbian and gay couples from marriage found its way to a state supreme court, this time in Vermont, in *Baker v. State*. The state once again was called upon to articulate its reasons for the marriage exclusion. The Vermont Supreme Court noted as follows:

> . . . The principal purpose the State advances in support of excluding same-sex couples from the legal benefits of marriage is the government's interest in 'furthering

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151 *Id.*

152 For example, Representative Bliley remarked that "It has nothing to do with whether single people adopt children or whether two women or two men. The thing is that there is no contract, there is nothing there legally to protect this child." 144 CONG. REC. H7381 (daily ed. Aug. 6, 1997) (statement by Rep. Bliley). This comment was entirely besides the point, as no obligations the couple might have with respect to each other would affect their joint responsibility for the support of the child which adoption would ensure.

153 *See In Re M.M.D. & B.H.M.*, 662 A.2d at 857–59 (cataloging a long list of benefits to a child from both parents being legal parents).

154 *See* 144 CONG. REC. H7381, H7383.

> the link between procreation and child rearing.' The State has a strong interest, it argues, in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support. The State contends, further, that the Legislature could reasonably believe that sanctioning same-sex unions 'would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing.' The State argues that since same-sex couples can't conceive a child on their own, state-sanctioned same-sex unions 'could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children.' Hence, the Legislature is justified, the State concludes, 'in using the marriage statutes to send a public message that procreation and child rearing are intertwined.'[155]

The Vermont Supreme Court's response to this argument forged a link between joint adoption and relationship recognition. In 1993, the Vermont Supreme Court had approved joint adoptions by lesbian and gay couples, the first state appeals court in the country to do so.[156] In its 1996 revision of the state's adoption laws, the Vermont legislature had codified the court's holding.[157] Because the legislature had "acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear children . . . "[158] and had "also acted to expand the domestic relations laws to safeguard the interests of same-sex parents and their children when such couples terminate their domestic relationship,"[159] the court refused to accept the state's explanation for its marriage restriction. Rather, the court held that same-sex and opposite-sex couples raising children were similarly situated and the state's interest in providing for the security of children applied to both.[160] The court

155 *Baker*, 744 A. 2d at 881.
156 *In re* Adoptions of B.L.V.B. & E.L.V.B., 628 A. 2d 1271 (Vt. 1993).
157 VT. STAT. ANN. tit. 15A, § 1-102 (b) (Supp. 2000).
158 *See Baker*, 744 A. 2d at 882.
159 *Id.*
160 *Id.* at 884.

found "extreme logical disjunction" between denying the benefits of marriage to same-sex couples and the stated purposes of "protecting children and 'furthering the link between procreation and child rearing.'"[161]

The state also asserted an interest in "promoting child rearing in a setting that provides both male and female role models."[162] To this, the court responded that "[i]t is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that child-development experts disagree and the answer is decidedly uncertain."[163] More fundamentally, however, the court found the argument "that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies . . . patently without substance"[164] because of the 1996 legislation facilitating joint adoption and other legal protections for children raised by gay and lesbian couples.

The court held in *Baker* that the failure to extend the benefits of marriage to same-sex couples violated the state constitution, and ordered the legislature to fashion a remedy.[165] As a result, the legislature enacted a statute creating Civil Unions as a status available to same-sex couples, conferring all of the rights and responsibilities of marriage.[166] This is the only legislation in the United States that compares with the Registered Partnership laws in Europe. In contrast to the order of developments in Europe, the Civil Unions statute was passed *after* the state had already fully embraced joint parenting by lesbian and gay couples. Most dramatically, precisely because the state had embraced such joint parenting, it was unable to rely on any claimed benefit of raising children within a heterosexual marriage to sustain the ban on same-sex unions.

The state's earlier support of joint parenting by lesbians and gay men played such a decisive role in undermining the state's subsequent attempt to retain the same-sex marriage exclusion that the two issues are now utterly and invariably linked in American public policy discourse. Within months of the *Baker* decision, three state

161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.* at 885.
165 *Id.* at 886–87.
166 VT. STAT. ANN. tit. 15, §§ 1201-07 (Supp. 2000).

legislatures showed concern for the impact of their adoption laws on future same-sex marriage litigation.

In 1999, the Connecticut Supreme Court had ruled in *In re Baby Z.*[167] that its adoption statute did not permit a non-biological lesbian mother to adopt her partner's child. The court did find that the adoption would be in the child's best interest and invited the legislature to change the statute.[168] Attempts to amend the statute were underway when the *Baker* decision was handed down, but the course of the debate was altered by the court's reasoning in *Baker*, as legislators balked at enacting a law that might someday be read as support for gay and lesbian marriage. One legislator articulated the dilemma as follows:

> For those who might be opposed to the fact that a gay person may adopt a child or a gay person may be artificially inseminated, that train has already left the station. That is our law . . . . When you talk about this, naturally the conversation of gay marriage came up. It went hand in hand. A lot of us were very uncomfortable with that concept and are not ready for it. I am one of them. But in the meantime what do we do about these children?[169]

The debate in the Connecticut Senate was even more explicit. One senator noted that, "I don't want this to be the vehicle for changing the law of marriage in the state of Connecticut."[170] He continued,

> I'm very worried about what happened in Vermont . . . . They said the Legislature there, by allowing a gay couple to, or a same-sex couple to adopt, the Legislature there has therefore given up their right to argue . . . about the sanctity of marriage between a man and a woman. So that's what I'm worrying about[171]

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167 *In re* Adoption of Baby Z., 724 A. 2d 1035 (Conn. 1999).

168 *Id.* at 1060.

169 H.R. 5830, 2000 Gen. Sess. (Conn. Apr. 28, 2000) (statement of Rep. Cafero), *available at* http://www.cga.state.ct.us/2000/trn/H/2000HTR00428-R00-TRN.htm.

170 H.R. 5830, 2000 Gen. Sess. (Conn. May 3, 2000) (statement of Sen. Upson), *available at* http://www.cga.state.ct.us/2000/trn/S/2000STR00503-R00-TRN.htm.

171 *Id.*

Support for giving full legal protection to children raised by gay and lesbian couples was strong enough that legislators were committed to solving what one called the "technical problem"[172] the state supreme court had found in their adoption statute. At the same time, the legislature did not want to find itself in the Vermont situation. The legislature did amend the adoption statute to permit second-parent adoption, but the act amending the adoption law contains a legislative finding that "the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman."[173] The act also states that, "[n]othing in this act shall be construed to establish or constitute an endorsement of any public policy with respect to marriage, civil union or any other form of relation between unmarried persons or with respect to any rights of or between such persons other than their rights and responsibilities to a child who is a subject of an adoption as provided for [in this act]."[174]

Connecticut was supportive of same-sex parenting. Two states on the opposite end of the spectrum, Utah and Mississippi, also reacted to the *Baker* decision. The Utah legislature had been working on an adoption ban, a follow up measure to a ban instituted earlier by the state's Division of Child and Family Services. The ban was specifically directed at both unmarried heterosexual couples and gay and lesbian couples in that it did not allow adoption by any single adult cohabiting outside of marriage. Under the proposal, a single gay person not living with a partner would be able to adopt, but neither a gay man or lesbian living with a partner, nor a straight man or woman living with a partner, would be able to adopt, even as a single individual.[175]

Supporters of gay and lesbian parenting lobbied for a compromise measure, which passed the Senate Judiciary Committee. Under the compromise, joint adoption would have been permitted if the child was the grandchild, niece, or nephew of the adopter and

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172 H.R. 5830, 2000 Gen. Sess. (Conn. Apr. 28, 2000) (statement of Rep. Lawlor), *available at* http://www.cga.state.ct.us/2000/trn/H/2000HTR00428-R00-TRN.htm.

173 2000 Conn. Acts 228 § 1 (4) (Reg. 2000 Sess.), *available at* http://www.cga.state.ct.us/2000/fc/2000HB-05830-R000691-FC.htm.

174 *Id.* at § 4 (13).

175 *No to Unmarried Couples and Sex Ed, Yes to Teachers; State's Prison Workers and College Professors aren't Among Winners*, SALT LAKE TRIB., Mar. 5, 2000, at A16.

if clear and convincing evidence existed of a previous relationship between the adopting adult and the child.[176] Although committee endorsement would normally have resulted in passage on the floor of the Senate, the amendments were removed after an argument was made that gay activists would use the amendment's provisions to argue for the right to marry, as had happened in Vermont.[177] One senator said on the floor of the Senate, "We want to make it clear that we do not approve of homosexual marriage in this state."[178] Thus the legislature ultimately focused not on the children who might benefit from adoption but on erecting the strongest possible barricade against any future argument in favor of same-sex marriage.

Mississippi had enacted a law banning same-sex marriage in 1997.[179] Furthermore, case law in Mississippi disfavors gay and lesbian parents seeking to retain custody of their children after divorce.[180] There is no evidence that an openly gay or lesbian person has ever adopted a child in Mississippi, nor that a joint adoption by a lesbian or gay couple has ever been granted. Nonetheless, "spurred in part by Vermont's recognition of gay unions," Mississippi enacted a statute effective July 1, 2000 prohibiting "adoption by couples of the same gender."[181] Even Mississippi, however, refused to deny recognition to such adoptions granted in other states.[182]

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176 Hilary Groutage, *Bill Would Allow Polygamists, Same-Sex Couples to Adopt — In Specific Circumstances*, SALT LAKE TRIB., Feb. 17, 2000, at A1.

177 Hilary Groutage, *Amendments to Adoption Bills Axed; Without Them, Unmarried Couples Not Allowed to Adopt*, SALT LAKE TRIB., Feb. 19, 2000, at A1. The legislation as enacted is UTAH CODE ANN. §78-30-1(3) (b) (2000).

178 Robert Gehrke, *Bills Banning Gay Adoption Appear Headed for Passage*, ASSOCIATED PRESS, Feb. 18, 2000.

179 MISS. CODE ANN. § 93-1-1(2). This was one of many state bans enacted after the Congress passed the Defense of Marriage Act. For a complete listing of state laws concerning same-sex marriage, see Wayne van der Meide, National Gay Lesbian Task Force, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* (2000).

180 *See* Weigland v. Houghton, 730 So. 2d 581 (Miss. 1999).

181 Gina Holland, *Musgrove Signs Gay Adoption Ban,* COM. APPEAL, May 4, 2000, at DS6. *See* MISS. CODE ANN. §93-17-3 (2) (2000).

182 Miss. H.B. 49 (amending § 93-17-3 of Miss Code) (died on calendar March 16, 2000).

CONCLUSION

For most of the last 15 years, the issues involved in validating gay and lesbian couples as partners have remained distinct from those involved in validating gay and lesbian couples as parents. This has inured to the benefit of gay and lesbian families in both Europe and the United States. Most of the European countries would not likely have extended partnership recognition to gay and lesbian couples if simultaneous approval of gay and lesbian parenting had been required. Similarly, gay and lesbian couples in the United States would not likely have obtained protection of their ability to jointly parent children if each test case had also been a referendum on legal recognition of same-sex partnerships.

The European pattern may continue. Although Denmark has recently modeled for other nations acceptance of joint adoption by gay and lesbian couples, countries now considering partnership recognition for the first time appear more likely to follow the original Danish approach of excluding provisions recognizing joint parenthood. Furthermore, the prohibition on joint adoption of children adopted internationally, sometimes coupled with a prohibition on donor insemination of lesbians, continues to send, at best, a mixed message about the value of gay and lesbian couples as parents. This will change only if the recommendations of the recent commission in Sweden are adopted into law by that country and then overtake the Danish model as the prototype for future European legislation.

The American pattern, on the other hand, has changed in recent years. Joint adoption faces opposition by those concerned largely with denying partnership recognition, and especially marriage, to same-sex couples. Meanwhile, opponents of same-sex marriage articulate, as one of their principal reasons, the maintenance of the heterosexual nuclear family as the only optimal environment for the rearing of children. From now on, therefore, advocates for gay and lesbian families may need to be prepared to address parenting and partnership issues at the same time. This will pose new, but not insurmountable, challenges.