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Deborah L. Forman
dforman@law.whittier.edu

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INTERSTATE RECOGNITION OF SAME-SEX PARENTS IN THE WAKE OF GAY MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS

DEBORAH L. FORMAN*

Abstract: This Article examines the parental rights of a same-sex partner/spouse who is neither biologically related to, nor an adoptive parent of, a child being raised by the couple. Using a hypothetical example of a same-sex couple with one child, this Article explores whether the parental rights granted to a non-biological parent by marriage, civil union, or domestic partnership can and will survive a move to another state that does not explicitly recognize such same-sex relationships. Relying on statutory and common law precedents, this Article argues that even in those jurisdictions that have enacted a mini-Defense of Marriage Act, parental rights likely can survive the invalidation of a same-sex relationship because the Uniform Parentage Act, precedents regarding the legitimacy of children, and general choice of law principles all provide potent arguments for advocates seeking to preserve the parental rights of the same-sex partner.

* © 2004, Deborah L. Forman, Professor of Law, J. Allan Cook and Mary Schalling Cook Children's Law Scholar, and Director, Center for Children's Rights, Whittier Law School. I wish to thank my two outstanding research assistants—Center for Children's Rights Fellows Jennifer Culhane and Laura Callahan—for their invaluable assistance and the Whittier Law School for its support.

Author's Note: It is axiomatic that the law is constantly changing, and readers of law reviews are well aware that new cases, statutes, and events regularly intervene between the time of Article submission and actual publication. I mention this phenomenon here because rarely has a topic generated the dramatic and rapid activity we are witnessing in the battle over gay marriage. This Article was submitted for publication at the end of May 2004, and reflects the state of the law at that time. Since then, the first case involving an interstate dispute over parental rights granted to a lesbian co-parent under Vermont's civil union statute is pending before a Virginia appellate court. See Calvin R. Trice, *Appeal Filed in Custody Case; Woman's Lawyers Say Va. Should Not Have Jurisdiction in Dispute*, RICHMOND TIMES-DISPATCH, Dec. 9, 2004, at B4, 2004 WLNR 14119989. Furthermore, the November 2004 election brought the number of states with Defense of Marriage Acts ("DOMA") to forty-one. See NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY MARRIAGE MEASURES IN THE U.S. (2005), available at <http://www.thetaskforce.org/downloads/marriagemap.pdf>. It was impossible to address adequately these and other developments during the editorial process. A full discussion of these developments as they pertain to the interstate recognition of same-sex parents will appear in a future article.

INTRODUCTION

On May 17, 2004, as the United States marked the fiftieth anniversary of the landmark civil rights case, *Brown v. Board of Education*, gays and lesbians across the country celebrated a civil rights victory of their own.¹ That day, Massachusetts became the first state to allow same-sex couples to marry.² The day capped a stunning eighteen months that undoubtedly mark a watershed for gay rights. In the summer of 2003, the U.S. Supreme Court struck down the Texas criminal sodomy statute as a violation of due process in *Lawrence v. Texas*.³ Meanwhile, a series of Canadian court cases legalized same-sex marriage in the most populous provinces in that country.⁴ A few months later, on November 18, 2003, the Massachusetts Supreme Judicial Court declared in *Goodridge v. Department of Public Health* that the law restricting marriage to individuals of the opposite sex was a violation of equal protection under its constitution and instructed the Massachusetts legislature to remedy the violation within six months.⁵ Nor did the pace of change slow in 2004. The Massachusetts decision sparked a grassroots movement for the legalization of gay marriage in

¹ 347 U.S. 483, 495 (1954).

² Elizabeth Mehren, *Massachusetts Begins Allowing Gays to Wed*, L.A. TIMES, May 17, 2004, at A10.

³ 539 U.S. 558, 578-79 (2003).

⁴ See generally *EGALE Canada Inc. v. Canada* (Att'y Gen.), [2003] 225 D.L.R. (4th) 472 (B.C. Ct. App.); *Halpern v. Toronto* (Att'y Gen.), [2003] 225 D.L.R. (4th) 529 (Ont. Ct. App.); *Hendricks c. Québec* (PG), [2002] R.J.Q. 2506 (Que. Super. Ct.); Elizabeth Mehren, *Gay Couples Tie the Knot in Massachusetts*, L.A. TIMES, May 18, 2004, at A14; B.A., Robinson, Ontario Consultants on Religious Tolerance, *Same-Sex Marriages (SSM) in Canada*, at http://www.religioustolerance.org/hom_marb.htm (last updated Feb. 27, 2005) (noting that same-sex marriage is available to eighty percent of Canadians within their province of residency). Federal draft legislation which would legalize same-sex marriage throughout Canada is the subject of a reference case pending in the Canadian Supreme Court. Kirk Makin, *Denying Marriage to Gays Unfair, Ottawa Tells Court*, GLOBE & MAIL (Toronto), Apr. 1, 2004, at A4. Final action on the bill is expected in 2005. *Id.*

⁵ 798 N.E.2d 941, 948, 970 (Mass. 2003). In response to *Goodridge v. Department of Health*, Massachusetts legislators initially considered enacting a civil union or domestic partnership statute. See Cheryl Wetzstein, *Legislators Discuss Gay "Marriage": Massachusetts Leaders Favor Civil Union Law*, WASH. TIMES, Dec. 1, 2003, at A4. An advisory opinion from the justices of the Supreme Judicial Court of Massachusetts, however, in response to questions submitted by the Massachusetts Senate, made clear that the proposed civil union bill still would violate the equal protection and due process clauses of the Massachusetts Constitution. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569-72 (Mass. 2004). In light of the opinion, the Massachusetts legislature passed an amendment to the constitution limiting marriage to a man and a woman and establishing civil unions. Massachusetts law, however, requires re-enactment of the amendment by next year's legislature, followed by voter ratification, so it cannot become effective prior to November 2006. Elizabeth Mehren, *Last-Ditch Bid to Stop Gay Marriage*, L.A. TIMES, Apr. 16, 2004, at A16.

cities across the country, as mayors in San Francisco, California; Benton County and Portland, Oregon; King County, Washington; Sandoval County, New Mexico; and New Paltz, New York began issuing marriage licenses to same-sex couples, some even while under threat of prosecution for violating existing laws limiting marriage to opposite-sex couples.⁶ Proponents of same-sex marriage also filed lawsuits in several of these states, challenging bans on same-sex marriage as unconstitutional.⁷

These dramatic changes in the rights and status of gays, particularly in the area of family law, did not spring forth out of whole cloth. In fact, a series of cases in the preceding decade laid the foundation for these momentous decisions. In 1993, Hawaii became the first state to declare the denial of a marriage license to two people of the same sex unconstitutional.⁸ In *Baehr v. Lewin*, the Hawaii Supreme Court held that the petitioners, several same-sex couples wishing to marry but denied a license by the state, had demonstrated that the marriage restriction was facially unconstitutional gender discrimination under the Hawaii Constitution. On remand, the trial court ruled that the state had failed to meet its burden of showing that the restriction limiting marriage to opposite-sex couples was necessary to achieve any compelling interest, thus paving the way for same-sex couples to marry.⁹

While the appeal of the trial court's ruling was pending, the Hawaii legislature responded by amending its constitution to limit mar-

⁶ Joshua Akers, *N.M. Same-Sex Marriages off Again*, ALBUQUERQUE J., Mar. 24, 2004, at A1; David Austin, *Issuing of Licenses Resumes*, OREGONIAN (Portland, Or.), Mar. 16, 2004, at A1, LEXIS, News Library, OREGON File; Mark Larabee & Ashbel S. Green, *Benton Approves Gay Marriage*, OREGONIAN (Portland, Or.), Mar. 17, 2004, at A1, LEXIS, News Library, OREGON File; Tom Precious, *Mayor Is Charged over Gay Marriages*, BUFFALO NEWS, Mar. 3, 2004, at A8, 2004 WLNR 1615943; Lornet Turnbull et al., *Marriage Licenses Denied; Gays Take County to Court: Sims Is Both Defendant, Supporter; Nichols Acts to Recognize Unions*, SEATTLE TIMES, Mar. 9, 2004, at A1, 2004 WLNR 1791702.

⁷ *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 453-54 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004) (unpublished opinion); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114, at *1-2 (N.J. Super. Ct. Law Div. Nov. 5, 2003). See generally NAT'L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE UNITED STATES (2004) (discussing other pending cases in California, Florida, Indiana, New York, and Washington), available at <http://www.nclrights.org/publications/pubs/samesexrecognition1204.pdf> (last modified Dec. 6, 2004).

⁸ *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw.), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

⁹ *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *21-22 (Haw. Ct. App. Dec. 3, 1996), *order aff'd*, 950 P.2d 1234 (Haw. 1997).

riage to members of the opposite sex.¹⁰ Consequently, no same-sex couples ever had the opportunity to marry in Hawaii. Nonetheless, the response to the *Baehr* cases was swift and emphatic: Congress passed the federal Defense of Marriage Act (“DOMA”) in 1996, defining marriage for all federal laws, rules, and regulations as “a legal union between one man and one woman as husband and wife” and providing that no state need give effect to “a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”¹¹ Further, approximately eighty percent of the states enacted a variety of so-called “mini-DOMAs,” statutes or constitutional amendments which, at a minimum, declare marriage to be a union solely of individuals of the opposite sex and refuse to recognize marriages between individuals of the same sex from other states.¹²

Meanwhile, in 1999, in *State v. Baker*, the Vermont Supreme Court held that denying same-sex couples the benefits of marriage violated the Common Benefits Clause of the Vermont Constitution.¹³ The court stopped short of requiring that same-sex couples be allowed to marry and invited the legislature to devise an alternative system that would provide the same benefits as marriage to same-sex couples.¹⁴

¹⁰ 1997 Haw. Sess. Laws 117.

¹¹ Pub. L. No. 104-199, §§ 2(a), 3(a), 110 Stat. 2419, 2419 (1996).

¹² NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 25-101(c), -112 (West 2000); ARK. CODE ANN. § 9-11-208 (Michie 2002); CAL. FAM. CODE § 308.5 (West 2004); COLO. REV. STAT. § 14-2-104 (2003); DEL. CODE ANN. tit. 13, § 101(a), (d) (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19-3-3.1 (2004); HAW. REV. STAT. ANN. § 572-1 (Michie 1999); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1999); IND. CODE ANN. § 31-11-1-1 (Michie 2003); IOWA CODE ANN. §§ 595.2, .20 (West 2001); KAN. STAT. ANN. §§ 23-101, -115 (Supp. 2003); KY. REV. STAT. ANN. §§ 402.040, .045 (Michie 1999); LA. CIV. CODE ANN. arts. 89, 96 (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998); MICH. COMP. LAWS §§ 551.271–.272 (Supp. 2004) (MICH. STAT. ANN. §§ 25.15–.16 (Michie Supp. 2000)); MINN. STAT. ANN. § 517.03(a)(4), (b) (West Supp. 2004); MISS. CODE ANN. § 93-1-1(2) (2004); MO. ANN. STAT. § 451.022 (West 2004); MONT. CODE ANN. § 40-1-401 (2003); N.H. REV. STAT. ANN. §§ 457:1 to :3 (2004); N.C. GEN. STAT. § 51-1-2 (2003); N.D. CENT. CODE § 14-03-08 (2004); OHIO REV. CODE ANN. § 3101.01 (West Supp. 2005); OKLA. STAT. ANN. tit. 43, §§ 3, 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-1-38 (Michie Supp. 2003); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 6.204(c) (Vernon Supp. 2004); UTAH CODE ANN. §§ 30-1-2(5), 30-1-4(1) (1998); VA. CODE ANN. § 20-45.2 (Michie 2004); WASH. REV. CODE ANN. § 26.04.020 (West Supp. 2004); W. VA. CODE ANN. § 48-2-603 (Michie 2001); see NAT’L GAY & LESBIAN TASK FORCE, ANTI-GAY MARRIAGE MEASURES IN THE U.S. (2005), available at <http://www.thetaskforce.org/downloads/marriagemap.pdf>.

¹³ 744 A.2d 864, 867 (Vt. 1999).

¹⁴ *Id.*

The Vermont legislature responded by enacting the civil union statute, which allows same-sex couples to enter into a state-sanctioned civil union—a status providing all the rights and privileges of marriage under state law.¹⁵

Although Vermont's civil union statute explicitly reaffirmed that "marriage" means the legally recognized union of one man and one woman," it went significantly further than any other law up to that time in granting same-sex couples the equivalent rights, benefits, and responsibilities as married couples.¹⁶ In the fall of 2003, California enacted a law nearly as comprehensive: the California Domestic Partner Rights and Responsibilities Act, commonly referred to as A.B. 205.¹⁷

These dramatic and far-reaching developments raise a host of challenging legal questions involving the interpretation of the meaning and scope of these laws within their home states and especially their enforceability or recognition by other states. Although numerous scholars have addressed the validity of the federal DOMA and the choice of law dilemmas posed by same-sex marriage, courts only recently have begun to grapple with whether the rights afforded by Vermont's civil union statute will be recognized when the parties to that union move to another state and seek enforcement there.¹⁸ No court has yet decided whether an actual marriage by two people of

¹⁵ VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

¹⁶ *Id.* § 1201(4).

¹⁷ CAL. FAM. CODE §§ 297–299.6.

¹⁸ See generally *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002), *appeal granted in part*, 806 A.2d 1066 (Conn. 2002); *Burns v. Burns*, 560 S.E.2d 47, 48–49 (Ga. Ct. App. 2002); *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 412 (App. Div. 2003); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States? Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551 (1994); Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998); Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998); Note, *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028 (2003) [hereinafter *Constitutional Constraints*]; Thomas M. Keane, Note, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499 (1995); Christopher D. Sawyer, Note, *Practice What You Preach: California's Obligation to Give Full Faith and Credit to the Vermont Civil Union*, 54 HASTINGS L.J. 727 (2003).

the same sex will be recognized outside of the state or country where the marriage was performed.¹⁹

Marriage and the alternative systems recently created for same-sex couples provide extensive rights, benefits, and responsibilities for the parties to those unions. In this Article, I am concerned with one subset of those rights and responsibilities: those granting parental status to the partner/spouse who is neither biologically related to nor an adoptive parent of a child being raised by the couple. More specifically, this Article will explore whether parental rights afforded by marriage or one of these alternative systems will survive a move to another state which does not explicitly provide *for* recognition of these relationships.²⁰

Estimates of the number of children being raised by gay or lesbian parents run from six million to fourteen million.²¹ Demographers estimate that thirty-four percent of lesbian couples and twenty-two percent of gay male couples are raising children.²² Some of those couples are raising children from prior marriages of one or both of the partners, or children who were born or adopted by one partner prior to beginning a relationship with the current partner. Others decided jointly to become parents, either through adoption or by artificial insemination for lesbian couples or surrogacy for gay men.

Undoubtedly, many same-sex couples with children, like their heterosexual counterparts, will move one or more times during the course of their relationship. Although awareness of the uncertainties of enforcement of their marital or partnership rights might lead to lesser mobility among this population, states can expect that at some point in the not too distant future, partners from Vermont, California, Massachusetts, and Canada will seek to enforce aspects of their partnership or marriage in the courts of other jurisdictions. Indeed, sev-

¹⁹ One city, San Jose, California, has voted to recognize marriages of gay employees who marry elsewhere, though a Christian legal group has filed suit to block the action. Harriet Chiang, *The Battle over Same-Sex Marriage: Group Sues San Jose to Stop Family Benefits*, S.F. CHRON., May 14, 2004, at B3, 2004 WLNR 7629092.

²⁰ The only state to provide explicitly for recognition of rights granted to same-sex partners by other states is California. See CAL. FAM. CODE §§ 297–299.6.

²¹ V.C. v. M.J.B., 725 A.2d 13, 31 (N.J. Super. Ct. App. Div. 1999) (Wecker, J., concurring in part and dissenting in part), *aff'd*, 748 A.2d 539 (N.J. 2000); Danielle Epstein & Lena Mukherjee, Note, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT. 782, 800 n.101 (1997); Sally Jacobs, *What Can Social Science Add to the Gay Marriage Debate? Not Much So Far*, BOSTON GLOBE, Mar. 9, 2004, at C1, 2004 WLNR 3565811.

²² Charlene Gomes, *The Need for Full Recognition of Same-Sex Marriage*, HUMANIST, Sept.–Oct. 2003, at 15, 16, available at <http://www.thehumanist.org/humanist/articles/GomesSO03.pdf>.

eral appellate decisions have resulted already from efforts to gain interstate recognition of a civil union since the statute was enacted in 2001.²³ No cases have been decided yet involving parental rights acquired under these systems, but it is inevitable that such cases will arise.²⁴ How will the courts respond? How should they?

This Article seeks to answer both of these questions according to state statutory and common law. The answers to these questions are of the utmost importance for the partners in these relationships and for the children being raised in these families. Parents who have loved, nurtured, and supported their children are at risk of being stripped of their parental rights should they move, and their children are at risk of being completely cut off from a parent to whom they are deeply attached and on whom they have depended. It is my hope that this Article can serve as a resource and a blueprint for advocates who will be litigating this issue in the future.

To assist us in our task, I have created the following hypothetical to provide a framework for analyzing a state's obligation or ability to recognize and to enforce parental rights provided to same-sex partners through marriage or one of the alternative systems by another state or country: Andrea and Sarah have been involved in a committed lesbian relationship for four years. They have lived together for the past two years and have decided to start a family through the use of artificial insemination.²⁵ The couple agrees that Andrea will be inseminated with sperm from an anonymous donor and bear the child. They also agree that after a three-month maternity leave, Andrea will return to work as an attorney, while Sarah, a nurse who makes considerably less than Andrea, will quit her job and stay home to care for the

²³ See *Rosengarten*, 804 A.2d at 184; *Burns*, 560 S.E.2d at 49; *Langan*, 765 N.Y.S.2d at 422.

²⁴ See Author's Note *supra* at *.

²⁵ I am focusing on lesbian parents who conceive by artificial insemination for two reasons. First, gay or lesbian couples who choose adoption in California, Massachusetts, or Vermont almost certainly will complete the adoption jointly, because courts generally will not approve an adoption by a married couple without both spouses' consent. See Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J.L. & FAM. STUD. 297, 314-15 (2003). Second, gay men who choose to create a family through surrogacy likewise will usually need to go through an adoption or other proceeding, as the non-biologically related parent would when a heterosexual couple uses a surrogate. See *In re Adoption of K.F.H. & K.F.H.*, 844 S.W.2d 343, 344-45 (Ark. 1993) (finding surrogate mother's consent to adoption by child's father's wife unnecessary because of failure to communicate with child); *Adoption of Matthew B.*, 232 Cal. App. 3d 1239, 1251 (Ct. App. 1991) (holding that surrogate not allowed to revoke consent to adoption by wife of child's father); *Doe v. Doe*, 710 A.2d 1297, 1301, 1317 (Conn. 1998) (finding wife of husband who conceived child with surrogate by artificial insemination was not child's parent in the absence of adoption).

baby. Prior to undergoing the insemination, Andrea and Sarah decide to solemnize their relationship, as permitted by the jurisdiction in which they live. Andrea ultimately becomes pregnant and gives birth to a baby girl, Madeleine. When Madeleine is four, a new job opportunity for Andrea prompts the family to move to another jurisdiction. One year later, Andrea and Sarah decide to end the relationship.

What legal rights, if any, would Sarah have to custody or visitation with Madeleine under this scenario? In the pages that follow, I will consider whether and how the answer to that question varies if Andrea and Sarah originally solemnized their relationship by marrying in Massachusetts or Canada or by entering into a civil union in Vermont or registering as domestic partners in California under A.B. 205. I begin, in Part I, by analyzing the nature of the parental rights afforded by each system to the non-biological parent—the parent in Sarah’s position.²⁶ In Part II, I consider arguments for recognition of those parental rights in other jurisdictions.²⁷ I analyze first if Andrea and Sarah have married in Massachusetts or Canada, beginning with jurisdictions that have not enacted a DOMA and continuing with jurisdictions which have enacted DOMAs.²⁸ I will argue that, although parental rights likely can be secured in the non-DOMA jurisdictions through recognition of the marriage, more creative lawyering will be required in the DOMA jurisdictions. In these states, even if the courts refuse to recognize the same-sex marriage, advocates for same-sex parents nonetheless will be able to make a variety of arguments for recognition of their parental rights, including application of the Uniform Parentage Act (the “UPA”), recognition of the “incident” of parental status, if not of the marriage itself, and reliance on precedents governing choice of law in cases disputing legitimacy and more generally. I next discuss how the analysis would change if Andrea and Sarah entered into a Vermont civil union or a California domestic partnership, rather than marrying.²⁹ In Part III, I consider opportunities and obstacles to seeking custody or visitation as a third party.³⁰ Finally, in Part IV, I suggest some strategic alternatives to solidify a same-sex partner’s parental rights.³¹

²⁶ See *infra* notes 32–78 and accompanying text.

²⁷ See *infra* notes 80–439 and accompanying text.

²⁸ See *infra* notes 82–389 and accompanying text.

²⁹ See *infra* notes 391–439 and accompanying text.

³⁰ See *infra* notes 441–452 and accompanying text.

³¹ See *infra* notes 453–467 and accompanying text.

I. PARENTAL RIGHTS FOR SAME-SEX PARTNERS

A. *Under Marriage*

1. Massachusetts

If Andrea and Sarah lived in Massachusetts and were to marry there, Sarah would enjoy the same parental rights as a husband in her position would. Massachusetts, like most states, provides that a husband who consents to his wife's artificial insemination becomes for all purposes, the father of any children resulting from the procedure.³² Thus, Sarah would be considered Madeleine's legal parent and would have a right to seek custody and visitation in the event of a divorce.

2. Canada

Canada applies a more expansive rule. A man who consents to the artificial insemination of his wife or cohabiting partner is considered the legal father of any children born of the procedure.³³ Thus, as in Massachusetts, if Andrea and Sarah were to marry in Canada, Sarah would be considered Madeline's legal parent.

B. *Under the Domestic Partnership or Civil Union*

Both California's A.B. 205 and Vermont's civil union statute grant same-sex partners the same parental rights as spouses.³⁴ Although these provisions might seem at first glance to ensure that same-sex partners enjoy equal rights to custody, visitation, and child support as the biological parent, that assertion is open to interpretation, at least in Vermont. These statutes do not provide more rights than the partners would obtain were they married, and spouses who are not biologically related to their children do not always enjoy rights equivalent to those of the biological parent. As no cases have yet decided the scope of parental rights under these statutes, we will need to consider precedent from analogous areas of the law in each of these states, namely statutes and cases concerning husbands who are not biologically related to the children born during the marriage.

³² MASS. GEN. LAWS ch. 46, § 4B (2002).

³³ R.S.M. ch. V60, § 3(6) (1987) (Can.); NFLD. R.S. ch. C-13, § 12 (1990) (Can.); S.Y.T. ch. 31, § 13 (2002) (Can.).

³⁴ See CAL. FAM. CODE § 297.5(d) (West 2004); VT. STAT. ANN. tit. 15, § 1204(f) (2002).

1. California

The California Partner Rights and Responsibilities Act provides that “[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.”³⁵ In California, as in Massachusetts, the rights of a spouse to a child conceived by artificial insemination with the spouse’s consent are clear. Under section 7613 of the California Family Code, a husband who consents to the artificial insemination of his wife with donor semen under the supervision of a licensed physician is treated in law as if he was the natural father.³⁶ Thus, if Andrea and Sarah lived in California and registered as domestic partners under A.B. 205, Sarah could be assured of full parental rights as long as she and Andrea complied with the statute by using a physician to perform the insemination.³⁷

2. Vermont

The rights of a same-sex parent in Sarah’s position are less clear if she and Andrea lived in Vermont and entered into a civil union there. The civil union statute provides as follows:

The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.³⁸

Unfortunately, Vermont has no statute defining the parental rights of a spouse when the wife is artificially inseminated. It seems likely that if a court faced a custody or visitation dispute between parties to a civil union, it would follow the lead of the many other states which have adopted the rule making the husband the legal father where the wife was artificially inseminated.³⁹ Many of those states have statutes estab-

³⁵ CAL. FAM. CODE § 297.5(d).

³⁶ CAL. FAM. CODE § 7613(a); see *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (holding that wife who consented to implantation of embryo created with donated egg and sperm in surrogate is treated as natural parent based on artificial insemination statute).

³⁷ *Jordan C. v. Mary K.*, 224 Cal. Rptr. 530, 531 (Ct. App. 1986) (holding that failure to use physician for artificial insemination, as required by statute, meant a sperm donor had standing in a paternity action).

³⁸ VT. STAT. ANN. tit. 15, § 1204(f).

³⁹ Note, *Changing Realities of Parenthood: The Law’s Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2066–68 (2003).

lishing the rights and responsibilities of the husband; others have reached a similar result through case law, relying on public policy or estoppel principles.⁴⁰ Indeed, courts have imposed child support obligations on former husbands who did not consent in writing to the procedure during the marriage, even though a statute required it.⁴¹

In the absence of clear authority, however, advocates should be prepared to argue in favor of full parental rights based on existing statutory authority. Section 308(4) of title 15 of Vermont's domestic relations statute provides that a person is "rebuttably presumed to be the natural parent" if the child is born while the husband and wife are married.⁴² Since parties to a civil union enjoy the same rights as married persons in Vermont, Sarah would enjoy a rebuttable presumption that she is Madeleine's parent. The question, of course, remains: under what circumstances could that presumption be rebutted?

Vermont has relatively scant authority dealing with challenges to claims of parental status by spouses who are not biologically related to their children. Statutes allowing for an action to be brought by various parties to establish parentage and to determine paternity through genetic testing suggest that a negative finding by a paternity test could rebut the presumption provided by section 308 of title 15 of the Vermont statutes.⁴³

Case law implicitly supports the notion that the marital presumption of paternity can be rebutted by evidence demonstrating that the husband is not the biological father of the child. In 2001, in *Jones v.*

⁴⁰ See Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 301 (1991). Michael J. Yaworsky stated the following:

Generally speaking, a husband who consents to the artificial insemination of his wife using sperm from a third-party donor is treated in law as the father of any child born as a result of the insemination, for all purposes. Where this result is not dictated by statute, it has been said to arise by reason of public policy or the principles of equitable or promissory estoppel.

Id.; see 59 AM. JUR. 2D *Parent & Child* § 5 (2002).

⁴¹ See, e.g., *R.S. v. R.S.*, 670 P.2d 923, 926-28 (Kan. Ct. App. 1983); *K.B. v. N.B.*, 811 S.W.2d 634, 636, 639 (Tex. App. 1991); cf. *Lane v. Lane*, 912 P.2d 290, 292, 296 (N.M. Ct. App. 1996) (recognizing former husband as father with right to custody based on conduct and recitations in pleadings, even though no written consent provided prior to insemination).

⁴² V.F. STAT. ANN. tit. 15, § 308(4).

⁴³ See *id.* § 293 (allowing party to a support action to challenge the presumption of legal parentage provided by § 308); *id.* § 302 (permitting actions to establish parentage); *id.* § 304 (allowing motion to require genetic testing); cf. *id.* § 308(1) (noting that the rebuttable presumption remains if the alleged parent does not submit to genetic testing without good cause if ordered).

Murphy, the Vermont Supreme Court considered a challenge to a court order assigning paternity to the biological father of a child born to a woman married to another man.⁴⁴ The couple's divorce order had named the husband and wife as the child's parents.⁴⁵ A stipulation entered into shortly thereafter stated that blood tests showed unequivocally that the husband could not have fathered the child.⁴⁶ The mother filed a paternity action against the biological father, Richard Murphy, the next day, but did not move to amend the divorce judgment until the time for doing so (the nisi period) already had expired.⁴⁷ The trial court nonetheless amended the divorce decree and found that Murphy was the child's father.⁴⁸ Murphy appealed, and the Vermont Supreme Court reversed, finding that the trial court had erroneously issued two conflicting rulings regarding paternity, because the decree was not amended in a timely fashion.⁴⁹ The court's decision implies, however, that had the motion to amend the divorce order been brought within the nisi period, it would have been granted and the husband would have been relieved of all his parental rights and responsibilities.⁵⁰

Although the *Jones* court reversed the declaration of parentage against the biological father because of the conflicting divorce decree, it took pains to distinguish an earlier case.⁵¹ In *Godin v. Godin*, the court refused to allow a former husband to re-open a divorce decree many years later, upon learning that he was not the biological father of the child he had believed to be his daughter.⁵² The *Godin* court affirmed the trial court's order finding that the divorce decree was *res judicata*,

⁴⁴ 772 A.2d 502, 503 (Vt. 2001).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Jones*, 772 A.2d at 504, 506.

⁵⁰ See *id.* at 506-07 (Dooley, J., concurring). Justice John A. Dooley stated the following in his concurrence:

The mother of the child now has the virtually unfettered choice whether to obtain child support from the biological father or her former husband If, for example, the mother decides that her former husband's demands for visitation are unacceptable, she can disclose that he is not the biological father and bring a paternity action I suspect that a stipulated relief from the divorce judgment will be granted as a matter of course if there is an outstanding parentage order against the biological father.

Id. (Dooley, J., concurring).

⁵¹ *Id.* at 505-06.

⁵² 725 A.2d 904, 905 (Vt. 1998).

rejecting the ex-husband's argument that the wife, who knew another man was the biological father, had perpetrated a fraud on the court.⁵³ In reaching this conclusion, the court relied substantially on "fundamental policy concerns that require finality of paternity adjudications," specifically, the rebuttable presumption of parentage established by section 308 of title 15 of the Vermont statutes.⁵⁴ The court rooted section 308 of title 15 of the Vermont statutes in the conclusive presumption of paternity, a long-standing doctrine holding that a child is conclusively presumed to be the child of the marriage unless the husband was physically incapable of fathering the child.⁵⁵ The court described the presumption as "one of the strongest and most persuasive known to the law."⁵⁶ The court continued by enumerating several modern-day policies supporting adherence to the presumption, including protecting children from illegitimacy, preserving their emotional and financial security, and maintaining the stability of the family unit as well as "the continuity . . . and psychological security of an established parent-child relationship."⁵⁷ The court described the state's interest in ensuring the financial and emotional well-being of children by preserving this parent-child relationship as "direct and strong" and declared that "it must remain paramount."⁵⁸ In the court's view, it was "readily apparent that a parent-child relationship was formed, and it is that relationship, and not the results of a genetic test, that must control."⁵⁹ Moreover, the court acknowledged that these concerns take on even greater significance today "as family structures become more fluid and the means of conception become ever more varied."⁶⁰

As Justice John A. Dooley pointed out in his dissent, however, section 308 of title 15 of the Vermont statutes is a *rebuttable* presumption which operates "only to assign the burden of production."⁶¹ Once a party presents evidence rebutting the presumption—that the parent in question is not biologically related to the child—the presumption ceases to have effect, and the trier of fact must determine the fact at

⁵³ *Id.* at 905–06.

⁵⁴ *Id.* at 909; see VT. STAT. ANN. tit. 15, § 308 (2002).

⁵⁵ *Godin*, 725 A.2d at 909; see VT. STAT. ANN. tit. 15, § 308.

⁵⁶ *Godin*, 725 A.2d at 909 (quoting *Richard B. v. Sandra B.B.*, 625 N.Y.S.2d 127, 129 (App. Div. 1995)).

⁵⁷ *Id.* at 909–10.

⁵⁸ *Id.* at 910.

⁵⁹ *Id.* at 911.

⁶⁰ *Id.* at 912.

⁶¹ *Godin*, 725 A.2d at 915 (Dooley, J., dissenting).

issue based on the evidence rather than the presumption.⁶² Justice Dooley disagreed with the majority's policy analysis as well. In his view, the majority's approach perpetuated a legal fiction in place of the biological reality which "results in a host of inequities for the child, the presumptive father (the husband), and the alleged father."⁶³ He also was concerned that the majority's approach rewarded the mother for her fraudulent behavior.⁶⁴ Nor did he see the need to protect the family unit when the marriage had been dissolved many years earlier.⁶⁵

Although the *Godin* case would not be directly controlling in our hypothetical, the majority's reasoning lends strong support to Sarah's claims under the civil union.⁶⁶ The policies of ensuring financial and psychological security for the child apply equally in our case and indeed are arguably stronger here. In our hypothetical, Andrea and Sarah conceived the child by artificial insemination with sperm from an anonymous donor. Consequently, if the non-biological parent's status is challenged successfully, the child will be left with one parent without recourse to support from another biological parent.⁶⁷ Nor do Justice Dooley's objections undercut Sarah's argument. Although he may have a point about the typical functioning of the rebuttable presumption (though not one that garnered support of the majority in *Godin*), section 308 of the Vermont statutes contains references to the accuracy of genetic testing and clearly is designed to address the problem of uncertain paternity.⁶⁸ Likewise his policy concerns do not apply in the case of same-sex partners—no fraud is being perpetrated, no legal fiction substituted for a biological reality. The child is not being deprived of the right to know her "true" parent. All parties know that one parent is not biologically related.

⁶² *Id.* at 915 (Dooley, J., dissenting).

⁶³ *Id.* at 915–16 (Dooley, J., dissenting).

⁶⁴ *Id.* at 916 (Dooley, J., dissenting).

⁶⁵ *Id.* (Dooley, J., dissenting).

⁶⁶ See *Godin*, 725 A.2d at 909–10.

⁶⁷ See *id.* at 911 n.3. The court made the following observation:

This is not a case where a third party is seeking to *establish* paternity and assume support of the child, or where support is being sought from a third-party putative father. A finding of nonpaternity in this case would essentially leave the child without the benefit of a father-child relationship, and the economic and emotional well-being that accompanies it.

Id. Anonymous sperm donors typically retain no parental rights or responsibilities. Yaworsky, *supra* note 40, at 320–21.

⁶⁸ VT. STAT. ANN. tit. 15, § 308 (1), (3) (2002) (requiring only ninety-eight percent probability of parentage through genetic testing).

Thus, although the language of section 308 and the ability of a husband to contest his paternity under certain circumstances might suggest that the presumption in favor of Sarah's parentage could be rebutted merely by proving she was not the biological parent of Madeleine, such a result would be strikingly at odds with the underlying purposes of section 308 and the civil union statute. Because same-sex partners, in most instances, would not both be biologically related to the child, allowing the biological partner to rebut the presumption of parentage for the non-biological parent would make the parental rights granted by the civil union statute largely illusory, at least in disputes between the partners.⁶⁹

It seems highly doubtful that the legislature intended such an outcome.⁷⁰ The words of the Vermont Supreme Court in *Adoptions of B.L.V.B. & E.L.V.B.* apply equally here: "[t]o deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest."⁷¹ Either section 308, as applied to parties to a civil union, requires giving conclusive effect to the presumption of parentage, or the court should follow the general rule regarding children born of married women by artificial insemination.

In the very unlikely event that a court denied full parental status to Sarah, at a minimum, she would have rights equivalent to those of a stepparent. Unfortunately, a stepparent's right to custody or visitation appears quite limited under Vermont law. Section 293 of title 15 of the Vermont statutes allows stepparents living separately to petition the court for a decree regarding parental rights, responsibilities, and contact, but that provision as of yet has not been interpreted to pro-

⁶⁹ Some lesbian couples are taking advantage of assisted reproductive techniques to ensure that each partner has a biological tie to the child. One partner provides the egg, which is fertilized in vitro and then implanted in the other partner, who carries the fetus to term and gives birth to the child. NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 5-6 (2002), available at <http://www.nclrights.org/publications/pubs/lgbtfamilies092402.pdf>; Ryiah Lilith, Student Author, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL'Y & L. 207, 209-10, 216-17 (2001); cf. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 139 (Cl. App. 2004), superseded by 97 P.3d 72 (Cal. 2004) (finding lesbian who donated egg to partner was donor, not parent, because both intended only partner who gave birth to be legal parent).

⁷⁰ See *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1274 (Vt. 1993) (describing *Lubinsky v. Fair Haven Zoning Bd.*, 527 A.2d 227, 228 (Vt. 1986)) (noting that *Lubinsky* holds that the "intent of [a] statute is derived from consideration not only of language, but from [the] entire enactment, its reason, purpose and consequence, and on presumption that no unjust or unreasonable result was intended").

⁷¹ *Id.* at 1275.

vide a right to visitation by a stepparent once the marriage is dissolved.⁷² Dicta in a case rejecting a pre-civil union claim by a lesbian to visitation with her partner's adopted child is ambiguous at best.⁷³ In *Paquette v. Paquette*, the Vermont Supreme Court did consider the ability of a stepparent to seek custody of his stepson in a divorce.⁷⁴ The court first found that section 293 gave the court the power to award custody to a stepparent while the parties were still married under certain circumstances.⁷⁵ The court next interpreted a provision of Vermont's child custody statute, section 652 of title 15 of the Vermont statutes, to allow a stepparent to petition for custody in a divorce proceeding, but only under limited circumstances.⁷⁶ In deference to the parent's fundamental constitutional right to custody, and the concomitant presumption that custody with the parent is in the best interests of the child, the court concluded that a stepparent could obtain custody only if he or she acted *in loco parentis* to the child and demonstrated by clear and convincing evidence that either the parent was unfit or that extraordinary circumstances justified the award of custody in the best interests of the child.⁷⁷ If *Paquette* allows a stepparent to seek custody in a divorce, albeit under limited circumstances, surely a petition for visitation could be filed. We can expect, however, that the stepparent seeking visitation would have to make a similar showing to justify awarding visitation over the objections of a parent.⁷⁸

In summary, as long as Andrea and Sarah remain in their home state or country—whether Massachusetts, Canada, Vermont, or California—Sarah likely will be able to seek custody and/or visitation with Madeleine on an equal footing with Andrea. Although there are admittedly some vulnerabilities in Sarah's position in Vermont, the bet-

⁷² VT. STAT. ANN. tit. 15, § 293.

⁷³ *Titchenal v. Dexter*, 693 A.2d 682, 685, 687 (Vt. 1997) (noting that visitation rights were limited to married biological parents until legislature enacted grandparent statute, but also citing VT. STAT. ANN. tit. 15, § 293, granting stepparents, among others, the right to petition family court regarding parental rights and responsibilities).

⁷⁴ 499 A.2d 23, 25 (Vt. 1985).

⁷⁵ *Id.* at 25–26; see VT. STAT. ANN. tit. 15, § 293.

⁷⁶ *Paquette*, 499 A.2d at 29–30; see VT. STAT. ANN. tit. 15, § 652.

⁷⁷ *Paquette*, 499 A.2d at 29–30.

⁷⁸ Although one commentator suggests that a best interests showing would be sufficient, the U.S. Supreme Court's decision in *Troxel u. Granville*, 530 U.S. 57 (2000), likely compels a higher standard, similar to the *Paquette* standard, regardless of a state's prior precedents. See Jill Jourdan, *The Effects of Civil Unions on Vermont Children*, VT. B.J., Mar. 28, 2002, at 32, 34, available at http://www.vtbar.org/ezstatic/data/vtbar/journal/mar_2002/Jourdan.pdf (supporting sufficiency of best interests showing); *infra* notes 441–452 and accompanying text (discussing third-party claims for custody or visitation).

ter interpretation of the civil union statute would recognize her as a legal parent. In California, the result seems certain. In the next Part, I explore the portability of these parental rights.⁷⁹ What happens to Sarah's parental rights if Andrea and Sarah moved out of state when Madeleine was four?

II. RECOGNITION OF SAME-SEX PARTNERS' PARENTAL RIGHTS IN OTHER JURISDICTIONS

The most obvious way to frame the question regarding the validity of Sarah's parental rights in other jurisdictions is to ask whether the marriage, civil union, or domestic partnership will be recognized in the new state. But while the question may be straightforward, the answer is anything but. Interstate recognition of same-sex marriages, civil unions, and domestic partnerships arguably implicates the scope and meaning of the Full Faith and Credit Clause of the Constitution; the scope, meaning, and constitutionality of the federal DOMA; and the scope, meaning, and constitutionality of a patchwork of mini-DOMAs of varying types, all laid on top of a plethora of common law and statutory principles used by individual states to determine choice of law questions. In short, there is a complete lack of uniformity and the trend appears to be moving toward increasing diversity, as some states seek to equalize the family law rights of gays and lesbians and other states react with backlash toward that progress. Numerous scholars already have begun to address many of the questions surrounding interstate recognition of same-sex marriages, unions, and domestic partnerships, with no consensus on the answers or the reasoning supporting the answers.⁸⁰ Other observers have remarked that

⁷⁹ See *infra* notes 80–439 and accompanying text.

⁸⁰ Compare generally Strasser, *supra* note 18 (arguing that DOMA is unconstitutional under the Full Faith and Credit Clause and states must recognize same-sex marriages), with Whitten, *supra* note 18 (arguing that DOMA not unconstitutional under the Full Faith and Credit Clause). See generally Cox, *supra* note 18 (exploring the choice of law questions arising in litigation over the validity of same-sex marriages upon return to the state of domicile); Henson, *supra* note 18 (arguing that the Full Faith and Credit and Due Process Clauses require recognition of at least the incidents of marriage and that the public policy exceptions in choice of law cases should be narrowed); Rensberger, *supra* note 18; *Constitutional Constraints*, *supra* note 18 (providing a survey of the debate over constitutional constraints on refusals to recognize same-sex marriages); Keane, *supra* note 18 (arguing that the Full Faith and Credit Clause, the right of interstate travel, the fundamental interest in marriage, and conflict of law policies favor recognition of same-sex marriages in foreign states); Sawyer, *supra* note 18 (arguing that California policy requires recognition of the benefits granted to those who enter into a Vermont civil union).

“chaos” is likely to ensue once parties to these relationships attempt to enforce them elsewhere.⁸¹

I do not aspire in this Article to provide a comprehensive analysis of all of the questions raised by the advent of same-sex marriage and the alternative regimes, nor any conclusive answers regarding the question of interstate recognition of same-sex marriages, civil unions, or domestic partnerships generally. Rather, I focus in the following Section specifically on the issue of recognition of the *parental* rights of a same-sex partner like Sarah under statutory and common law principles, and I move beyond the arguments premised on rules governing interstate recognition of marriages.

A. Recognition of Parental Rights if the Couple Marries in Massachusetts or Canada

The validity of a marriage contracted in another state or country traditionally has been governed by the rule of *lex loci*—a marriage that is valid where it was performed will be held valid everywhere.⁸² A strong presumption in favor of recognizing marriages exists, and many states have statutes codifying the rule.⁸³ However, under the general conflicts rule of *lex loci*, the forum state may choose not to recognize such a marriage if it would offend the strong public policy of the forum state or, in some cases, if it was an evasory marriage.⁸⁴ In an evasory marriage, the parties purposely marry in a state other than the one in which they live to avoid a prohibition on the marriage in their home state. They then return and resume residence in the home state. Sarah

⁸¹ See, e.g., Kathleen Burge, *For Gays, Divorce May Soon Be a Useful Right*, BOSTON GLOBE, Dec. 3, 2003, at B1. One commentator made the following observation:

“I think all hell is going to break loose when states have to begin to deal with the process of gay divorce,” said John Mayoue, an Atlanta lawyer who has written extensively on same-sex unions. “I really think this is where the fight is going to come, and it’s going to be chaos.”

Id. at B6; see David Crary, *State-by-State Battle on Gay Marriage To Be Complex, Nasty*, SAN DIEGO UNION-TRIB., Nov. 28, 2003, at A21, 2003 WLNR 13451072 (quoting Mark Strasser of Capital University Law School as stating, “All of this will be a mess”).

⁸² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); RESTATEMENT OF CONFLICT OF LAWS §§ 121, 129 (1934); Henson, *supra* note 18, at 560–61 n.32; 52 AM. JUR. 2D *Marriage* § 64 (2000).

⁸³ See COX, *supra* note 18, at 1064–74.

⁸⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2); RESTATEMENT OF CONFLICT OF LAWS §§ 121, 129; COX, *supra* note 18, at 1067–68, 1074–82 (discussing evasory marriage statutes); Henson, *supra* note 18, at 560–61 & n.32; 52 AM. JUR. 2D *Marriage*, *supra* note 82, §§ 63–64.

and Andrea's marriage qualifies as a migratory marriage, rather than an evasatory marriage, because the parties married or registered as partners in the state in which they were then domiciled and intended to remain.⁸⁵

The public policy exception obviously presents the biggest hurdle to achieving recognition of the marriage outside of Massachusetts or Canada. The widespread adoption of state DOMAs compounds the problem.⁸⁶ These laws fall into roughly three categories: (1) laws prohibiting same-sex marriage and denying recognition to same-sex marriages validly contracted in other states (hereinafter "category one");⁸⁷ (2) laws that go beyond category one to explicitly deny recognition of any claim for a right, benefit, or responsibility based on the marriage (hereinafter "category two");⁸⁸ and (3) so-called "super-DOMAs," which not only deny recognition of all of the above, but expressly prohibit recognition of benefits provided by alternate marriage regimes such as civil unions or domestic partnerships.⁸⁹ These laws would seem at first

⁸⁵ See *Constitutional Constraints*, *supra* note 18, at 2038.

⁸⁶ The National Gay and Lesbian Task Force identifies thirty-nine states that have adopted anti-same-sex marriage laws as of June 2004. NAT'L GAY & LESBIAN TASK FORCE, *supra* note 12.

⁸⁷ NEV. CONST. art. 1, § 21; ALA. CODE § 30-1-19 (1998); ARIZ. REV. STAT. ANN. §§ 25-101(c), -112 (West 2000); CAL. FAM. CODE § 308.5 (West 2004); COLO. REV. STAT. § 14-2-104 (2003); DEL. CODE ANN. tit. 13, § 101(a), (d) (1999); HAW. REV. STAT. ANN. § 572-1 (Michie 1999); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1999); IND. CODE ANN. § 31-11-1-1 (Michie 2003); IOWA CODE ANN. §§ 595.2, .20 (West 2001); KAN. STAT. ANN. §§ 23-101, -115 (Supp. 2003); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1998); MICH. COMP. LAWS §§ 551.271-272 (Supp. 2004) (MICH. STAT. ANN. §§ 25.15-.16 (Michie Supp. 2000)); MISS. CODE ANN. § 93-1-1(2) (2004); MONT. CODE ANN. § 40-1-401 (2003); N.C. GEN. STAT. § 51-1-2 (2003); N.D. CENT. CODE § 14-03-08 (2004); OKLA. STAT. ANN. tit. 43, §§ 3, 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-1-38 (Michie Supp. 2003); TENN. CODE ANN. § 36-3-113 (2001); UTAH CODE ANN. §§ 30-1-2(5), 30-1-4(1) (1998); WASH. REV. CODE ANN. § 26.04.020 (West Supp. 2004).

⁸⁸ ALASKA STAT. § 25.05.013 (Michie 2002); ARK. CODE ANN. § 9-11-208 (Michie 2002); GA. CODE ANN. § 19-3-3.1 (2004); KY. REV. STAT. ANN. § 402.045 (Michie 1999); LA. CIV. CODE ANN. arts. 89, 96 (West 1999); MINN. STAT. ANN. § 517.03(a)(4), (b) (West Supp. 2004); MO. ANN. STAT. § 451.022(4) (West 2004); VA. CODE ANN. § 20-45.2 (Michie 2004); W. VA. CODE ANN. § 48-2-603 (Michie 2001).

⁸⁹ NEB. CONST. art. I, § 29; FLA. STAT. ANN. § 741.212 (West Supp. 2004); OHIO REV. CODE ANN. § 3101.01 (West Supp. 2005); TEX. FAM. CODE ANN. § 6.204(c) (Vernon Supp. 2004); see SEAN CAHILL & SAM SLATER, NAT'L GAY & LESBIAN TASK FORCE POLICY INST., MARRIAGE: LEGAL PROTECTIONS FOR FAMILIES AND CHILDREN 8 (2004), available at <http://www.thetaskforce.org/downloads/marriagebrief.pdf>. Montana may fall within this category. See MONT. CODE ANN. § 40-1-401. Its DOMA provides that same-sex marriages are prohibited and that "[a] contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited . . . is void as against public policy." *Id.* § 40-1-401(4). It is unclear whether a civil union or domestic partnership would constitute a "contractual

glance to resolve the question at hand in all but the nine jurisdictions (other than Vermont or Massachusetts) which do not have a DOMA. However there are a number of bases for challenging that conclusion in Sarah's case, as we will see later.⁹⁰ We begin, though, by considering arguments Sarah might raise in the states *without* a DOMA.

1. Recognition of Parental Rights in Non-DOMA Jurisdictions

The jurisdictions currently without any statutory provisions denying recognition to same-sex marriages contracted elsewhere or declaring such marriages against public policy include Connecticut, Maryland, New Jersey, New Mexico, New York, Rhode Island, Wisconsin, Wyoming, and the District of Columbia.⁹¹ These jurisdictions follow the general conflicts rule regarding marriages stated above, with some variations, so a same-sex partner seeking parental rights after the relationship has ended will argue that the forum jurisdiction should recognize the marriage because the marriage is neither against public policy nor an attempt to evade the forum's laws.⁹²

Sarah would have strong arguments to make in favor of recognition of the marriage in each of these jurisdictions. As a general matter, a court considering whether an out-of-state marriage violates the forum state's public policy begins by recognizing that a strong presumption exists in favor of validating marriages.⁹³ Next, the court likely will exam-

relationship" entered into to achieve a same-sex marriage. The timing of the amendment argues against this interpretation, because it was adopted in 1997, three years before Vermont enacted its civil union statute.

⁹⁰ See *infra* notes 128–389 and accompanying text.

⁹¹ See NAT'L GAY & LESBIAN TASK FORCE, *supra* note 12. Massachusetts and Vermont also fall within this category. In this Section, however, Sarah is seeking to have her Massachusetts marriage recognized elsewhere. Because Vermont allows civil unions, and, unlike California, has no contradictory DOMA ostensibly prohibiting recognition of same-sex marriages contracted elsewhere, Vermont undoubtedly would recognize the rights afforded by the Massachusetts marriage.

⁹² See N.M. STAT. ANN. § 40-1-4 (Michie 1999); OR. REV. STAT. § 106.210 (2003); WYO. STAT. ANN. § 20-1-111 (Michie 2003); *Fattibene v. Fattibene*, 441 A.2d 3, 5 (Conn. 1981), *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961); *Hudson Trail Outfitters v. District of Columbia Dep't of Employment Servs.*, 801 A.2d 987, 989 (D.C. 2002); *Henderson v. Henderson*, 87 A.2d 403, 408 (Md. 1952); *Sirois v. Sirois*, 50 A.2d 88, 89 (N.H. 1946); *Wilkins v. Zelichowski*, 140 A.2d 65, 68 (N.J. 1958); *Bucca v. State*, 128 A.2d 506, 508 (N.J. Super. Ct. Ch. Div. 1957); *Leszinske v. Poole*, 798 P.2d 1049, 1055 (N.M. Ct. App. 1990); *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 414 (App. Div. 2003); *Garrett v. Chapman*, 449 P.2d 856, 858 (Or. 1969); *In re Campbell's Estate*, 51 N.W.2d 709, 712 (Wis. 1952); *Hoagland v. Hoagland*, 193 P. 843, 844 (Wyo. 1920).

⁹³ See *Franklin v. Lee*, 62 N.E. 78, 83 (Ind. App. 1901) (noting that the "presumption in favor of marriage . . . is one of the strongest known to the law"); RESTATEMENT (SECOND)

ine related legislation and judicial decisions to ascertain the forum state's policy toward same-sex marriages. In Sarah's favor, each of these states has laws banning discrimination based on sexual orientation.⁹⁴ New Jersey and the District of Columbia have adopted domestic partnership ordinances which, although not as comprehensive as Vermont's or California's ordinances, provide gay and lesbian partners substantive legal benefits including rights to healthcare benefits and, in New Jersey, additional rights to pensions, insurance, and certain tax benefits comparable to those enjoyed by spouses, among others.⁹⁵

New York has extended rights to same-sex partners through judicial decisions.⁹⁶ Indeed, New York was the first state to recognize a partner in a Vermont civil union as a "spouse" for purposes of suing for wrongful death in New York in *Langan v. St. Vincent's Hospital*.⁹⁷ In doing so, the *Langan* court relied on precisely these kinds of statutory pronouncements.⁹⁸ The court bolstered its decision by citing laws prohibiting discrimination against gays and lesbians in employment, education, and housing, and including same-sex partners among those entitled to compensation from the September 11, 2001, victim compensation fund.⁹⁹ It also relied on a landmark decision by the New York Court of Appeals which recognized a long-term, same-sex partner as "family" for purposes of the New York City rent control ordinance.¹⁰⁰ In addition, the court relied on *In re Jacob*, a decision allowing second parent adoptions by same-sex partners, even though

OF CONFLICT OF LAWS § 283 cmt. h (1971); Cox, *supra* note 18, at 1098; see also Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 126 (1996) (discussing cases in which "the policy of preserving existing marriages overrode the policy against [racial] intermarriage").

⁹⁴ CONN. GEN. STAT. ANN. §§ 46a-81b to -81n, -81p to -81q (West 2004); MD. ANN. CODE art. 49B, §§ 8, 16, 22 (Supp. 2002); MASS. GEN. LAWS ANN. ch. 151B, § 3 (West 2004); N.H. REV. STAT. ANN. § 354-A:6 (Supp. 2004); N.J. STAT. ANN. § 10:5-12 (West 2002); N.Y. CIV. RIGHTS LAW § 40-C (McKinney Supp. 2004); N.Y. EXEC. LAW § 291 (McKinney Supp. 2004); OR. REV. STAT. § 659.030 (2003); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 441-42 (Or. Ct. App. 1998); NAT'L GAY & LESBIAN TASK FORCE, GLBT CIVIL RIGHTS LAWS IN THE U.S. (2003), available at <http://www.thetaskforce.org/downloads/civilrightsmap.pdf>.

⁹⁵ D.C. CODE ANN. § 32-701-706 (2001); N.J. STAT. ANN. §§ 26:8A-2, -4, -6, -12 (West Supp. 2004).

⁹⁶ *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (recognizing partner as "family" for purposes of rent control ordinance); *Slattery v. City of New York*, 697 N.Y.S.2d 603, 605 (App. Div. 1999), *appeal dismissed for lack of substantial constitutional question*, 727 N.E.2d 1253 (N.Y. 2000), *appeal dismissed*, 734 N.E.2d 1208 (N.Y. 2000).

⁹⁷ 765 N.Y.S.2d at 420-22.

⁹⁸ *Id.* at 415-16, 420-21.

⁹⁹ *Id.* at 415-16.

¹⁰⁰ *Id.* at 415 (citing *Braschi*, 543 N.E.2d at 55).

the adoption statute, if read literally, would have required the biological parent to relinquish all parental rights.¹⁰¹

Jacob should carry particular weight in Sarah's case, because it directly reflects the state's policy toward same-sex parenting.¹⁰² There, the court found that permitting a same-sex partner to adopt her partner's biological child would further the purpose behind the New York adoption statutes—to foster the child's best interests—by allowing “the two adults who actually function as [the] child's parents to become the child's legal parents.”¹⁰³ Likewise, in our hypothetical case, recognizing the marriage from Massachusetts or Canada would ensure that Madeleine would not be cut off from one of her parents.

Andrea might counter that *Alison D. v. Virginia M.* argues against recognition of the marriage.¹⁰⁴ In *Alison D.*, the New York Court of Appeals found a lesbian co-parent lacked standing under section 70 of the New York Domestic Relations Law to seek visitation.¹⁰⁵ However, the court's unwillingness to give a broad reading to this statute seems insufficient to overcome the other precedent and statutory authority favoring recognition of the marriage. Moreover, the *Alison D.* court's concern with unleashing unfettered judicial discretion to recognize claims by individuals who had acted in a parental capacity would not be implicated by validation of the marriage.

A number of other states in this category also have extended rights related to parenting to same-sex partners. Like New York, both Connecticut and New Jersey allow second-parent adoptions by same-sex partners.¹⁰⁶ Connecticut, Maryland, New Jersey, New Mexico, Rhode Island, and Wisconsin also have granted rights to same-sex partners who have co-parented children in the absence of an adoption.¹⁰⁷

¹⁰¹ *Id.* at 416 (citing *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995)).

¹⁰² See 660 N.E.2d at 399.

¹⁰³ *Id.*

¹⁰⁴ See generally 572 N.E.2d 27 (N.Y. 1991).

¹⁰⁵ *Id.* at 29.

¹⁰⁶ *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 541 (N.J. Super. Ct. App. Div. 1995); *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 555 (N.J. Super. Ct. App. Div. 1993); see CONN. GEN. STAT. ANN. § 45a-727a (West 2004).

¹⁰⁷ See *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840, 844 (Conn. Super. Ct. 1999) (holding that lesbian co-parent had standing to petition for visitation); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000) (ruling that lesbian co-parent had standing to petition for visitation); *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000), *aff'd*, 748 A.2d 539 (N.J. 2000) (finding that lesbian co-parent had standing to seek joint legal custody and visitation); *A.C. v. C.B.*, 829 P.2d 660, 662 (N.M. Ct. App. 1992) (ruling that lesbian co-parent had colorable claim of standing to seek right to maintain some type of continuing relationship with child); *Rubano v. DiCenzo*, 759 A.2d 959, 977 (R.I. 2000) (holding that lesbian co-parent had standing to seek enforcement of visitation agreement); *In re Custody of*

Although the law strongly supports recognition of the marriage in most of these states, achieving marital recognition in Connecticut and Maryland could prove more difficult. These states have statutory language undercutting the claim for same-sex marriage recognition. Maryland's public accommodations statute, which prohibits discrimination based upon sexual orientation, specifically states that the act "may not be construed to authorize or validate a marriage between two individuals of the same sex."¹⁰⁸ Likewise, Connecticut's anti-discrimination statute provides that nothing in those sections be construed "to authorize the recognition of or the right of marriage between persons of the same sex."¹⁰⁹ Maryland defines marriage as a union of a man and a woman,¹¹⁰ and Connecticut expressly states that "the current public policy of the state . . . is now limited to a marriage between a man and a woman."¹¹¹

These statutes might well mean merely that courts cannot use these laws to find a right to same-sex marriage within Maryland or Connecticut, as the Vermont Supreme Court did in *Baker*; however, legislative history and case law in Connecticut have persuaded one court of a broader interpretation.¹¹² In *Rosengarten v. Downes*, the Connecticut Appellate Court considered a petition by a party to a Vermont civil union to dissolve the relationship.¹¹³ The lower court denied the petition, finding that the court lacked jurisdiction because the petition did not involve a marriage or a "matter relating to family

H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995) (recognizing that lesbian co-parent had standing to seek to establish mother-child relationship and to obtain visitation); *cf.* Gestl v. Frederick, 754 A.2d 1087, 1103 (Md. Ct. Spec. App. 2000) (finding that Maryland court had jurisdiction, as opposed to Tennessee court, because lesbian co-parent could obtain custody in Maryland by showing extraordinary circumstances); *Barnae v. Barnae*, 943 P.2d 1036, 1041 (N.M. Ct. App. 1997) (holding that New Mexico was convenient forum for hearing lesbian co-parent's claim to custody and timesharing).

Indeed, in these jurisdictions, Sarah would appear to have standing to seek visitation with Madeleine, regardless of whether she and Andrea had married in Massachusetts or Canada, because she acted as a *de facto* parent or *in loco parentis* to Madeleine and because the marriage, whether valid or not, arguably represents an agreement between the parties that Sarah obtain parental rights. These precedents, however, do not obviate the need for recognition of rights flowing from the marriage because even these states may not consider the non-biological parent on an equal footing with the biological parent. *See infra* notes 453-467 and accompanying text.

¹⁰⁸ MD. ANN. CODE art. 49B, § 5 (1998).

¹⁰⁹ CONN. GEN. STAT. ANN. § 46a-81f (West 2004).

¹¹⁰ MD. CODE ANN., FAM. LAW § 2-201 (1999).

¹¹¹ CONN. GEN. STAT. ANN. § 45a-727a.

¹¹² *Rosengarten v. Downes*, 802 A.2d 170, 177-78, 180-83 (Conn. App. Ct. 2002), *appeal granted in part*, 806 A.2d 1066 (Conn. 2002).

¹¹³ *Id.* at 172.

relations."¹¹⁴ In affirming the trial court's decision, the appellate court cited legislative history behind a change in the state's adoption statutes, which evidenced a concern that allowing same-sex adoption might lead a Connecticut court to require civil unions, as permitting such adoptions had in Vermont.¹¹⁵ This background supports an interpretation that still would not necessarily preclude recognition of an out-of-state same-sex marriage. The court found other legislative history, however, that works against recognition.¹¹⁶ Debate on the adoption bill suggested that the legislature refrained from enacting a DOMA because legislators believed it was unnecessary given the statements contained in these statutes.¹¹⁷

Precedents regarding validation of out-of-state marriages in Connecticut and Maryland are inconclusive. Although Connecticut courts have invalidated an out-of-state marriage between an uncle and a niece and a bigamous marriage, both of those kinds of marriages involved conduct which was criminal.¹¹⁸ Moreover, Maryland has validated an uncle-niece marriage.¹¹⁹ Both jurisdictions have recognized common law marriages entered into elsewhere.¹²⁰

With the possible exceptions, then, of Maryland and Connecticut, it seems highly likely that the non-DOMA states would *not* find the same-sex marriage to violate strong public policy. The non-DOMA states would seem to have little interest in denying recognition of the marriage, particularly in our scenario, when the parties made no attempt to evade the forum's marital restriction.¹²¹ Courts are much more reluctant to invalidate migratory marriages than evasory

¹¹⁴ *Id.* at 175.

¹¹⁵ *Id.* at 181.

¹¹⁶ *Id.* at 181–82.

¹¹⁷ *Rosengarten*, 802 A.2d at 181–82. If a court were to follow *Rosengarten* and to refuse to recognize the marriage in Connecticut, that ruling would not necessarily preclude a same-sex partner from seeking to obtain recognition of his or her parental rights by other means. See *infra* notes 128–389 and accompanying text.

¹¹⁸ *Catalano*, 170 A.2d at 728–29; *Anderson v. Anderson*, 238 A.2d 45, 46 (Conn. Super. Ct. 1967).

¹¹⁹ *Fensterwald v. Burk*, 98 A. 358, 360 (Md. 1916), *writ of error dismissed* 248 U.S. 592 (1918).

¹²⁰ *Delaney v. Delaney*, 405 A.2d 91, 93 (Conn. Super. Ct. 1979); *Jackson v. Jackson*, 33 A. 317, 319–20 (Md. 1895).

¹²¹ Although commentators have opined in the past that the existence of anti-sodomy laws in a particular state might indicate that same-sex marriage was against public policy, the U.S. Supreme Court's decision in *Lawrence v. Texas* declared such statutes unconstitutional. See generally 539 U.S. 558 (2003). Thus any statutes that remain on the books could not be used to establish a policy against same-sex marriage recognition.

marriages, although it has been done.¹²² Indeed, section 283 of the *Restatement (Second) of Conflict of Laws* ("Second Restatement") provides that "a marriage which satisfies the requirement of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage *at the time of the marriage*."¹²³ Comment k of section 283 of the *Second Restatement* indicates that as of the drafting of the section, "a marriage had only been invalidated when it violated a strong policy of a state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter."¹²⁴ This distinction between migratory and evasory marriages held true, for the most part, even in miscegenation cases where parties sought to have an interracial marriage recognized in a jurisdiction which prohibited such marriages to the point of criminalizing them.¹²⁵ The need to protect the parties' expectations and prevent one party from summarily choosing to escape marital obligations by moving to another jurisdiction compels recognition of migratory marriages.¹²⁶ By contrast, when both parties knowingly marry in a state in which they are not domiciled, purposely to avoid restrictions in their home state, they are arguably on notice of the vulnerability of the marriage and the policies for recognition are weaker.¹²⁷

Thus, in our hypothetical, Sarah has compelling arguments in favor of recognition of a marriage that neither offends public policy in most of the non-DOMA states nor involves an attempt to evade the forum state's laws. Once the marriage is recognized, she would have all

¹²² See *Constitutional Constraints*, *supra* note 18, at 2040, 2041–42; Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 340, 367–70 (1998). The problem of interstate recognition of evasory same-sex marriages contracted in Massachusetts may be moot. Governor Mitt Romney notified the governors and attorneys general of the other forty-nine states that Massachusetts will not issue licenses to same-sex couples from their states based on a 1913 law enacted when Massachusetts recognized interracial marriages, but other states did not. Elizabeth Mehren, *Massachusetts Limits Gay Marriages*, L.A. TIMES, Apr. 30, 2004, at A11. Challenge to the limitation as discriminatory seems highly likely.

¹²³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (emphasis added).

¹²⁴ *Id.* § 283(2) cmt. k.

¹²⁵ See Koppelman, *supra* note 93, at 119–26 (discussing validity of non-evasive, interracial marriages); P.H. Vartanian, Annotation, *Recognition of Foreign Marriage as Affected by Local Miscegenation Law*, 3 A.L.R.2d 240, § 5 (1949).

¹²⁶ Strasser, *supra* note 122, at 349.

¹²⁷ It remains to be seen whether courts will limit application of the DOMAs to evasory marriages; none of the statutes on their face distinguish between migratory and evasory marriages.

the legal rights outlined in Part I and would be able to pursue custody and/or visitation with Madeleine. However a same-sex partner in Sarah's position most likely will need to look to other bases for securing her parental rights in the jurisdictions discussed in the next Section.

2. Recognition of Parental Rights in DOMA Jurisdictions

Although the ambiguous statutory language in Maryland and Connecticut *may* give courts in those states grounds to deny recognition to a foreign same-sex marriage, the remaining eighty percent of the states have clearly declared their unwillingness to validate an out-of-state, same-sex marriage. Although the statutes vary, all expressly state at a minimum that same-sex marriages either will not be recognized or are against public policy.¹²⁸ Thus Sarah would seem to be foreclosed from arguing for validation of her marriage under choice of law principles.¹²⁹ However, the state DOMAs should not prevent Sarah from gaining recognition of her parental rights. The key to accomplishing that goal will be to convince the court that it has jurisdiction to hear the case, that the co-parent (spouse) has standing to bring it, and that she has standing to bring it as a parent. For only as a parent will she clearly and definitively be entitled to have the custody question decided based on the best interests of the child.¹³⁰

a. Jurisdiction and Standing

Most custody and visitation disputes come to court in connection with a divorce or a paternity action. In states with a DOMA, because the court would not recognize the marriage, it may have no jurisdiction to consider a divorce of the parties. Indeed, this type of jurisdictional problem provided the basis for a Connecticut appellate court to dismiss a petition for dissolution of a Vermont civil union brought in

¹²⁸ See *supra* notes 87–89 and accompanying text (summarizing statutory language).

¹²⁹ I am assuming for purposes of discussion that the DOMAs in each state would be valid. I do not consider here arguments for invalidating those statutes. See Koppelman, *supra* note 93, at 126–32 (arguing that the state DOMAs do not establish definitively blanket non-recognition of same-sex marriages, but leave room for recognition in some instances); *infra* note 265 (discussing *Lawrence*, 539 U.S. at 576–79; *id.* at 582–83 (O'Connor, J., concurring); and *Romer v. Evans*, 517 U.S. 620, 623, 634–35 (1996)). See generally Christopher Rizzo, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J.L. & POL'Y 1 (2002) (analyzing a challenge to one state's particularly broad statute banning same-sex marriage).

¹³⁰ For a discussion of the difficulties inherent in seeking visitation or custody as a non-parent third party, see *infra* notes 453–467 and accompanying text.

Connecticut.¹³¹ In *Rosengarten*, a party to a Vermont civil union sought to dissolve the union in Connecticut.¹³² The trial court dismissed the action on the grounds that it had no jurisdiction because the civil union was neither a marriage nor a “matter relating to family relations” under the jurisdictional statutes.¹³³ The appellate court affirmed.¹³⁴

Fortunately, however, courts typically have broad jurisdiction to adjudicate disputes concerning children, including custody, visitation, and child support, when the parents are not married.¹³⁵ Even in *Rosengarten*, the court indicated that the superior court would have had jurisdiction under a “catchall” jurisdictional provision, if the civil union case had involved children.¹³⁶

Not all courts would necessarily agree. For example, in *Curiale v. Reagan*, a California appellate court found it lacked subject matter jurisdiction to consider a visitation claim brought by a lesbian co-parent.¹³⁷ The court could only adjudicate a custody claim if it had a proper proceeding before it, such as a dissolution, guardianship, or dependency action.¹³⁸ In the court’s view, the petitioner lacked standing to initiate any of those proceedings.¹³⁹ However, in *Nancy S. v.*

¹³¹ *Rosengarten*, 802 A.2d at 184.

¹³² *Id.* at 172.

¹³³ *Id.*

¹³⁴ *Id.* at 184.

¹³⁵ See, e.g., ALA. CODE § 12-17-24.2(a) (Supp. 2003); ARK. CODE ANN. § 9-14-105(a) (Michie 2002); DEL. CODE ANN. tit. 10, § 902 (1999); FLA. STAT. ANN. §§ 61.501–.542 (West Supp. 2005); 750 ILL. COMP. STAT. ANN. 5/601 (West Supp. 2004); MD. CODE ANN., FAM. LAW § 1-201(a) (Supp. 2004); N.C. GEN. STAT. § 50-13.5(c) (2003); R.I. GEN. LAWS § 8-10-3(a) (Supp. 2003); S.C. CODE ANN. § 20-7-420(20) (Law. Co-op. 1985); WASH. REV. CODE ANN. § 26.12.190(1) (West 1997); *In re Jones*, No. 2000 CA 56, 2002 WL 940195, at *4–6 (Ohio Ct. App. May 10, 2002). Jurisdiction extends as well to custody and visitation disputes between non-parents and parents. See, e.g., *Buness v. Gillen*, 781 P.2d 985, 988 (Alaska 1989) (commenting that the parental custody statute “does not imply that the superior court lacks jurisdiction to adjudicate custody disputes between a parent and a non-parent. Such disputes are civil matters over which the superior court has undoubted subject matter jurisdiction.”); *In re Bonfield*, 780 N.E.2d 241, 248 (Ohio 2002) (stating that jurisdiction of juvenile court “cannot be avoided merely because the petitioner is not a ‘parent’” under the state’s parentage act).

¹³⁶ *Rosengarten*, 802 A.2d at 177 (citing CONN. GEN. STAT. § 46b-1(17) (2001)). In addition, section 46b-1(8) of the General Statutes of Connecticut specifically provides jurisdiction over “habeas corpus and other proceedings to determine the custody and visitation of children.” CONN. GEN. STAT. ANN. § 46b-1(8) (West 2004).

¹³⁷ 272 Cal. Rptr. 520, 522 (Ct. App. 1990); see *West v. Superior Court*, 69 Cal. Rptr. 2d 160, 164 (Ct. App. 1997). In a 3–2 decision in 1997, the Vermont Supreme Court likewise rejected a lesbian co-parent’s claim to visitation based on lack of jurisdiction. *Titchenal v. Dexter*, 693 A.2d 682, 689–90 (Vt. 1997).

¹³⁸ *Curiale*, 272 Cal. Rptr. at 522.

¹³⁹ *Id.*

Michele G., another California appellate court rejected this conclusion, noting that “[a] court . . . lacks ‘jurisdiction’ only if it has no power to render a decision over the dispute.”¹⁴⁰ Because the petitioner claimed she was a parent, the court had jurisdiction to decide her status under the UPA, though the court ultimately rejected her claim for lack of standing.¹⁴¹

In the end, most courts would likely find jurisdiction to hear Sarah’s claim, but standing might prove the more formidable obstacle. A same-sex parent in Sarah’s position must have standing to petition the court for custody or visitation. Although at common law, standing can be established by showing that the petitioner “has some real interest in the action,”¹⁴² custody and related disputes are generally governed by statute. Such statutes typically provide that a child custody proceeding can be initiated by a parent.¹⁴³ In some states, Sarah might have to commence an additional legal proceeding to establish maternity. For example, Arizona allows a parent to initiate a custody proceeding by filing for dissolution of a marriage or legal separation or by filing a proceeding to establish maternity.¹⁴⁴ However, Arizona also defines “legal parent” as one who is related by blood or adoption.¹⁴⁵ Regardless of the nature of the proceedings she must bring, Sarah will have to persuade the court that she is a parent under the relevant statute, even if she is not biologically related to Madeleine. The crux of my argument calls for recognition of parental status flowing from the marriage, even if the DOMA declares the marriage void. The following Sections will explore how a marriage declared invalid nonetheless can serve as the basis for establishing standing as a parent.

¹⁴⁰ 279 Cal. Rptr. 212, 215 n.2 (Ct. App. 1991).

¹⁴¹ *Id.* at 215–19; *see* Thomas v. Thomas, 49 P.3d 306, 307–08 (Ariz. Ct. App. 2002) (finding that trial court had jurisdiction to hear partner’s petition for custody when partner had acted *in loco parentis*).

¹⁴² Liston v. Pyles, No. 97APF01-137, 1997 WL 467327, at *11 (Ohio Ct. App. Aug. 12, 1997) (Tyack, J., dissenting in part and concurring separately in part) (citing State *ex rel.* Lamier v. Lamier, 664 N.E.2d 1384, 1386 (Ohio Ct. App. 1995)).

¹⁴³ *See, e.g.*, ALASKA STAT. § 25.20.060(a) (Michie 2002); ARIZ. REV. STAT. ANN. § 25-401 (West 2000); DEL. CODE ANN. tit. 13, § 721(a) (1999); 750 ILL. COMP. STAT. ANN. 5/601(b)(1) (West Supp. 2004); IND. CODE ANN. § 31-17-2-3 (Michie 2003); MONT. CODE ANN. § 40-4-211(4)(a) (2003); NEV. REV. STAT. ANN. 125.510 (Michie 2004); N.C. GEN. STAT. § 50-13.1 (2003); 23 PA. CONS. STAT. ANN. § 5312 (West 2001); TENN. CODE ANN. § 36-6-510 (2001).

¹⁴⁴ ARIZ. REV. STAT. ANN. § 25-401(B)(1)(b), (B)(3) (West Supp. 2004).

¹⁴⁵ *Id.* § 25-415(G)(2).

b. Parental Rights Under the UPA

At least ten states with "category one" DOMAs have adopted the UPA, including the provision that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship."¹⁴⁶ In these states, Sarah can argue that the marriage, even if rendered invalid by the forum state's DOMA, establishes her status as a mother under the UPA and qualifies her to seek custody as a parent. The language of this provision and the comparable paternity provision suggest a broad scope that courts have been slow to embrace, preferring to limit standing essentially to parents related by biology, adoption, or, for men, marriage.¹⁴⁷ Indeed, a number of judicial decisions have dismissed claims for custody or visitation by a lesbian co-parent based on lack of standing, finding that the partner did not meet the statutory definition of parent.¹⁴⁸ These cases are all

¹⁴⁶ ALA. CODE § 26-17-18 (1992) (emphasis added); CAL. FAM. CODE § 7650 (West 2004); COLO. REV. STAT. § 19-4-122 (2003); HAW. REV. STAT. ANN. § 584-21 (Michie 1999); 750 ILL. COMP. STAT. ANN. 45/19 (West 1999); KAN. STAT. ANN. § 38-1126 (2000); MO. ANN. STAT. § 210.848 (West 2004); MONT. CODE ANN. § 40-6-121; NEV. REV. STAT. ANN. 126.231; N.M. STAT. ANN. § 40-11-21 (Michie 1999); N.D. CENT. CODE § 14-17-20 (2004); see MINN. STAT. ANN. § 257.71 (West 2003) (including slightly different language); OHIO REV. CODE ANN. § 3111.17 (West 2000) (category two state); R.I. GEN. LAWS § 15-8-26 (2003) (no DOMA).

¹⁴⁷ ARIZ. REV. STAT. ANN. § 25-415(G)(2) (defining parent as biological or adoptive); *Bonfield*, 780 N.E.2d at 246-47 (limiting "parent" to biological or adoptive under domestic relations statute); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (App. Div. 1998) (holding that lesbian co-parent "who is neither the biological nor adoptive parent" lacked standing to seek visitation); *Liston*, 1997 WL 467327, at *3 (defining parent under child support statute as biological or adoptive); *In re Parentage of L.B.*, 89 P.3d 271, 278-79 (Wash. Ct. App. 2004) (finding that state's version of the Uniform Parentage Act (the "UPA") limits parentage to marriage or biology, but that common law claims may be entertained), *review granted*, 101 P.3d 107 (Wash. 2004); Ruthann Robson, *Making Mothers: Lesbian Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 20 (2000) (observing that "[t]he statutory schemes generally define 'parenthood' by a combination of biology and the legal relationship between the putative parent and at least one biological parent"); see *infra* notes 150-152, 182-194 and accompanying text (discussing paternity presumptions). But see *Liston*, 1997 WL 467327, at *9-10 (Tyack, J., dissenting in part and concurring in part) (stating that standing under child support statute not limited to "biological or adoptive parents"); *infra* note 149 (citing cases recognizing standing by lesbian co-parents).

¹⁴⁸ *E.g.*, *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 139 (Ct. App. 2004) (finding that lesbian co-parent not a parent under the UPA), *superseded by* 97 P.3d 72 (Cal. 2004); *In re Guardianship of Z.C.W.*, 84 Cal. Rptr. 2d 48, 50 (Ct. App. 1999) (noting that courts of appeal have determined a lesbian parent neither biologically nor adoptively related is not entitled to custody); *Nancy S.*, 279 Cal. Rptr. at 219 (holding that lesbian partner not a parent under the UPA); *Bonfield*, 780 N.E.2d at 246-47 (finding that same-sex partner not a "parent" under the state's parentage act, but allowing partner and parent to enter into shared custody agreement); *State ex rel. D.R.M.*, 34 P.3d 887, 891-92 (Wash. Ct. App. 2001) (finding that lesbian co-parent not a parent under UPA); cf. *McGuffin v. Overton*, 542 N.W.2d 288,

distinguishable from our hypothetical, though, because in none of them had the partners legally married anywhere.¹⁴⁹

This distinction is significant because the UPA makes statutes related to establishing paternity applicable to establishing maternity, insofar as practicable.¹⁵⁰ Indeed, the statutes addressing how a mother can establish a parent-child relationship provide that the relationship can be established by proof of the woman having given birth "or pur-

291-92 (Mich. Ct. App. 1995) (finding that partner not a parent and lacked standing under child custody statute); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (finding that partner not a parent and lacked standing under domestic relations law); *Lynda A.H.*, 673 N.Y.S.2d at 991 (finding that partner lacked standing to seek visitation); *Parentage of L.B.*, 89 P.3d at 278-79, 285 (finding that lesbian co-parent did not meet the UPA definition of parent, but could seek visitation as *de facto* parent).

¹⁴⁹ Moreover, as we shall see, courts are beginning to read the UPA more expansively to recognize a co-parent's standing. See *infra* notes 217-237 and accompanying text (discussing *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000)). Two Washington cases, in dicta, suggested that the UPA might have provided an avenue for a lesbian co-parent to seek visitation. *Parentage of L.B.*, 89 P.3d at 278-79, 285; *D.R.M.*, 34 P.3d at 892. *Parentage of L.B.* held, however, that a newer version of the UPA did not give a lesbian co-parent standing. 89 P.3d at 278-79, 285. *Parentage of L.B.* and other courts have recognized a partner's right to pursue custody or visitation even in the absence of marriage on a variety of other theories though. E.g., *In re Guardianship of Olivia J.*, 101 Cal. Rptr. 2d 364, 368 (Ct. App. 2000) (noting that a relative or any other person may file for guardianship, though such a non-parent must show detriment to the child if he or she stays with the parent); *In re Hirenica C.*, 22 Cal. Rptr. 2d 443, 448-50 (Ct. App. 1993) (allowing claims by *de facto* parents or persons "with an interest" in the child); *Laspina-Williams*, 742 A.2d at 843 (noting that state statute allows "any person" to seek visitation of a minor child); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000) (allowing those deemed to be *de facto* parents to pursue visitation); *LaChapelle v. Mitten*, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000) (noting that "the welfare of the child takes precedence" in determining custody); *Russell v. Bridgens*, 647 N.W.2d 56, 65 (Neb. 2002) (Gerrard, J., concurring) (noting that the *in loco parentis* doctrine allows a co-parent or partner to pursue custody); *V.C.*, 748 A.2d at 550 (allowing claims by those found to be psychological parents); *A.C. v. C.B.*, 829 P.2d 660, 664 (N.M. Ct. App. 1992) (allowing such claims if in the best interests of the child); *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001) (applying the doctrine of *in loco parentis* to grant standing for custody or visitation); 89 P.3d at 285 (allowing common law claims of *de facto* or psychological parentage); *H.S.H.-K.*, 533 N.W.2d at 435 (allowing petitions for visitation when the petitioner has a parent-like relationship with the child and a "significant triggering event" justifies the state's involvement); cf. *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145, at *10 (Del. Fam. Ct. Feb. 5, 2002) (deeming lesbian co-parent a parent under Delaware child support statute and finding that she was equitably estopped from denying support obligation); *Barnae*, 943 P.2d at 1039-41 (suggesting that in analysis of interstate jurisdictional dispute, co-parent would have standing in New Mexico to seek timesharing and custody); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780, 784 (Fam. Ct. 1985) (holding that woman who posed as a man, married a woman, and consented to artificial insemination was a parent responsible for child support for resulting children).

¹⁵⁰ See *supra* note 146.

suant to the provisions of this chapter.”¹⁵¹ The UPA provides that a man is presumed to be the father if he and the child’s mother “attempted to marry each other by a marriage solemnized in apparent compliance with law, *although the attempted marriage is or could be declared invalid*” and, if the marriage was declared invalid by a court, the child was born within 300 days of that determination or, if the marriage is invalid without a court order, the child was born within 300 days of the termination of cohabitation.¹⁵² In our hypothetical, the parties did attempt to marry, the marriage would be invalid in these DOMA jurisdictions, and the child was born within 300 days of the termination of cohabitation. In essence, Sarah would, by “parity of reasoning,” use these provisions to establish herself as a presumed mother.¹⁵³

Courts already have relied on this type of analysis to establish parental rights for mothers who are not biologically related to their children.¹⁵⁴ The first case to do so was *In re Marriage of Buzzanca*.¹⁵⁵ *Buzzanca* involved claims surrounding a child who was born with the assistance of reproductive technology.¹⁵⁶ John and Luanne Buzzanca arranged for a surrogate to carry to term a child conceived with donor sperm and donor egg.¹⁵⁷ Shortly before the birth of the child, Jaycee, John and Luanne separated.¹⁵⁸ John subsequently refused to pay child support on the ground that he was not Jaycee’s father.¹⁵⁹ The trial court agreed, ruling that because neither he nor Luanne were biologically related to Jaycee, neither was a legal parent.¹⁶⁰ The Cali-

¹⁵¹ ALA. CODE § 26-17-4(1); accord 750 ILL. COMP. STAT. ANN. 45/4(1) (“or under this Act”); N.D. CENT. CODE § 14-17-03(1).

¹⁵² ALA. CODE § 26-17-5 (Supp. 2003) (emphasis added); CAL. FAM. CODE § 7611 (West 2004); COLO. REV. STAT. § 19-4-105 (2003); KAN. STAT. ANN. § 38-1114 (2000); MO. ANN. STAT. § 210.822 (West 2004); N.D. CENT. CODE § 14-17-04; accord MINN. STAT. ANN. § 257.55 (West 2003) (limiting time to 280, rather than 300, days); OHIO REV. CODE ANN. § 3111.03 (West 2000); WASH. REV. CODE ANN. § 26.26.116 (West Supp. 2004); see also 750 ILL. COMP. STAT. ANN. 45/5 (utilizing slightly different language and giving no time limit). The UPA and these statutes provide another basis for presumed fatherhood—when a man receives the child into his home and holds the child out as his own. The same-sex partner also would fall into this category: indeed, so would many co-parenting same-sex couples who did not marry or enter into a civil union or domestic partnership. *But see K.M.*, 13 Cal. Rptr. 3d at 151–52 (rejecting claim by lesbian partner based on paternity presumption).

¹⁵³ See *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998).

¹⁵⁴ *Buzzanca*, 72 Cal. Rptr. 2d at 282.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Buzzanca*, 72 Cal. Rptr. 2d at 282.

¹⁶⁰ *Id.*

ifornia Court of Appeal reversed, rejecting a result that rendered the child "a legal orphan."¹⁶¹ It held that John was the father based on an analogy to the artificial insemination statute which declares that a husband who consents to the insemination of his wife is the legal father of the resulting child.¹⁶² Like artificial insemination, the *in vitro* fertilization which the Buzzancas planned for and initiated was a medical procedure causing the procreation of a child and thus rendering the Buzzancas the parents, regardless of their lack of biological tie to Jaycee.¹⁶³ In Luanne's case, the court specifically relied on the UPA provision allowing a mother-child relationship to be established by proof of giving birth "or under this part."¹⁶⁴ In the court's view, this provision allowed application of the UPA's artificial insemination provision to Luanne to establish maternity.¹⁶⁵

Subsequent cases support our argument even more directly. In *In re Karen C.*, the California Court of Appeal held that a woman who had held a child out as her own was a presumed mother, and her child, Karen, the subject of a dependency proceeding, had standing to bring an action to establish a mother-child relationship under California's UPA.¹⁶⁶ Karen's biological parents had given her to Leticia, the presumed mother, shortly after Karen's birth.¹⁶⁷ At the hospital, the birth mother had identified herself as Leticia, so that Leticia's name would be on the birth certificate.¹⁶⁸ Leticia thereafter raised Karen as her own, allowing Karen to believe she had been adopted.¹⁶⁹

¹⁶¹ *Id.* at 284, 293-94.

¹⁶² *Id.* at 284-88.

¹⁶³ *Id.* at 282. Although not decided under the UPA, *Karin T. v. Michael T.* used similar reasoning to hold a woman responsible for child support. 484 N.Y.S.2d at 784. The woman, Marlene, had posed as a man, Michael, and married Karin. *Id.* at 781. Michael subsequently signed a consent to the artificial insemination of Karin. *Id.* at 782. Two children were born to the couple by this method. *Id.* at 781-82. Upon separation, Karin sought child support. *Id.* at 781. The court granted the petition, even though a proceeding to void the marriage was pending, on the grounds that Michael's signing of the consent brought the children into the world "as if done biologically." *Id.* at 784; accord *Chambers*, 2002 WL 1940145, at *10 (lesbian co-parent's involvement in artificial insemination of partner "while biologically not providing the genetic material necessary to conceive this child, constituted a symbolic act of procreation").

¹⁶⁴ *Buzzanca*, 72 Cal. Rptr. 2d at 284.

¹⁶⁵ *Id.* at 288. Building on *Buzzanca*, lesbian co-parents in California have sought and obtained declarations of parentage under the UPA when one partner has consented to the artificial insemination of the other and both intend to raise the child together. NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 69, at 5-6.

¹⁶⁶ 124 Cal. Rptr. 2d 677, 679, 681 (Ct. App. 2002).

¹⁶⁷ *Id.* at 678.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

These facts came to light when Karen was ten and became a dependent of the court due to Leticia's abuse and neglect.¹⁷⁰ Karen petitioned the court to determine that a mother-child relationship existed with Leticia.¹⁷¹ The juvenile court denied the request on the grounds that Leticia was neither a birth nor genetic mother.¹⁷²

On appeal, the court declared Leticia a presumed mother.¹⁷³ The court reached this conclusion by applying the presumptions contained in section 7611 of the California Family Code, which deal with paternity.¹⁷⁴ The court recognized that a paternity judgment represents not solely a reflection of genetics, but rather "a mixture of a search for genetic truth and the implementation of the strong public policies favoring marriage and family stability, and disfavoring labels of illegitimacy."¹⁷⁵ Thus, a judgment of paternity could be, in the court's words, "a decretal fiction"—a fiction created by decree.¹⁷⁶ The court went on to conclude that these principles "should apply equally to women."¹⁷⁷

The analysis did not end there, however, because section 7612(a) of the California Family Code allows these parentage presumptions to be rebutted "in an appropriate action by clear and convincing evidence."¹⁷⁸ The question remained in *Karen C.* whether this was an appropriate action for rebutting the presumption.¹⁷⁹ The court remanded the case to the juvenile court for a determination on that issue.¹⁸⁰ The analysis of that question would include public policy considerations, such as whether the courts should allow a form of *de facto* adoption that bypassed all legal formalities.¹⁸¹

The question for us, then, is whether our hypothetical case presents "an appropriate action" for rebuttal of the presumption of motherhood created by the invalid same-sex marriage. Other cases can help to guide us in this analysis.

In *In re Nicholas H.*, the California Supreme Court held that a man who was not biologically related to the child he helped to raise none-

¹⁷⁰ *Id.*

¹⁷¹ *Karen C.*, 124 Cal. Rptr. 2d at 678.

¹⁷² *Id.*

¹⁷³ *Id.* at 679.

¹⁷⁴ *Id.* at 679–81.

¹⁷⁵ *Id.* at 680.

¹⁷⁶ *Karen C.*, 124 Cal. Rptr. 2d at 680.

¹⁷⁷ *Id.* at 681.

¹⁷⁸ CAL. FAM. CODE § 7612(a) (West 2004); *Karen C.*, 124 Cal. Rptr. 2d at 680.

¹⁷⁹ *Karen C.*, 124 Cal. Rptr. 2d at 681.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 683.

theless would be considered a "presumed father" entitled to custody.¹⁸² The presumed father, Thomas, had lived with the boy, Nicholas, and his mother, Kimberly, on and off over a period of several years, beginning while Kimberly was pregnant with Nicholas.¹⁸³ Nicholas's birth certificate identified Thomas as the father.¹⁸⁴ Thomas provided financial support for Nicholas and throughout the years acted as his father.¹⁸⁵ Kimberly had a history of drug use and violence, including an arrest and jail time for felony assault.¹⁸⁶ Shortly after her release, the police placed Nicholas in the custody of the Alameda County Social Services Agency.¹⁸⁷ In a dependency proceeding, the juvenile court placed Nicholas with Thomas and ordered family reunification services for Kimberly.¹⁸⁸ On appeal, the court of appeals held that the presumption of paternity supporting placement with Thomas was rebutted by Thomas's admission that he was not Nicholas's biological father.¹⁸⁹ The California Supreme Court reversed, holding that this was *not* an "appropriate action" to rebut the presumption of parentage provided by the statute.¹⁹⁰ In reaching this conclusion, the court relied on previous cases which had held that "the extant father-child relationship is to be preserved at the cost of biological ties."¹⁹¹ The court emphasized that the social relationship between the father and child was "much more important" to the child than biological paternity.¹⁹² However the court also distinguished cases involving competing claims by candidates vying for parental rights.¹⁹³ In *Nicholas H.*, if the court had allowed rebuttal of Thomas's presumed father status, Nicholas would have been left with no father and a troubled mother.¹⁹⁴

¹⁸² 46 P.3d 932, 941 (Cal. 2002).

¹⁸³ *Id.* at 934-35.

¹⁸⁴ *Id.* at 935.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 934-35.

¹⁸⁷ *Nicholas H.*, 46 P.3d at 934-35.

¹⁸⁸ *Id.* at 936.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 941.

¹⁹¹ *Id.* at 938 (citing *Michelle W. v. Ronald W.*, 703 P.2d 88, 93 (Cal. 1985); *Comino v. Kelley*, 30 Cal. Rptr. 2d 728, 731 (Ct. App. 1994)).

¹⁹² *Nicholas H.*, 46 P.3d at 938 (quoting *Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 124 (Ct. App. 1994) (quoting *Estate of Cornelious*, 674 P.2d 245, 248 (Cal. 1984)) (internal quotations omitted)).

¹⁹³ *Id.* at 936.

¹⁹⁴ *Id.* Nicholas's purported biological father, a man named Jason, had never come forward and the Alameda County Social Services Agency was unable to locate him or establish his paternity. *Id.* at 933, 935.

In *In re Salvador M.*, a California appellate court applied the *Nicholas H.* analysis to a presumed mother case.¹⁹⁵ There, the court declared a woman to be a presumed mother of a child she was raising even though the two were not biologically related.¹⁹⁶ Once again, the issue arose in a dependency case.¹⁹⁷ The petitioner, Monica, was the half-sister of Salvador, the subject of the dependency proceeding.¹⁹⁸ Monica was eighteen when Salvador was born and already had a child of her own.¹⁹⁹ She and their mother, Rosa, cared for both children, and Monica continued to care for Salvador after Rosa was killed when Salvador was three.²⁰⁰ Five years later, Monica was arrested on drug charges, and social services took Salvador into protective custody.²⁰¹ Monica admitted to the social worker that she was Salvador's sister, although Salvador believed she was his mother.²⁰² Monica filed a motion for *de facto* parent status and to establish maternity.²⁰³ The appellate court found that, although Monica had confided to school officials that she was Salvador's sister, she otherwise had held him out to the world as her son, qualifying her for presumed mother status under section 7611 of the California Family Code.²⁰⁴ Unlike in *Karen C.*, the court did not require a remand on the rebuttal question; it ruled that this was not an appropriate action to rebut the presumption.²⁰⁵ The court observed that "[t]he paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family."²⁰⁶ An existing parent-child relationship "is 'considerably more palpable than the biological relationship of actual paternity' and 'should not be lightly dissolved.'"²⁰⁷ The court found no justification for severing the "deeply-rooted mother/child bond" in contravention of the state's interest in preserving the family relationship.²⁰⁸

¹⁹⁵ *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708–09 (Ct. App. 2003).

¹⁹⁶ *Id.* at 709.

¹⁹⁷ *Id.* at 707.

¹⁹⁸ *Id.* at 706.

¹⁹⁹ *Id.*

²⁰⁰ *Salvador M.*, 4 Cal. Rptr. 3d at 706.

²⁰¹ *Id.* at 706–07.

²⁰² *Id.* at 707.

²⁰³ *Id.*

²⁰⁴ *Id.* at 708–09.

²⁰⁵ *Salvador M.*, 4 Cal. Rptr. 3d at 709; *Karen C.*, 124 Cal. Rptr. 2d at 681.

²⁰⁶ *Salvador M.*, 4 Cal. Rptr. 3d at 708.

²⁰⁷ *Id.* (quoting *Nicholas H.*, 46 P.3d at 938).

²⁰⁸ *Id.* at 709.

The policies supporting findings of presumed parenthood in *Nicholas H.* and *Salvador M.*, as well as *Buzzanca*, apply with equal or greater force in the case of a same-sex partner seeking to maintain the parental status acquired by virtue of the same-sex marriage. In our hypothetical case, Sarah has an existing parent-child relationship with Madeleine; indeed, she has acted as Madeleine's primary caretaker since infancy. Their "deeply-rooted" attachment deserves protection and is essential to Madeleine's well-being.²⁰⁹ To allow the denial of Sarah's parental status would deprive Madeleine of her second parent with no alternative candidate available to fill that role.

Some might argue, however, that these precedents are distinguishable. After all, *Nicholas H.* and *Salvador M.* involved dependency proceedings, not custody cases between two fit parents, and the *Nicholas H.* court explicitly differentiated cases in which "another candidate is vying for parental rights and seeks to rebut a § 7611(d) presumption in order to perfect his claim."²¹⁰ Andrea undoubtedly would claim to be such a candidate.

However, the existence of another fit parent does not lessen the devastating impact on Madeleine of destroying Sarah's parental rights. Courts have noted the tremendous harm that can occur to the child when one parent has the power to summarily sever the child's relationship with the other, non-biological, parent. A Pennsylvania court made the following observation:

In this era of artificial insemination, surrogate parenting and in-vitro fertilization, legal rights of a non-biological parent may become fixed by virtue of the parties' actions and the developmental relationship of the child with the parent. To permit one parent to revoke the parentage of the other parent, once these rights have been legally determined . . . invites chaos to the child's emotional well-being and legal status.²¹¹

²⁰⁹ See *Rubano*, 759 A.2d at 975 (stating that "children have a strong interest in maintaining the ties that connect them to adults who love and provide for them" (quoting *V.C.*, 748 A.2d at 550)).

²¹⁰ *Nicholas H.*, 46 P.3d at 941.

²¹¹ *Coburn v. Coburn*, 558 A.2d 548, 552-53 (Pa. Super. Ct. 1989); accord *Sider v. Sider*, 639 A.2d 1076, 1086 (Md. 1994). The *Sider* court stated the following:

"A relationship resulting in bonding and psychological dependence upon a person without biological connection can develop during an ongoing biological parent/child relationship. Particularly is this true when the relationship is developed in the context of a family unit and is fostered, facilitated and, for most of the child's life, encouraged by the biological parent. That

Moreover, cases outside the dependency context likewise have acknowledged the importance, indeed the primacy, of the social relationship and the parent-child bond, even at the expense of biological ties. In numerous cases pitting biological fathers against non-biological fathers who were married to or cohabiting with the mother at the time of conception or birth of the child, the courts have declared that a presumption of parenthood based on biology does not necessarily trump presumed parenthood based on other circumstances.²¹² In several cases, the court ultimately sided with the non-biological fathers.²¹³ Likewise, courts have refused to let biology control in cases even closer to our hypothetical, in which a wife tried to disestablish the paternity of her husband during a divorce.²¹⁴ *Buzzanca*, of course, extended this notion even further. There, the court recognized parental status created by initiating the in vitro fertilization and surrogacy arrangement, even in the absence of an existing

the relationships, one with a known biological parent and the other with an acknowledged, though, in fact, non-biological, parent, progress at the same time, does not render either less viable.”

639 A.2d at 1086 (quoting *Monroe v. Monroe*, 621 A.2d 898, 906 (Md. 1993)).

²¹² *E.g.*, *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535, 538–39 (Ct. App. 1995); *N.A.H. v. S.L.S.*, 9 P.3d 354, 363–64 (Colo. 2000); *Doe v. Doe*, 52 P.3d 255, 262 (Haw. 2002); *Witso v. Overby*, 627 N.W.2d 63, 69 (Minn. 2001); *In re Welfare of C.M.G.*, 516 N.W.2d 555, 560 (Minn. Ct. App. 1994); *cf. Monroe*, 621 A.2d at 904–05 (holding that court must consider variety of factors, including best interests of the child, before ordering blood tests requested by mother to disestablish paternity of husband).

²¹³ *E.g.*, *Michelle W. v. Ronald W.*, 703 P.2d 88, 95 (Cal. 1985); *C.M.G.*, 516 N.W.2d at 561. The California Supreme Court also sided with the non-biological father in the appeal of a dependency petition presenting conflicting presumptions of paternity. *In re Jesusa V.*, 85 P.3d 2, 6 (Cal. 2004).

²¹⁴ *E.g.*, *State v. P.*, 457 N.Y.S.2d 488, 493 (App. Div. 1982) (commenting that “[t]o countenance the wife’s attempt to deny the husband’s paternity after she allowed the husband and [daughter] to develop a father-daughter relationship, would be a cruel and unseemly affront to decency and morality to which the law should not give its imprimatur” and citing cases that refuse to allow biology to control when wife tried to disestablish paternity of husband). Courts in these cases rely on a variety of theories, including the “equitable parent doctrine” and equitable estoppel. *E.g.*, *Titus v. Rayne*, No. CN91-6133, 1992 WL 437586, at *13–14 (Del. Fam. Ct. Nov. 19, 1992) (relying on equitable estoppel theory); *Marriage of Gallagher*, 539 N.W.2d 479, 482 (Iowa 1995) (citing cases relying on equitable estoppel to prevent disestablishment of paternity for biological reasons); *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (relying on equitable parent doctrine); *Commonwealth ex rel. Coburn*, 558 A.2d 548, 551–52 (Pa. Super. Ct. 1989) (relying on equitable estoppel theory). Not all courts have adopted these theories. *E.g.*, *D.G. v. D.M.K.*, 557 N.W.2d 235, 243 (S.D. 1996) (rejecting equitable parent theory); *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 809 (Tex. App. 1992) (rejecting equitable estoppel theory).

parent-child relationship.²¹⁵ Parental status could be created without genetic tie, merely by intending to become a parent.²¹⁶

The idea of using paternity provisions to establish legal motherhood arose in a context closest to our hypothetical in *Rubano v. DiCenzo*.²¹⁷ In *Rubano*, a lesbian co-parent sought visitation with her former partner's biological child, conceived by artificial insemination during the relationship.²¹⁸ After the couple separated, Maureen Rubano filed a petition to establish her *de facto* parent status and to obtain visitation.²¹⁹ She and DiCenzo subsequently agreed to permanent visitation, and the family court entered an order to that effect.²²⁰ DiCenzo reneged on the agreement; Rubano sought to enforce it.²²¹ The family court sought guidance from the Rhode Island Supreme Court as to whether it had jurisdiction to enter the visitation order and whether the non-biological partner had standing to petition for visitation.²²² The court answered both questions in the affirmative.²²³

Initially, the court rejected Rubano's claim for jurisdiction based on "equitable matters arising out of the family relationship" because the family court jurisdiction statute applied only to petitions for divorce or separate maintenance.²²⁴ However, the court found two other independent bases supporting jurisdiction in the family court.²²⁵ It began by evaluating the family court's jurisdiction under Rhode Island's Uniform Law on Paternity ("ULP").²²⁶ The ULP tracks the UPA language discussed earlier, allowing "any interested party" to petition to establish a mother-child relationship and making applicable the

²¹⁵ *Buzzanca*, 72 Cal. Rptr. 2d at 293-94.

²¹⁶ *Id.* at 282; see *Thomas*, 49 P.3d at 307-09 (holding that mother's former domestic partner who acted *in loco parentis* could seek custody of child); *In re Jerry P.*, 116 Cal. Rptr. 2d 123, 125 (Ct. App.) (holding that man never married to mother nor genetically related to child has constitutional right to establish presumed father status when mother or third parties blocked ability to receive child into his home, if he makes substantial efforts to assume parental responsibilities), *superseded by* 46 P.3d 331 (Cal.), *review dismissed and cause remanded by* 53 P.3d 133 (Cal. 2002).

²¹⁷ See 759 A.2d at 970.

²¹⁸ *Id.* at 961.

²¹⁹ *Id.* at 962.

²²⁰ *Id.*

²²¹ *Id.* at 962-63.

²²² *Rubano*, 759 A.2d at 963.

²²³ *Id.* at 965, 967.

²²⁴ *Id.* at 965.

²²⁵ *Id.* at 965-72.

²²⁶ *Id.* at 966.

paternity statutes “insofar as practicable.”²²⁷ An earlier Rhode Island case, *Pettinato v. Pettinato*, had affirmed an award of custody to a non-biological father, deemed a *de facto* father by the court, over the mother’s objections, finding that the mother was estopped from challenging the parental relationship.²²⁸ The court applied the same reasoning to Rubano’s claim, declaring her an “interested party” under the ULP, because she had functioned as a parent, even though she was not biologically related to the child.²²⁹ The court next found a separate and additional ground for family court jurisdiction.²³⁰ Rubano’s claim for visitation fell within “matters relating to adults who shall be involved with paternity of children born out of wedlock.”²³¹ In a footnote, the court noted the obvious—that the word “paternity” typically denoted fatherhood, but also that the legislature had instructed that statutes be construed in a gender-neutral manner.²³² Rubano was “involved with” the child’s paternity because she and DiCenzo jointly planned to bear and to raise the child, because she helped to arrange the insemination procedure and paid for it, because the child’s last name was a hyphenated version of both their surnames, and because Rubano helped raise the child for four years.²³³ Thus, the court found two bases for jurisdiction sufficient to grant her standing to seek adjudication of her parental claims.²³⁴

Clearly, the *Rubano* decision strongly bolsters Sarah’s claim in our hypothetical. She, like Rubano, participated in the planning of the insemination and acted as a parent—indeed, she was the primary caretaker for Madeleine. Of course, *Rubano* would grant Sarah standing to pursue visitation regardless of whether she had ever married Andrea. The marriage, even if deemed invalid because of a DOMA,

²²⁷ *Rubano*, 759 A.2d at 966. This language is identical to California’s. *Id.* at 982 (Bourcier, J., concurring and dissenting).

²²⁸ *Id.* at 967–68 (citing *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990)).

²²⁹ *Id.* at 969.

²³⁰ *Id.* at 970. The court found a basis for superior court jurisdiction as well. *Id.* at 972.

²³¹ *Id.* at 970.

²³² *Rubano*, 759 A.2d at 970. The court noted that it was

mindful of the Legislature’s instruction that when statutes are construed “[e]very word importing the masculine gender only, may be construed to extend to and to include females as well as males.” Thus, two women may certainly be “adults who shall be involved with paternity” of a child for purposes of this statute.

Id. at 970 n.13 (citations omitted) (quoting R.I. GEN. LAWS §§ 4-3-3, 8-10-3(a) (1956)).

²³³ *Id.* at 971.

²³⁴ *Id.* at 977.

nonetheless further buttresses Sarah's claim for *de facto* parent status by giving her a clearly defined alternative basis for standing.²³⁵ The California presumed mother cases and the Rhode Island Supreme Court's willingness to apply the paternity statutes to a same-sex mother's claim provide an avenue for other UPA states to recognize the rights of a same-sex spouse, even if their DOMAs prohibit recognition of the marriage.

Some may claim that these cases stretch the application of the UPA too far.²³⁶ However, they are consistent with the UPA's purpose: the UPA seeks to eliminate discrimination against illegitimate children.²³⁷ As the Hawaii Supreme Court observed, "The fundamental purposes of [the UPA] are 'to provide substantive legal equality for all children regardless of the marital status of their parents' and to protect the rights and ensure the obligations of parents of children born out of wedlock."²³⁸ Children being raised by same-sex couples are to a large degree a new breed of illegitimates, suffering a fate similar to their predecessors born to unwed mothers in prior generations. Both groups have been deprived of a host of rights, benefits, and protections, not the least of which is a continuing relationship with both parents, based solely on their parents' marital status or lack thereof.²³⁹

The UPA offers one way to ameliorate the children's position without running afoul of a DOMA. But a court in a UPA state reluctant to tread this path, as well as courts in non-UPA states, can still recognize the parental rights bestowed on the co-parent by the marriage on a variety of other theories, as the next Section details.

²³⁵ Unlike Rubano, Sarah cannot rely on a written agreement entered into after the relationship dissolved, as Rubano did in seeking to assert her visitation rights. *Id.* at 961-63. Moreover, *Rubano* only considered a claim for visitation, though its reasoning would seem to allow a suit for custody as well. *See id.* at 965-77.

²³⁶ *See id.* at 981-82 (Bourcier, J., concurring and dissenting).

²³⁷ *K.M.*, 13 Cal. Rptr. 3d at 141; *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 55 (Ct. App. 2000); *Doe*, 52 P.3d at 261-62.

²³⁸ *Doe*, 52 P.3d at 261 (quoting H.R. 8-190, Reg. Sess., at 1019 (Haw. 1975)).

²³⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956-57, 964 (Mass. 2003); Debra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 903 (2000); *see* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 436-49 (1999) (discussing benefits enjoyed by children of married parents, denied to children of same-sex couples).

c. *Parental Rights as an Incident of the Marriage*

Sarah can argue first that her claim does not require recognition of the marriage per se. Rather, a court could, and should, recognize one particular incident of the marriage—her status as Madeleine's parent. A number of scholars suggest that courts have the power to distinguish treatment of the marriage from treatment of the incidents of the marriage.²⁴⁰ Case law also supports this approach. For example, in *In re Dalip Singh Bir's Estate*, a California appellate court allowed multiple wives to a polygamous marriage, contracted in India, to inherit from their husband, the decedent, who was domiciled in California for some years leading up to and at the time of his death.²⁴¹ The trial court ruled that under the laws and public policy of California, only the first wife of the decedent would be recognized.²⁴² The appellate court reversed, holding that the public policy which troubled the trial court would be relevant only if the wives had attempted to cohabit with their husband in California.²⁴³ By contrast, "where only the question of descent of property is involved, public policy is not affected."²⁴⁴

Miller v. Lucks took a similar approach in a miscegenation case.²⁴⁵ There, the decedent, a black woman, had married a white man in Mississippi.²⁴⁶ To avoid prosecution under Mississippi's anti-miscegenation law, the couple fled to Illinois, where they married again, legally.²⁴⁷ The husband later claimed to be his wife's sole heir in a probate proceeding

²⁴⁰ Cox, *supra* note 18, at 1062 n.168 (recognizing the power of the courts to distinguish treatment of the marriage from treatment of the incidents of marriage, but arguing against application of the doctrine in same-sex marriage cases); J. David Fine, *The Application of Issue-Analysis to Choice of Law Involving Family Law Matters in the United States*, 26 LOY. L. REV. 31, 33–34 (1980); Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 841–42 (1999); Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It's Due*, 28 RUTGERS L.J. 313, 363–64 (1997). The first *Restatement of Conflict of Laws* provision addressing choice of law in questions of marriage validity leaves room for a state to refuse to recognize a marriage which "offends a community's moral sense," but it also recognizes the harshness of denying an incident of marriage to a legally married couple and urges recognition "unless enjoyment of that incident 'violently offends the moral sense of the community.'" Cox, *supra* note 18, at 1085 (quoting Charles W. Taintor, II, *Marriage in the Conflict of Laws*, 9 VAND. L. REV. 607, 615 (1956)) (emphasis added).

²⁴¹ 188 P.2d 499, 502 (Cal. Dist. Ct. App. 1948).

²⁴² *Id.* at 499.

²⁴³ *Id.* at 502.

²⁴⁴ *Id.*

²⁴⁵ 36 So. 2d 140, 142 (Miss. 1948).

²⁴⁶ *Id.* at 141.

²⁴⁷ *Id.*

brought in Mississippi.²⁴⁸ The court agreed to recognize the marriage only for purposes of inheritance.²⁴⁹ Even though interracial marriage was a criminal offense and prohibited by the state constitution at the time, the court found that the purpose of the statute was to prevent an interracial couple from living together.²⁵⁰ Allowing the husband to inherit would not violate this policy.²⁵¹

These precedents carry particular weight because they involved forms of marriage—polygamous and interracial—that were prohibited widely, in the case of the former, and very strongly opposed, in the case of the latter. Indeed, in his research on the miscegenation precedents, Andrew Koppelman describes the public policy against miscegenation as “exceedingly strong.”²⁵² In *State v. Ross*, the North Carolina Supreme Court described an interracial marriage as “revolting,” yet nonetheless recognized the marriage of the parties, legally contracted in South Carolina.²⁵³

Two questions arise, then: what is the purpose behind the statutes refusing to recognize same-sex marriages and would recognition of Sarah’s parental status violate this policy? Were we actually litigating this case in a particular jurisdiction, we undoubtedly would delve into other sources, including legislative history, to ascertain the policy behind that state’s DOMA. It is enough for our purposes here to canvas the possible justifications for the statutes. Some state DOMAs have codified a statement of purpose.²⁵⁴ For example, Alabama’s Marriage Protection Act states the following:

Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting the unique relationship in order to promote, among other goals, the stability and welfare of society and its children.

. . . .

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 142.

²⁵⁰ *Miller*, 36 So. 2d at 142.

²⁵¹ *Id.*

²⁵² Koppelman, *supra* note 93, at 109.

²⁵³ 76 N.C. 242, 246–47 (1877). Indeed, in language that echoes the arguments against same-sex marriage, “the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural.” Baehr v. Lewin, 852 P.2d 44, 63 (Haw.) (citing *Loving v. Virginia*, 388 U.S. 1, 3 (1967)), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

²⁵⁴ ALA. CODE § 30-1-19(b), (c) (1998); MICH. COMP. LAWS § 551.1 (Supp. 2004) (MICH. STAT. ANN. § 25.1 (Michie Supp. 2000)); TENN. CODE ANN. § 36-3-113(a) (2001).

Marriage is a sacred covenant, solemnized between a man and a woman.²⁵⁵

Tennessee states it somewhat differently:

Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.²⁵⁶

Washington's statute defining marriage as "a civil contract between a male and a female" contains findings affirming a Washington appellate court decision that denied persons of the same sex the right to marry.²⁵⁷ The findings state that "[i]t is a compelling interest of the state of Washington to reaffirm its historical commitment to the institution of marriage as a union between a man and a woman as husband and wife and to protect that institution."²⁵⁸ Other mini-DOMAs contain similar explanations.²⁵⁹

These statements indicate that the DOMAs' chief purpose is to protect and to preserve the separate and exalted status of "marriage" as an institution historically comprised of a man and a woman. The DOMAs do not necessarily manifest a desire to prohibit same-sex partners from obtaining some of the benefits of marriage through other means. The example of California is instructive. In 2000, Californians overwhelmingly voted to approve Proposition 22, declaring that only marriage between a man and a woman would be valid in the state.²⁶⁰ Yet three years later, the legislature enacted A.B. 205, a com-

²⁵⁵ ALA. CODE § 30-1-19(b), (c) (internal numbering omitted).

²⁵⁶ TENN. CODE ANN. § 36-3-113(a).

²⁵⁷ WASH. REV. CODE ANN. § 26.04.010 (West Supp. 2004) (Historical and Statutory Notes: Intent (citing *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974))).

²⁵⁸ *Id.* (Historical and Statutory Notes: Intent (quoting S.H.B. 1130, ch. 1, § 2, 55th Leg., Reg. Sess. (Wash. 1998) (enacted to amend §§ 26.04.010-.020))).

²⁵⁹ See LA. CIV. CODE ANN. art. 86 (West 1999) (Legislative Intent: Traditional Marriage (quoting H.R. 30-124, Reg. Sess. (La. 1996))); MICH. COMP. LAWS § 551.1 (MICH. STAT. ANN. § 25.1); 23 PA. CONS. STAT. ANN. § 1704 (West 2001).

²⁶⁰ Marriage Watch.org, Marriage Law Project, *California Proposition 22*, at <http://marriagelaw.cua.edu/media/prop22.cfm> (last updated Apr. 14, 2004) (stating that 4,618,673

prehensive domestic partnership statute providing virtually all the rights, benefits, and responsibilities of marriage to same-sex partners.²⁶¹ Hawaii's statutes reveal a similar, though less pronounced, dichotomy.²⁶² This inconsistency suggests that the state DOMA's purpose, at least in "category one," may be largely symbolic.²⁶³ Even the

(61.4%) voted in favor, and 2,909,370 (38.6%) against Proposition 22—a twenty-three-point margin).

²⁶¹ See *supra* note 17. A lawsuit challenging A.B. 205 on the grounds that it violates Proposition 22 is pending. *Suit Filed Against Gay Rights Law*, SAN DIEGO UNION-TRIB., Sept. 23, 2003, at A5, 2003 WLNR 13428737. The author of Proposition 22, Pete Knight, also has spearheaded a campaign to repeal A.B. 205 by initiative, an effort unsuccessful so far. *Domestic-Partner Bill May Face Referendum*, SAN DIEGO UNION-TRIB., Oct. 4, 2003, at A6, 2003 WLNR 13439763; Ann Perry, *State Has OK'd Some Rights for Gay Couples*, SAN DIEGO UNION-TRIB., Mar. 7, 2004, at H1, 2004 WLNR 16993121.

²⁶² See HAW. REV. STAT. ANN. §§ 572-1, -3 (Michie 1999). Section 572C-2 of the Hawaii Revised Statutes states the following:

The legislature finds that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman. The legislature further finds that because of its unique status, marriage provides access to a multiplicity of rights and benefits . . . that are contingent upon that status. . . .

However, the legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited . . . from marrying. For example . . . two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

Id. § 572C-2. Pennsylvania evidences a similar perspective through court decisions. Its domestic relations statute stated that it is "the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman" and goes on to deny recognition to same-sex marriages from other jurisdictions. 23 PA. CONS. STAT. ANN. § 1704. Concurrently, however, the Pennsylvania Supreme Court has recognized a lesbian partner's right to seek visitation with the biological child of her partner. See *T.B.*, 786 A.2d at 914. It has also allowed for the possibility of second parent adoptions by same-sex partners. See *In re Adoption of R.B.F. and R.C.F.*, 803 A.2d 1195, 1201–02 (Pa. 2002).

²⁶³ Koppelman, *supra* note 93, at 126–32; see Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (Sosman, J., dissenting) (describing battle over whether civil union would satisfy equal protection under Massachusetts Constitution as "a squabble over the name to be used" and stating that "we have a pitched battle over who gets to use the 'm' word"); cf. Maggie Gallagher, *Massachusetts v. Marriage*, WKLY. STANDARD, Dec. 1, 2003, at 21, 25. Maggie Gallagher noted the following:

What some dismiss as protecting "merely" the word marriage is actually 90 percent of the loaf. If a married couple no longer consists of a husband and wife, we lose the shared meaning of the word; we lose the ability to speak the idea in public and be understood. Such ideas are what culture is made of. . . . The opponents of marriage understand what many of its friends do not: Capturing the word is the key to deconstructing the institution.

last line of the Tennessee statement, referencing the rights and privileges of marriage, would not bar Sarah inexorably from pursuing recognition of the marriage as a basis for parental rights, because parental rights apply to unmarried as well as married persons.²⁶⁴ They are not “unique and exclusive” to marriage.

Other reasons for prohibiting recognition of same-sex marriage might include expressing moral disapproval of those relationships or animus toward gays and lesbians. Of course, statutes enacted for these purposes may well prove unconstitutional under *Lawrence v. Texas* and *Romer v. Evans*.²⁶⁵ Putting aside this constitutional challenge, Sarah could argue, even here, that recognizing her parental rights after the relationship has ended does not express approval of the relationship, because it does not encourage the parties to remain together. Nor does it confer on the parties uniquely spousal benefits. It merely protects the parent-child relationship that has formed, which is consistent with the policy in virtually every state of promoting the best interests of the child.²⁶⁶ Likewise, although these statutes may express prejudice toward gays and lesbians, the overwhelming majority of states today recognize that gays and lesbians can be good parents and will not deprive a gay or lesbian parent of custody or visitation solely based on their sexual orientation.²⁶⁷

Id.

²⁶⁴ See TENN. CODE ANN. § 36-9-113(a) (2001).

²⁶⁵ See *Lawrence*, 539 U.S. at 576–79; *Romer*, 517 U.S. at 635. In *Lawrence*, the U.S. Supreme Court struck down Texas’s anti-sodomy statute, finding that it violated the Due Process Clause because it furthered “no legitimate state interest” which could “justify its intrusion into the personal and private life of the individual.” 539 U.S. at 578. Moral objections to homosexual sodomy would not suffice. *Id.* at 582–83 (O’Connor, J., concurring). Furthermore, Justice Sandra Day O’Connor, concurring, observed that “we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.” *Id.* at 582 (O’Connor, J., concurring). In *Romer*, the Court struck down an amendment to Colorado’s constitution which deprived gays and lesbians of protection under state anti-discrimination laws as a violation of equal protection. 517 U.S. at 623. The provision, “born of animosity toward the class of persons affected,” bore no rational relation to a legitimate state interest. *Id.* at 634–35. See generally Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997) (arguing that the equal protection component of the Fifth Amendment’s Due Process Clause, in light of the *Romer* decision, renders the federal DOMA unconstitutional).

²⁶⁶ See *infra* note 335 and accompanying text (citing and discussing statutory authority concerning the best interest of the child standard and the familial relationship).

²⁶⁷ See *infra* notes 341–343 and accompanying text (discussing state approaches to custody determinations, including the nexus test).

d. *Parental Rights Based on Legitimation*

Alternatively, a same-sex partner could eschew asking the court to grant her parental status as an incident to the marriage. Rather, she would argue that the marriage, whether void in the forum jurisdiction or not, served to legitimate the child born into the relationship and thereby created a legal parent-child relationship. Under this approach, Sarah would argue that the choice of law rules governing parent-child relationships, and legitimacy in particular, should govern the question of her right to seek custody of and visitation with Madeleine.

It has been the case since at least the Roman civil law that marriage conferred legitimacy on children born while the mother was married.²⁶⁸ Indeed, this rule generally was interpreted to establish a conclusive presumption of paternity in the husband of the mother; until fairly recent times, only proof of impotence or non-access could rebut the presumption.²⁶⁹ Therefore, husbands who were not in fact the biological fathers of their children nonetheless were considered to be the legal fathers of those children for all purposes. Even in modern times, this presumption persists and has withstood constitutional challenge.²⁷⁰ Children born out-of-wedlock may be considered illegitimate and have no legal relationship with their father.²⁷¹ Their status can change, however, under certain circumstances. Typically, a father can legitimate his children by later marrying the mother or by certain other legitimating acts, such as acknowledging the child in writing.²⁷² These methods of legitimation vary from state to state. Regardless of the method, legitimation creates a parent-child relationship in the eyes of the law which did not exist previously.²⁷³ Once created, that relationship carries with it all the rights, privileges, and

²⁶⁸ Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 47-48 (2003); Edward R. Armstrong, Note, *Family Law-Putative Fathers and the Presumption of Legitimacy—Adams and the Forbidden Fruit: Clashes Between the Presumption of Legitimacy and the Rights of Putative Fathers in Arkansas*, 25 U. ARK. LITTLE ROCK L. REV. 369, 371-72 (2003).

²⁶⁹ Hubin, *supra* note 268, at 47-50; Armstrong, *supra* note 268, at 372.

²⁷⁰ See *Michael H. v. Gerald D.*, 491 U.S. 110, 131-32 (1989) (upholding California's conclusive presumption of paternity statute).

²⁷¹ Armstrong, *supra* note 268, at 373.

²⁷² See generally C.S. Patrinelis, Annotation, *What Amounts to Recognition Within Statutes Affecting the Status or Rights of Illegitimates*, 33 A.L.R.2d 705 (1954).

²⁷³ *Smith v. Mitchell*, 202 S.W.2d 979, 981 (Tenn. 1947); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287 cmt. a (1971).

responsibilities of legal parenthood, including the right to custody and visitation.²⁷⁴

Sarah's task will be to convince the forum state to recognize the status of legitimacy and the parent-child relationship created by the same-sex marriage, even if it will not recognize the marriage. Precedent supports this approach. In *Peirce v. Peirce*, the Illinois Supreme Court considered a petition to inherit brought by the son of the decedent's second wife.²⁷⁵ The decedent married the petitioner's mother while he was still married to his first wife; his second wife was unaware of his preexisting marriage.²⁷⁶ Although the decedent later divorced his first wife, he did not go through a subsequent formal marriage ceremony with his second wife.²⁷⁷ The petitioner claimed to be legitimate based on the common law marriage that existed in Nevada after the decedent's divorce from his first wife.²⁷⁸ The Illinois Supreme Court agreed, even though Illinois law did not recognize common law marriages contracted in other jurisdictions.²⁷⁹ The court stated the following:

We are not called upon to recognize the common law or however designated marriage of Era Peirce and deceased in Nevada as valid, contrary to the public policy of this State. We do, however, recognize the effect of the attainment of marital status under the laws of Nevada in so far as it operates to make the children legitimate.²⁸⁰

A Pennsylvania case, *In re George Estate*, made the point even more strongly, in a case involving a child of a bigamous marriage, who had been legitimated in Ohio, seeking to take under a trust being administered in Pennsylvania:

²⁷⁴ *Hardy v. Arcemont*, 444 S.E.2d 327, 329 (Ga. Ct. App. 1994). See generally Donald M. Zupanec, Annotation, *Effect, in Subsequent Proceedings, of Paternity Findings or Implications in Divorce or Annulment Decree or in Support or Custody Order Made Incidental Thereto*, 78 A.L.R.3d 846 (1977) (considering the effect of paternity findings and citing relevant cases).

²⁷⁵ 39 N.E.2d 990, 991 (Ill. 1942).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 991-92.

²⁷⁸ *Id.* at 992.

²⁷⁹ *Id.* at 993.

²⁸⁰ *Peirce*, 39 N.E.2d at 993; see *Succession of Caballero v. Executor*, 24 La. Ann. 573, 577 (1872) (recognizing legitimation of child born to interracial couple married in Havana but residing in Louisiana); cf. *Franklin*, 62 N.E. at 83 (citing *Teter v. Teter*, 101 Ind. 129, 137 (1884), and stating that "the presumption in favor of marriage and the legitimacy of children is one of the strongest known to the law, and in favor of a child asserting its legitimacy this presumption applies with peculiar force").

[A] recognition of the legitimacy of Mrs. Downey does not per se involve a recognition of the lawfulness of the acts of the parents or approve of their wrongdoing. The Ohio statute certainly does not condone the parents' conduct. A fortiori a recognition of the status of a child born of a bigamous union does not involve a recognition of the lawfulness of the conduct of the parents. The statute concerns itself simply and exclusively with the rights of innocent children.²⁸¹

The pertinence of this language to our case is clear: a court in a DOMA jurisdiction can view the child as legitimate, and thus the same-sex partner as a legal parent, without recognizing or validating the marriage or condoning the relationship.²⁸²

In some states, Sarah would be able to rely on statutes that address this issue. For example, Illinois prohibits marriage between two individuals of the same sex, but also provides that "children born or adopted of a prohibited or common law marriage are legitimate."²⁸³ Likewise, Montana declares same-sex marriage prohibited, but also provides that "[c]hildren born of a prohibited marriage are legitimate."²⁸⁴ Of course, Andrea might argue that such statutes would not apply because Madeleine was not "born of" the marriage because both parents are not biologically related to her. On the other hand, by that reasoning, children who were conceived by artificial insemination with the putative husband's consent also would not be children "born of the marriage" if the marriage were declared invalid, an interpretation courts seem unlikely to adopt. Moreover, the law has long recognized parenthood created by marriage, rather than biology, in establishing paternity.²⁸⁵

In the absence of specific statutory instruction, courts will look to the choice of law principles operative in their jurisdiction. Although a variety of choice of law regimes exists, as we shall see shortly, the question of legitimacy, like marriage, appears to have developed its own rules apart from the general system governing choice of law in a par-

²⁸¹ 4 Pa. D. & C.2d 334, 338 (Orph. Ct. 1955).

²⁸² *See id.*

²⁸³ 750 ILL. COMP. STAT. ANN. 5/212(a)(5), (c) (West 1999). This provision was enacted subsequent to *Peirce*.

²⁸⁴ MONT. CODE ANN. § 40-1-401(1)(d), (3) (2003); *see* COLO. REV. STAT § 14-2-110 (2003) (declaring children of prohibited marriages legitimate).

²⁸⁵ *See supra* note 147 and accompanying text.

ticular state.²⁸⁶ In most jurisdictions, the legitimacy of the child is determined by the rule of “the personal law of the child” rather than the law where the property is located.²⁸⁷ Identifying the personal law of the child can become quite complicated. Indeed, the American Law Reports annotation on the subject identifies at least ten possibilities;²⁸⁸ however, any of these approaches would lead to the same result in our hypothetical. The personal law of the child for determining the status of legitimacy and thus the existence of the parent-child relationship would be the place where the marriage took place, because that is also the place where Andrea and Sarah were domiciled and Madeleine was born. The *Second Restatement* leads to the same result, declaring that

[t]he child will usually be held legitimate if this would be his status under the local law of the state where either (a) the parent was domiciled when the child’s status of legitimacy is claimed to have been created or (b) the child was domiciled when the parent acknowledged the child as his own.²⁸⁹

²⁸⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. c (1971) (noting that courts have evolved rules accommodating the conflicting values of the general rule in certain areas); *Estate of Ortiz*, 383 N.Y.S.2d 502, 503 (Surrog. Ct. 1976) (applying the prevailing rule that place of a child’s birth determines legitimacy, but using a “center of gravity” or “interest analysis” test for tort and contract disputes).

²⁸⁷ C.C. Marvel, Annotation, *Conflict of Laws as to Legitimacy or Legitimation or as to Rights of Illegitimates, as Affecting Descent and Distribution of Decedent’s Estate*, 87 A.L.R.2d 1274 § 2(a) (1963). Compare *In re Blanco Estate*, 323 N.W.2d 671, 676 (Mich. Ct. App. 1982) (applying “minority rule” which applies law of situs, rather than personal law, to determine who can inherit), and Marvel, *supra*, § 5, with *In re Estate of Dauenhauer*, 535 P.2d 1005, 1006 (Mont. 1975) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, 287–288 (1971); RESTATEMENT OF CONFLICT OF LAWS §§ 137–141 (1934)).

²⁸⁸ The American Law Reports annotation lists the following approaches to identifying the personal law of the child:

- (1) [T]he state in which the marriage is celebrated[;]
- (2) the state in which the father or mother is domiciled (a) at the time of the intermarriage or (b) at the time of the birth of the child[;]
- (3) the state of the birth of the child or (where the alleged ground of legitimation is acknowledgment of the child without intermarriage)[;]
- (4) the state in which the acts of acknowledgment were performed[;]
- (5) the state of the domicile of the father at the time he performed those acts[;]
- (6) the state of domicile of the father at the time of the child’s birth[;]
- (7) the state of the child’s birth or (when the alleged ground of illegitimacy is the invalidity of the marriage, of the parents)[;]
- (8) the state where the marriage was celebrated[;]
- (9) the state where the parents were domiciled at the time of celebration[;]
- (10) the state where the child was born.

Marvel, *supra* note 287, § 2(a).

²⁸⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287(2) (1971).

The rule does leave room for the forum jurisdiction to decline to apply the personal law of the child if it would "contravene . . . public policy or offend against good morals."²⁹⁰ However, courts typically have found that recognition of the status of legitimacy does not offend public policy, even if the marriage would do so, and even in cases involving widely disapproved forms of marriage like bigamy and interracial marriage.²⁹¹ The case of *George Estate*, quoted above, addressed this contention.²⁹² The court there recognized the legitimacy of a daughter born of a bigamous marriage, who would have been considered legitimate in the state of her birth, Ohio, though not if she had been born in the forum state, Pennsylvania.²⁹³ The court identified important policies underlying this result, recognizing a "larger and more far-reaching consideration of public policy" was at stake.²⁹⁴ It hesitated to

ignore the status acquired by Mrs. Downey at birth . . . except under the pressures of much stronger considerations than any existing in this case. . . . [For t]he matter of personal status, lawfully acquired in one jurisdiction, is a thing which ought not to be lightly interfered with or ignored.²⁹⁵

The court provided the following explanation:

"It would be in the highest degree inconvenient if a status of this sort, once established, were liable to fluctuation and change with time, place, or circumstance. Hence, when these relations are once established by the proper law, they remain, in general, fixed and unchangeable, into whatsoever countries the parties may wander, or wheresoever the question may arise."²⁹⁶

²⁹⁰ *George Estate*, 4 Pa. D. & C.2d at 337.

²⁹¹ *Succession of Cabellero*, 24 La. Ann. at 575-77 (involving interracial marriage); *Green v. Kelley*, 118 N.E. 235, 236-37 (Mass. 1918) (exemplifying bigamy); *George Estate*, 4 Pa. D. & C.2d at 338-39; see *Eubanks v. Banks*, 34 Ga. 407, 417-18 (1866) (considering bigamy and citing a case in accord involving incestuous marriage). *Contra In re Bruington's Estate*, 289 N.Y.S. 725, 731 (Sur. Ct. 1936) (refusing to recognize children of bigamous second marriage as legitimate because against public policy).

²⁹² 4 Pa. D. & C.2d at 337-38.

²⁹³ *Id.* at 339.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* (quoting RALEIGH C. MINOR, CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW 212 (1901)).

Granted, we are seeking here not to maintain the status of legitimacy for inheritance purposes, but to afford the parent and child the opportunity to continue their relationship. Some might argue these purposes are distinguishable, and that "stronger considerations" justify a state in refusing to recognize the status created by a same-sex marriage to support a claim for custody or visitation. But what would those considerations be? Possibilities include protecting the biological parent from claims by a partner which infringe upon the parent's constitutional right to control her child's upbringing and expressing the state's disapproval of same-sex marriage. The first concern does not carry weight because one parent does not enjoy superior rights to the child's other parent,²⁹⁷ and our claim is that the marriage created a full-fledged parent-child relationship which survives regardless of the validity of the marriage. By this reasoning, *Troxel v. Granville* should not constitute an unassailable barrier to this approach.²⁹⁸ In *Troxel*, the U.S. Supreme Court struck down a Washington third-party visitation statute which permitted "[a]ny person" to petition for visitation "at any time."²⁹⁹ In a plurality opinion, the Court found the "breathhtakingly overbroad" statute to infringe the parent's fundamental right to rear her children.³⁰⁰ After the death of her children's father, to whom she was never married, Tommy Granville and the paternal grandparents, the Troxels, failed to agree on the grandparents' visitation.³⁰¹ The grandparents petitioned for visitation under the statute, and the trial court granted the petition, finding that visitation was in the children's best interests.³⁰² In the plurality's view, parents are presumed to act in their children's best interests, and their views regarding visitation are entitled to "special weight."³⁰³ The plurality also emphasized that Granville had offered to allow some continued visitation, rather than cut the grandparents off from the children completely.³⁰⁴

The fractured nature of the *Troxel* decision as well as the narrowness of its holding have created much uncertainty about the parame-

²⁹⁷ See, e.g., ALA. CODE § 30-3-2(a) (1989); GA. CODE ANN. § 19-9-3(a)(1) (1998); IND. CODE § 31-17-2-8 (2003); VA. CODE ANN. § 20-124.2(B) (Michie 2000).

²⁹⁸ See generally 530 U.S. 57 (2000).

²⁹⁹ *Id.* at 67-68.

³⁰⁰ *Id.*

³⁰¹ *Id.* at 60-61.

³⁰² *Id.* at 61.

³⁰³ *Troxel*, 530 U.S. at 69-70.

³⁰⁴ *Id.* at 71.

ters of third-party visitation.³⁰⁵ Our claim here, though, is that Sarah seeks custody or visitation not as a third party, but as a co-equal parent based on the parent-child relationship created by the marriage, even if invalidated.³⁰⁶ Indeed, if the marriage renders Sarah a parent, the state has just as much interest in protecting her constitutional rights as Andrea's, suggesting that recognition of Sarah's rights, rather than obliteration of them, would better serve the state's goal. Moreover, the primary concern of the *Troxel* plurality—the risk of an unwarranted intrusion into the parents' fundamental right to make decisions regarding their children—simply is not implicated in this situation. In our hypothetical case, the biological parent already has ceded her exclusive parental role by marrying her partner, conceiving a child, and raising the child together.³⁰⁷ As the Rhode Island Supreme Court noted in recognizing standing of a lesbian co-parent to enforce a visitation agreement with the biological mother in *Rubano*, "Di-Cenzo rendered her own parental rights with respect to this boy less exclusive and less exclusory than they otherwise would have been had she not by word and deed allowed Rubano to establish a parental bond with the child and then agreed to allow reasonable visitation."³⁰⁸ By contrast, Tommy Granville never had agreed to nor had encouraged the Troxels' assumption of a parental role with her children, nor had they assumed such a role.³⁰⁹ As Nancy Polikoff has observed,

³⁰⁵ Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 371, 392–407 (2002); James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 973–78 (2003); Rachel Ary, Note, *Troxel v. Granville: The Constitutionality of State Statutes Permitting Third-Parties to Petition for Visitation with a Child*, 30 CAP. U. L. REV. 409, 410–11 (2002); see *infra* notes 441–452 and accompanying text (discussing co-parent's right to seek custody or visitation as a third party).

³⁰⁶ See *Rideout v. Riendeau*, 761 A.2d 291, 303 (Me. 2000) (finding constitutional the awarding of visitation to grandparents acting as parents based on best interests standard); *Liebner v. Simcox*, 834 A.2d 606, 612 (Pa. Super. Ct. 2003) (concluding *Troxel* not controlling when person acting *in loco parentis* seeks visitation); *Rubano*, 759 A.2d at 974–77 (holding that biological parent's agreement to have lesbian partner assume *de facto* parent status supported standing for partner to seek visitation). *But see In re Nelson*, 825 A.2d 501, 504 (N.H. 2003) (declining to equate third person acting *in loco parentis* with natural or adoptive parent).

³⁰⁷ See *Parentage of L.B.*, 89 P.3d at 285 (noting that when legal parent consents to and fosters another's development of parent-child relationship, parent's constitutional rights not infringed).

³⁰⁸ 759 A.2d at 976.

³⁰⁹ In addition, Granville had not terminated all visitation with the Troxels. In the typical co-parenting dispute, one parent has cut off all visitation with the other. See *supra* notes 125–127 (citing cases).

Troxel does not define parenthood nor affect the ability of states to do so. Legally unrecognized lesbian mothers are parents. Such recognition obviates any possible "third party" problem within the meaning of *Troxel*; it guarantees equal status for both parents, not a lesser status that confers lesser rights and responsibilities.³¹⁰

The argument is even stronger in our situation, for our co-parent *was* a legally recognized parent in her home state. Consequently, recognizing Sarah's parental rights does not offend the policy of protecting a parent's fundamental rights.

The second possible concern—expressing disapproval of gay relationships—even if permissible, cannot outweigh the critical need for certainty in this area.³¹¹ Indeed, the arguments in favor of recognizing the status of legitimacy and the parent-child relationship are much more compelling in this context than in the question of inheritance. In those cases, only money is at stake. In these cases, failure to recognize the relationship likely will leave both a child and a parent emotionally scarred, in addition to depriving the child of the crucial and more tangible benefits of the parent-child relationship, such as child support, health benefits, and the right to inherit from the second parent.

e. *Parental Rights Under the Choice of Law Regimes*

Many of these arguments also apply if we move beyond the legitimation cases to consider the analysis under broader choice of law systems. Our task would be made simpler if states adhered to one particular approach in deciding choice of law questions. Unfortunately, no such consensus exists. States may apply one of at least four different approaches to deciding these questions.³¹²

The first *Restatement of the Conflict of Laws* ("First Restatement") sets forth rigid, mechanical rules for deciding choice of law questions in an effort to establish guidelines outside the forum's substantive law.³¹³

³¹⁰ Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 834 (2001); see Dolgin, *supra* note 305, at 401–02 (describing cases of *de facto* parents as "easily distinguished" from *Troxel*).

³¹¹ See *supra* notes 265–267 and accompanying text (discussing animus toward gays as a justification for denying recognition to the marriage); *infra* notes 340–343 and accompanying text (discussing shift in family law toward acceptance of gay parents generally).

³¹² Scholars have grouped the states in different ways. Compare Cox, *supra* note 18, at 1083–97 (identifying four approaches), with Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1115–16 (1987) (identifying six approaches currently in use).

³¹³ Cox, *supra* note 18, at 1084.

These guidelines were based on a "vested rights" theory which saw the forum court's role as "enforc[ing] existing rights created under that foreign law."³¹⁴ Followed by approximately fifteen states, the *First Restatement* provides that the forum state should apply the law of the place "where the key event leading to the plaintiff's cause of action occurred."³¹⁵ In this case, the key event was the creation of the parent-child relationship, albeit through the marriage.³¹⁶ Under the *First Restatement*, states may refuse to enforce another state's law which violated the forum state's public policy,³¹⁷ but the policy analysis above would apply here as well and should lead to the conclusion that recognition of parental rights does not offend public policy.³¹⁸

The *Second Restatement*, followed by approximately half the states, sets forth a multifactorial analysis to determine choice of law.³¹⁹ In the absence of statutory directive, the court seeks to identify the state with the most significant relationship by considering the following:

- (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.³²⁰

How do these factors apply to the recognition of the same-sex partner's parental rights in a jurisdiction which does not otherwise recognize the marriage?

One need of the interstate and international systems in this context is to ensure a system that works well and that fosters "harmonious relations between states."³²¹ A rule that requires recognition of parental rights granted by one state, in another, would facilitate these goals by providing uniformity. Some might argue, though, that it would undermine harmonious relations by forcing states opposed to same-sex

³¹⁴ *Id.*

³¹⁵ *Id.* at 1083-84.

³¹⁶ *Cf. Holmes v. Traweek*, 577 S.E.2d 777, 779 (Ga. 2003) (noting that unwed mother entitled to custody has "vested right" in relationship with her child).

³¹⁷ Fruehwald, *supra* note 240, at 818.

³¹⁸ *See supra* notes 294-310 and accompanying text.

³¹⁹ Cox, *supra* note 18, at 1096.

³²⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

³²¹ *Id.* § 6.2 cmt. d.

marriage to allow it. While that argument might have some force in questions involving the validity of the marriage per se, it has much less currency when dealing with the parental rights question. In the latter case, while most states do not recognize same-sex partners as legal parents, neither do they have statutes explicitly expressing a policy against such rights.

We have already discussed two possible relevant policies of the forum—protecting the biological parent's rights and disapproving of same-sex relationships. In addition, the forum might have an interest in avoiding unequal treatment of its domiciles. The forum would be awarding parental rights to a same-sex partner who had married in Massachusetts or Canada, but now lived in the forum, while citizens of the forum could not obtain similar rights. This disparity might encourage more evasory marriages, as citizens of the forum state seek to acquire parental rights by marrying in Massachusetts or Canada.

The next factor considers the relevant policies and interests of other interested states.³²² In our hypothetical, the state where the marriage took place and where all parties were domiciled at the time and remained for some time thereafter certainly would qualify as another interested state. Massachusetts's policy in allowing same-sex marriage is clear—to ensure equality for its citizens under the Massachusetts Constitution.³²³ The court stated the following:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.³²⁴

Moreover, the court specifically highlighted the disadvantages that the same-sex marriage ban works on children:

Excluding same-sex couples from civil marriage . . . prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized."

. . . .

³²² See *supra* note 320 and accompanying text.

³²³ *Goodridge*, 798 N.E.2d at 949.

³²⁴ *Id.* at 968.

... It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.³²⁵

Similar concerns motivated the Canadian courts to legalize same-sex marriages.³²⁶ In ruling that the ban on same-sex marriage violated the equality rights of same-sex couples under the Canadian Charter of Rights and Freedoms, the Ontario Court of Appeal found that excluding same-sex couples from the "fundamental social institution" of marriage discriminates because it "perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships."³²⁷ The court further noted that same-sex couples have children and that they "should be able to benefit from the same stabilizing institution as their opposite-sex counterparts."³²⁸

Some might argue that once the parties leave Massachusetts or Canada and make their domicile elsewhere, the interest of those jurisdictions wanes. In fact, the jurisdiction's interests are more enduring. First, Massachusetts's and Canada's interest in securing equality for their citizens supports interstate recognition of the partner's parental rights because an opposite-sex spouse in the same position would enjoy such rights.³²⁹ Second, Massachusetts and Canada, as stated above, have a strong interest in the welfare of children within their jurisdiction, and continuing uncertainty regarding the durability of parental rights afforded by marriage to a same-sex couple would not further children's best interests.³³⁰ Partners whose rights are vulnerable might refrain from fully assuming their parental role, for fear that their rights could be easily abrogated by a move elsewhere. In addition, uncertainty puts the child at risk of abandonment by the partner, without repercussions. A partner who had been the sole support for a child born into the marriage, for example, could deliberately move to a state that does not recognize the marriage and thereby potentially insulate herself from

³²⁵ *Id.* at 964 (citation omitted) (quoting *id.* at 325 (Cordy, J., dissenting)).

³²⁶ *Halpern v. Canada* (Att'y Gen.), [2003] 225 D.L.R. (4th) 529, 561-62 (Ont. Ct. App.).

³²⁷ *Id.*

³²⁸ *Id.* at 567.

³²⁹ See *Opinions of the Justices*, 802 N.E.2d at 576 (Sosman, J., dissenting) (pointing out that lack of recognition in other jurisdictions "is a difference that gives rise to a vast assortment of highly tangible, concrete consequences" which means same-sex couples who marry will continue to have "a different status").

³³⁰ See *supra* notes 325-328 and accompanying text.

claims for child support.³³¹ A child might even find herself orphaned if the biological parent died and the forum state refused to recognize the partner as a parent.³³²

The next factor—the protection of justified expectations—argues strongly in favor of recognizing parental rights. On the one hand, someone who is deemed a legal parent under the law surely would expect to maintain that status, regardless of where she lived.³³³ On the other hand, the precariousness of same-sex marriage in light of the federal DOMA, the state DOMAs, and a proposed amendment to the Constitution might suggest that any expectations regarding interstate recognition of rights afforded by the marriage would not be justified.³³⁴ While this argument might have some currency for the parents, it fails to address the expectations that are most critical here—the child's. A child of a same-sex marriage would likely have no inkling that the status of one of her parents could be challenged if she moved to another state.

The child's needs likewise lie at the heart of the next factor—the underlying policies of the field of law. First, in every state, one can find declarations that the “best interests of the child” are paramount in a variety of contexts concerning the parent-child relationship.³³⁵

³³¹ She would not succeed in evading her responsibilities in all circumstances. The Uniform Child Custody Jurisdiction and Enforcement Act, adopted in Massachusetts, provides for expansive long-arm jurisdiction enabling child support orders to be entered against certain out-of-state parents. MASS. GEN. LAWS ch. 209B, §§ 2, 7 (2002); see JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 9.06[F][3][b], [4] (2d ed. 2001) (discussing interstate child support enforcement mechanisms).

³³² Cf. *Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993) (noting that where one parent dies, children of lesbian relationships “often remain in legal limbo for years while their future is disputed in the courts”); *Roberson v. Pickett*, 900 S.W.2d 112, 114 (Tex. App. 1995) (affirming that under the Texas Family Code, a child without a legally recognized father was orphaned when the mother died).

³³³ Cf. *K.M.*, 13 Cal. Rptr. 3d at 151 (commenting that “[t]he law requires a fixed standard that gives prospective parents some measure of confidence in the legal ramifications of their procreative actions”).

³³⁴ See S.J. Res. 26, 108th Cong. (2003).

³³⁵ See, e.g., *J.A.H. v. Calhoun County Dep't of Human Res.*, 865 So. 2d 1228, 1231–32 (Ala. Civ. App. 2003); *M.W. v. Dep't of Health & Soc. Servs.*, 20 P.3d 1141, 1144 (Alaska 2001); *State v. Bean*, 851 P.2d 843, 845 (Ariz. Ct. App. 1992); *Blackwood v. Floyd*, 29 S.W.3d 694, 696 (Ark. 2000); *In re J.C.*, 128 Cal. Rptr. 2d 671, 677 (Ct. App. 2002); *N.A.H.*, 9 P.3d at 357; *Ford v. Ford*, 789 A.2d 1104, 1111, 1113 (Conn. App. Ct. 2002); *In re A.H.*, 842 A.2d 674, 684 (D.C. 2004); *Rose v. Ford*, 861 So. 2d 490, 493 (Fla. Dist. Ct. App. 2003); *Bodne v. Bodne*, 588 S.E.2d 728, 729 (Ga. 2003); *Doe v. Doe*, 44 P.3d 1085, 1096–97 (Haw. 2002); *Roberts v. Roberts*, 64 P.3d 327, 329–30 (Idaho 2003); *In re Marriage of Collingbourne*, 791 N.E.2d 532, 544 (Ill. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1255, 1257 (Ind. Ct. App. 2004); *In re K.C.*, 660 N.W.2d 29, 33, 35 (Iowa 2003); *In re Marriage of Rayman*, 47 P.3d 413, 415 (Kan. 2002); *Amin v. Bakhty*, 798 So. 2d 75, 82–83 (La. 2001); *Rodrigue v.*

Second, most, if not all, states have expressed a policy in favor of "frequent and continuing contact with both parents."³³⁶ Third, family law seeks to promote stability and continuity of family relationships.³³⁷ Fourth, family law prefers two parents, rather than one, when possible.³³⁸ Fifth, family law aims to encourage parental responsibility.

Brewer, 667 A.2d 605, 606 (Me. 1995); *Stubbs v. Colandrea*, 841 A.2d 361, 370 (Md. Ct. Spec. App. 2004); *In re Custody of Kali*, 792 N.E.2d 635, 639-42 (Mass. 2003); *Winn v. Winn*, 593 N.W.2d 662, 690 (Mich. Ct. App. 1999), *vacated and remanded by* 595 N.W.2d 826 (Mich. 1999); *In re Welfare of J.R.*, 655 N.W.2d 1, 5 (Minn. 2003); *In re Adoption of D.N.T.*, 843 So. 2d 690, 719 (Miss. 2003) (Graves, J., dissenting); *Harmon v. Headley*, 95 S.W.3d 154, 159 (Mo. Ct. App. 2003); *In re A.F.*, 77 P.3d 266, 269 (Mont. 2003); *Claborn v. Claborn*, 673 N.W.2d 533, 540 (Neb. 2004); *In re Guardianship of D.R.G.*, 62 P.3d 1127, 1132 (Nev. 2003); *In re Pasquale*, 777 A.2d 877, 879-80 (N.H. 2001); *In re State ex rel. Children Youth & Families Dep't*, 32 P.3d 790, 796 (N.M. Ct. App. 2001); *In re Marino S.*, 795 N.E.2d 21, 27 (N.Y. 2003), *cert. denied*, 540 U.S. 1059 (2003); *In re Shepard*, 591 S.E.2d 1, 5 (N.C. Ct. App. 2004), *review denied sub nom.*, *In re D.S.*, 599 S.E.2d 42 (N.C. 2004); *Peek v. Berning*, 622 N.W.2d 186, 189 (N.D. 2001); *Willis v. Willis*, 775 N.E.2d 878, 889 (Ohio Ct. App. 2002); *In re Baby Girl L.*, 51 P.3d 544, 554-55 (Okla. 2002); *In re Marriage of Compton*, 33 P.3d 369, 372-73 (Or. Ct. App. 2001); *Liebner*, 834 A.2d at 610; *Africano v. Castelli*, 837 A.2d 721, 728 (R.I. 2003); *Doe v. Ward Law Firm*, 579 S.E.2d 303, 307 (S.C. 2003); *In re Guardianship of T.L.R.*, 645 N.W.2d 246, 250 (S.D. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 149 (Tenn. 2002); *In re Shockley*, 123 S.W.3d 642, 652 (Tex. App. 2003); *In re Adoption of B.T.D.*, 68 P.3d 1021, 1029 (Utah Ct. App. 2003); *Habecker v. Giard*, 820 A.2d 215, 219 (Vt. 2003); *Norfolk Div. of Soc. Servs. v. Hardy*, 593 S.E.2d 528, 532 (Va. Ct. App. 2004); *In re Placement of R.J.*, 5 P.3d 1284, 1287, 1288 (Wash. Ct. App. 2000); *Hager v. Hager*, 591 S.E.2d 177, 181 (W. Va. 2003) (Davis, J., dissenting); *In re Termination of Parental Rights to Prestin T.B.*, 648 N.W.2d 402, 410-12 (Wis. 2002); *Drake v. McCulloh*, 43 P.3d 578, 584 (Wyo. 2002).

³³⁶ CAL. FAM. CODE § 3004 (West 2004); *accord* ALA. CODE § 30-3-150 (1998); ALASKA STAT. § 25.20.060 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-408 (West 2000); ARK. CODE ANN. § 9-13-101(b)(1)(B) (Michie Supp. 2003); COLO. REV. STAT. § 14-10-124 (2003); D.C. CODE ANN. § 16-914 (Supp. 2004); FLA. STAT. ANN. § 61.13(2)(b)(1) (West Supp. 2004); IDAHO CODE § 32-717B (Michie 1996); IOWA CODE ANN. § 598.41 (West 2001); LA. REV. STAT. ANN. § 9:335 (West 2000); MISS. CODE ANN. § 93-5-24(5)(c) (2004); MO. ANN. STAT. § 452.375 (West 2004); OHIO REV. CODE ANN. § 3109.051 (West 2000); OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 2004); 23 PA. CONS. STAT. ANN. § 5302 (West 2001); UTAH CODE ANN. § 30-3-10 (Supp. 2004); VA. CODE ANN. § 20-124.2(B) (Michie 2004).

³³⁷ *E.g.*, ARIZ. REV. STAT. ANN. § 8-515.03 (West Supp. 2004); ARK. CODE ANN. § 9-28-601 (Michie 2002); 750 ILL. COMP. STAT. ANN. 405/1-3 (West Supp. 2004); MONT. CODE ANN. § 40-4-212 (2003); NEB. REV. STAT. ANN. § 43-1308 (Michie 1999); OHIO REV. CODE ANN. § 3107.161; OKLA. STAT. ANN. tit. 10, § 1116.3; 23 PA. CONS. STAT. ANN., ch. 53, subch. B, Uniform Law Comments Prefatory Note; UTAH CODE ANN. § 30-3-33.

³³⁸ *E.g.*, *Sharon S. v. Superior Court*, 73 P.3d 554, 568-69 (Cal. 2003), *cert. denied*, 540 U.S. 1220 (2004); *Jacob*, 660 N.E.2d at 399; *see* Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 49 (2003); Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 301 (1998); Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER SOC. POL'Y & L. 183, 236 n.248 (1995); Kathryn E. Kovacs, *Recognizing Gay and Lesbian Families: Marriage and Parental Rights*, 5 LAW & SEXUALITY 513, 537 (1995); Ira

Every state has laws providing that both parents have an obligation to provide financial support, and parents who willfully fail to provide such support or otherwise neglect or abuse their children can be subject to criminal penalties.³³⁹

The only policies that potentially undercut the claim for recognition are those preferring heterosexual parents and protecting the rights of biological or adoptive parents against third parties. As already discussed, the latter does not apply, because our hypothetical partner Sarah is not a third party, but rather a parent, and the biological parent freely consented to her acquisition of parental rights by marrying her.³⁴⁰ The former policy has weakened considerably in most jurisdictions. While in the past, many jurisdictions discriminated openly against gay and lesbian parents in custody determinations, today most states take sexual orientation into account only if the other parent demonstrates a nexus between the parent's sexual conduct and harm to the child.³⁴¹ A smaller group of states allows the courts to consider the conduct, but does not require a denial of custody.³⁴² Only a handful of states retain a rule that homosexuality renders a parent per se unfit. Moreover, these states may well soften their stance in light of *Lawrence*, because the basis for the rule in the past has been, at least in part, that homosexual conduct was a crime in these jurisdictions.³⁴³

C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1332 (1994); Susan C. Stevenson-Popp, "I Have Loved You in My Dreams": *Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U. L. REV. 727, 736 (2003).

³³⁹ LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 680-82 (2d ed. 2000); Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 13 (2003); Laure Ashley Culbertson, Comment, *Article 613 of the Louisiana Children's Code: Child Abuse Investigations in the Twilight of the Fourth Amendment*, 55 LA. L. REV. 361, 363 (1994).

³⁴⁰ See *supra* notes 297-310 and accompanying text (distinguishing *Troxel*).

³⁴¹ NAT'L CTR. FOR LESBIAN RIGHTS, *CUSTODY CASES INVOLVING LESBIAN AND GAY PARENTS: AN INFORMATION SHEET* (2000), available at <http://www.nclrights.org/publications/pubs/cc1000.pdf> (last updated Oct. 1, 2000); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 635 & n.67 (1996).

³⁴² Shapiro, *supra* note 341, at 639.

³⁴³ The states that retain a rule that homosexuality renders a parent per se unfit are Alabama, Mississippi, Missouri, and Virginia. See *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (citing ALA. CODE § 13A-6-65 (1975), which made deviate sexual conduct a misdemeanor, to support change in custody back to former husband from lesbian mother); *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998) (citing ALA. CODE § 13A-6-65(a)(3), which made lesbianism illegal, to restrict lesbian mother's visitation and to uphold custody award to father); *L. v. D.*, 630 S.W.2d 240, 243-45 (Mo. Ct. App. 1982) (citing MO. REV. STAT. § 566.090(3) (1979), which made "deviate sexual intercourse with another person of the same sex" a crime, in upholding custody award and visitation arrangement in favor of fa-

The next factor—certainty, predictability, and uniformity—points toward recognition of the parent-child relationship. Courts have long acknowledged the importance of providing certainty for marriages because of the rights to property, benefits, and legitimacy bound up with that status.³⁴⁴ The need for certainty and predictability is even more compelling for this issue. Here, as we have seen, a child's emotional as well as financial well-being is at stake. Whatever risks the parents face should the marriage not be recognized pale in comparison to the damage a child will suffer if cut off permanently from one of her parents. Nor would a rule of non-recognition serve these goals because, as discussed in the previous Section, the states without DOMAs likely will view the marriage as valid. Indeed, refusal to recognize the partner's parental status would encourage forum shopping; a biological parent wishing to ensure no claims for custody or visitation by the other parent could purposely move to a jurisdiction where neither the marriage nor the spouse's parental rights would be recognized. It seems clear, however, from a choice of law perspective that neither rule would lead to absolute certainty, predictability, or uniformity because states with either "category two" or super-DOMAs will follow a statutory directive likely requiring non-recognition.³⁴⁵ This dilemma should not prove dispositive in "category one" DOMA jurisdictions. As comment (i) to section 6 of the *Second Restatement* acknowledges, courts should aim to develop a good rule of law, rather than adhere to existing rules for the sake of uniformity.³⁴⁶

The last factor—ease and determination of the law to be applied—supports Sarah's claim. Identifying Sarah as a parent need not require complicated legal analysis. The court merely needs to ascertain that she and Andrea married in Massachusetts or Canada and that the spouse of a woman artificially inseminated is deemed a legal parent of the resulting child for all purposes. Analysis of the factors listed in section 6 of the *Second Restatement* thus leads to the conclu-

ther against lesbian mother); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (citing VA. CODE ANN. § 18.2-361 (1950), which made homosexual conduct a felony, to support custody award to grandparent against lesbian mother); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (citing VA. CODE ANN. § 18.2-361 (1950) in support of custody award to mother against homosexual father); NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 341.

³⁴⁴ *Doe v. Roe*, 704 P.2d 940, 942 (Haw. Ct. App. 1985) (referencing and quoting *Cleveland v. Cleveland*, 559 P.2d 744, 748 (Haw. 1977), which "deem[ed] the certainty of marital status to be an important public policy," and "held that the 'policy of finality with respect to decrees terminating marriage . . . is strongly expressed in the statutes'").

³⁴⁵ See *infra* notes 388–389, 439 and accompanying text.

³⁴⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. i (1971).

sion that even a state which has declared it will not recognize a same-sex marriage can apply Massachusetts or Canadian law and acknowledge Sarah's right, as a parent, to seek custody or visitation with the child she planned for and parented since birth.

While no case law yet exists analyzing this question under the *Second Restatement* approach (or any other), a Nevada court has confronted a choice of law question concerning parental status.³⁴⁷ *Hermanson v. Hermanson* involved a custody dispute between a husband and wife who were divorcing.³⁴⁸ Cindy married her husband, David, in California, when she was six-months pregnant with a child by another man.³⁴⁹ The couple lived together on and off for the first three years of the child's life, in a volatile relationship marked by domestic violence perpetrated by David against Cindy.³⁵⁰ Cindy and James, the child, subsequently moved to Iowa where she raised James alone.³⁵¹ When James was eight, Cindy moved to Las Vegas where she and David attempted a reconciliation which lasted only a month.³⁵² Cindy filed for divorce, alleging that there was no issue of the marriage, even though David was named as the father on James's birth certificate.³⁵³ David sought to be declared the father and to obtain visitation rights.³⁵⁴ Blood tests subsequently proved conclusively that David was not James's biological father.³⁵⁵ Nonetheless, the trial court held that David was conclusively presumed to be David's father based on the California Evidence Code.³⁵⁶ After a trial, the court awarded David joint legal custody and liberal visitation rights.³⁵⁷ On appeal, the Nevada Supreme Court reversed, ruling that the trial court erred in applying California law, even though the parties married there and James was born there.³⁵⁸ The court acknowledged that some courts determine paternity according to the law of the child's birthplace.³⁵⁹ It chose, instead, to apply the substantial relationship test: it would apply the law of the state which had a substantial relationship with the

³⁴⁷ *Hermanson v. Hermanson*, 887 P.2d 1241, 1243 (Nev. 1994).

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 1242.

³⁵⁰ *Id.* at 1243.

³⁵¹ *Id.*

³⁵² *Hermanson*, 887 P.2d at 1243.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Hermanson*, 887 P.2d at 1243.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 1244 n.2.

transaction if the transaction did not violate a strong public policy of Nevada.³⁶⁰

On its face, this precedent would seem to undercut Sarah's claim. To the extent *Hermanson* stands for the proposition that a forum court need not recognize parental rights lawfully acquired elsewhere, she would argue that it was wrongly decided. However, a closer look at the case suggests that it does not yield such a sweeping claim and can be distinguished from our hypothetical case. First, the evidence code section on which David relied had been repealed, bringing California's public policy in line with Nevada's policy.³⁶¹ In both states, the presumption of paternity could be rebutted.³⁶² The court specifically found that Nevada's public policy gave the child a right to bring a paternity action up until three years after the age of majority; in its view, that right should not be abridged by a repealed California statute.³⁶³ The court thus implicitly found that there was no existing conflict between California and Nevada law.³⁶⁴ Indeed, if the divorce had been heard in California, the outcome may have been the same.³⁶⁵ Although the court did not discuss specifically the remaining *Second Re-*

³⁶⁰ *Id.* at 1244.

³⁶¹ *Id.* at 1244 n.3.

³⁶² *Hermanson*, 887 P.2d at 1244 n.3.

³⁶³ *Id.* at 1244.

³⁶⁴ *See id.*

³⁶⁵ The repeal of section 621 of the California Evidence Code actually did not abolish the conclusive presumption of paternity; it remains codified at section 7540 of the California Family Code. CAL. EVID. CODE § 621 (West Supp. 1991) (current version at CAL. FAM. CODE § 7540 (West 2004)). However, the presumption now can be rebutted by the mother if she brings a motion within two years of the birth of the child and the biological father has acknowledged paternity. CAL. FAM. CODE § 7541(c). Although David Hermanson might have argued that neither of these conditions were met, he would not have prevailed because he could not rely on the conclusive presumption in the first instance. That presumption applies only if the child is conceived when the husband and mother are married and cohabiting. *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 298 (Ct. App. 2000). Here, the parties married when the mother was already pregnant. *Hermanson*, 887 P.2d at 1242. Even without the benefit of the conclusive presumption, however, David Hermanson would have been deemed a presumed father under section 7611 of the California Family Code. *See* CAL. FAM. CODE § 7611. The Nevada Supreme Court appears to have erred, however, when it concluded that this presumption of paternity could be rebutted "at any time." *See Hermanson*, 887 P.2d at 1244. Section 7630 of the California Family Code provides that an action to declare the "nonexistence of the father and child relationship" may be brought only if "within a reasonable time after obtaining knowledge of relevant facts." CAL. FAM. CODE § 7630. In *Hermanson*, the mother claimed that the husband knew from the start that he was not the child's biological father. 887 P.2d at 1242. However, California courts might nonetheless have refused to apply the presumption, finding that its underlying policies were not served, which they have done on occasion. *See, e.g., Steven W.*, 39 Cal. Rptr. 2d at 538-39; *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d 797, 799 (Ct. App. 1993).

statement factors, in addressing a claim by the husband for parental status based on equitable estoppel, the court made other salient points which distinguish the case from our hypothetical.³⁶⁶ In *Hermanson*, the husband had not had contact with the child for some years, except for the attempted one-month reconciliation prior to the filing for divorce.³⁶⁷ Nor had he paid any significant support for the child.³⁶⁸ In essence, he appeared at best to have acted as a stepparent many years prior to the adjudication.³⁶⁹ By contrast, in our hypothetical, the non-biological parent undertook parental caretaking functions and provided support for the child throughout the child's life until her spouse moved out.

The other two types of choice of law regimes include Brainerd Currie's "governmental interest analysis" and Robert Lefflar's "choice-influencing considerations" or "better rule of law" analysis.³⁷⁰ Few states follow the governmental interest analysis.³⁷¹ Of these, only California would fall within the category of cases we are discussing in this Section. Under the governmental interests analysis, cases either present false conflicts, true conflicts, or unprovided-for cases.³⁷² One commentator suggests that any case in which both parties are now domiciliaries of the forum presents a false conflict.³⁷³ This approach would allow the forum to apply its law to our hypothetical situation.³⁷⁴ However, no California case explicitly declares that a true conflict requires parties with different domiciles. Our situation, where the parent-child relationship was formed in another state, might yield a "true conflict" if both states have an interest in the case and if the applicable state laws differ.³⁷⁵ If a true

³⁶⁶ See *Hermanson*, 887 P.2d at 1244-45.

³⁶⁷ *Id.* at 1245.

³⁶⁸ *Id.* Although not technically germane to either the choice of law or equitable estoppel claims, the history of violence perpetrated by David provides an additional reason to avoid finding the husband to be the child's legal father.

³⁶⁹ See *id.* at 1243, 1245.

³⁷⁰ Cox, *supra* note 18, at 1083.

³⁷¹ Barbara Cox identifies four states that follow the government interest analysis—California, Hawaii, Massachusetts, New Jersey. *Id.* at 1093. Hawaii, however, appears to follow the significant relationship or the *Restatement (Second) of Conflict of Laws* approach, and Massachusetts appears to follow Robert Lefflar's rule. See *Roxas v. Marcos*, 969 P.2d 1209, 1235 n.16 (Haw. 1998); *Lewis v. Lewis*, 748 P.2d 1362, 1365 (Haw. 1988); *Peters v. Peters*, 634 P.2d 586, 593-95 (Haw. 1981); *Bushkin Assocs., Inc. v. Raytheon Co.*, 473 N.E.2d 662, 670 (Mass. 1985).

³⁷² Cox, *supra* note 18, at 1090.

³⁷³ See *id.*

³⁷⁴ See *id.*

³⁷⁵ See *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721, 725 (Cal. 1978); *Scott v. Superior Court*, 202 Cal. Rptr. 920, 922 (Ct. App. 1984).

conflict does exist, the court then must evaluate the comparative impairment to each state's interests and apply the law of the state whose interests would suffer most.³⁷⁶ Considering Sarah's hypothetical case, California and Massachusetts arguably differ regarding the rights of same-sex parents, with California refusing to grant standing to lesbian co-parents and Massachusetts allowing same-sex couples to marry and thus to gain full parental rights.³⁷⁷ However, California's A.B. 205 provides domestic partners parental rights equivalent to married persons, completely deflating the argument that California's interests would be impaired substantially by recognizing the grant of parental rights under Massachusetts law.³⁷⁸ The interplay between A.B. 205 and California's DOMA further complicates the analysis. On the one hand, A.B. 205 provides explicitly for recognition of domestic partner or equivalent benefits from other states.³⁷⁹ On the other hand, A.B. 205 also specifically excludes recognition of a same-sex marriage, presumably out of deference to its DOMA.³⁸⁰ However, this distinction does not alter our choice of law analysis regarding parental rights, because it is not contingent on recognition of the marriage.³⁸¹

As for Robert Leflar's approach, it resembles the *Second Restatement* with an additional factor—the application of the better rule of law.³⁸² In terms of the validity of the marriage per se, the determination of the better law definitely would depend on one's perspective. Proponents of same-sex marriage would argue that recognition is the better rule because it fosters equality, and opponents would contend that preservation of traditional marriage is the preferable rule. However, when the issue is solely parental status, the better rule of law would seem to be the one that fosters the best interests of the child because all states espouse that policy.³⁸³ Of the two states with DOMAs that follow Leflar's approach, only Minnesota potentially would qualify as a "category one"

³⁷⁶ *Scott*, 202 Cal. Rptr. at 922.

³⁷⁷ *See West*, 69 Cal. Rptr. 2d at 160; *Nancy S.*, 279 Cal. Rptr. at 219; *Curiale*, 272 Cal. Rptr. at 522; *Opinions of the Justices*, 802 N.E.2d at 569–72; *Goodridge*, 798 N.E.2d at 961, 970.

³⁷⁸ CAL. FAM. CODE § 297.5(d) (West 2004).

³⁷⁹ *Id.* § 299.2.

³⁸⁰ *Id.* §§ 299.2, 308.5. Proposition 22 is codified in section 308.5 of the California Family Code. *See id.* § 308.5.

³⁸¹ Moreover, a same-sex spouse could argue for parental status based on the UPA, as discussed in *supra* notes 146–239 and accompanying text.

³⁸² *Cox*, *supra* note 18, at 1096–97. The other factors include "(1) predictability of result, (2) maintenance of interstate and international order, (3) simplification of the judicial task, [and] (4) advancement of the forum's governmental interests." *Id.*

³⁸³ *See supra* note 335 and accompanying text.

DOMA state.³⁸⁴ Its DOMA provides that a same-sex marriage is void and that "contractual rights granted by virtue of the marriage . . . are unenforceable in this state."³⁸⁵ Thus Sarah would have to argue that the parental rights she seeks are not "contractual rights" granted by the marriage to avoid application of the DOMA.³⁸⁶ She has a reasonable chance of succeeding with this argument, because the law generally considers parenthood to be a status created by biological, marital, or social ties, rather than one created by contract.³⁸⁷

Despite some arguments to the contrary, then, we can see that even in "category one" states with a DOMA, a parent in Sarah's position has a colorable claim to parental status, and thus standing to pursue custody and visitation under a best interests standard, by virtue of the same-sex marriage. Unfortunately, in the "category two" states, these arguments would likely be unavailable to her. These states have DOMAs that explicitly deny recognition of the marriage for any purpose and deny recognition of any of the benefits or rights arising from the marriage.³⁸⁸ One of these states, Louisiana, directly forecloses the argument based on legitimacy by statute. Article 96 of Louisiana's Civil Code provides that a null marriage nonetheless produces "civil effects" in favor of the child of the parties, but expressly states that a same-sex marriage "does not produce any civil effects."³⁸⁹ In these jurisdictions, a co-parent seeking parental rights will likely need to pursue one or more of the alternative strategies discussed in Parts III and IV.³⁹⁰

³⁸⁴ The other state, Arkansas, has a "category two" type DOMA, which provides that the marriage shall be void and "any contractual or other rights granted by virtue of that license . . . shall be unenforceable in the Arkansas courts." ARK. CODE ANN. § 9-11-208 (Michie 2002). Minnesota straddles the line between "category one" and "category two." MINN. STAT. ANN. § 517.03 (West Supp. 2004).

³⁸⁵ MINN. STAT. ANN. § 517.03.

³⁸⁶ Were the DOMA to bar consideration of Sarah's status as a parent based on the marriage, she could still petition for custody. See *LaChapelle*, 607 N.W.2d at 168. But see *Kulla v. McNulty*, 472 N.W.2d 175, 184 (Minn. Ct. App. 1991) (dismissing co-parent's petition for visitation for failure to establish basis for third-party visitation).

³⁸⁷ See *In re Baby M.*, 537 A.2d 1227, 1234-35 (N.J. 1988) (invalidating surrogacy contract for violating public policy by allowing parents to decide custody of child before birth, without regard to best interests). But see *Bernie D. Jones, Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act*, 12 TEX. J. WOMEN & L. 419, 440-44 (2003) (arguing for the ability to determine parental rights by contract).

³⁸⁸ See *supra* note 87 (citing statutes).

³⁸⁹ LA. CIV. CODE ANN. art. 96 (West 1999).

³⁹⁰ See *infra* notes 441-467 and accompanying text.

B. *Recognition of Parental Rights if the Couple Enters into a Civil Union or Domestic Partnership*

In this Section, I examine how the analysis changes if Andrea and Sarah enter into a civil union in Vermont or a domestic partnership in California rather than marry. Indeed, this may constitute the more salient question for the moment as civil unions seem to be the compromise of choice for many, including the Massachusetts legislature, and a constitutional amendment to ban same-sex marriage is pending in Congress.³⁹¹ Ironically, in some states a civil union may actually provide greater protection to the parental rights of the non-biological parent than marriage would because most state DOMAs by their terms only prohibit recognition of marriage.

DOMAs we have classified as “category one” or “two category” speak only to recognition of “marriages.”³⁹² By their express terms, neither a Vermont civil union nor a California domestic partnership is a marriage.³⁹³ The civil union statute defines marriage as the “legally recognized union of one man and one woman” while providing that persons are eligible for the civil union if they are “of the same sex and therefore excluded from the marriage laws.”³⁹⁴ Legislative findings accompanying the bill further declare that “a system of civil unions does not bestow the status of marriage.”³⁹⁵ Likewise, California’s domestic partner statute provides that “[t]his section does not amend or modify any provision of the California Constitution or any provision of any

³⁹¹ See Jonathan Finer, *Massachusetts Moves to Ban Gay Marriage but Allow Unions*, WASH. POST, Mar. 12, 2004, at A7 (discussing proposed amendment to Massachusetts Constitution); Greg Frost, Reuters, *Lawmaker Eyes Simple Fix to Gay Marriage Spat*, Apr. 15, 2004, LEXIS, Mega News Library, REUNWS File (discussing poll showing fifty-one percent of respondents favoring civil unions); Aly Sujo, *63% Nix Gay Nups—But Most Also Oppose Amendment: Poll*, N.Y. POST, Mar. 26, 2004, at 23, LEXIS, News Library, NYPOST File (discussing poll showing forty percent of respondents favor civil unions compared to thirty-one percent favoring gay marriage). At the same time, challenges to the ban on same-sex marriage are escalating and may eclipse adoption of civil union type statutes. See, e.g., *ACLU to File Lawsuit for Gay Marriage Rights*, TIMES UNION (Albany), Apr. 7, 2004, at B3, 2004 WLNR 745953; Chiang, *supra* note 19, at B3; Amy Fagan, *House Moves Slowly on Marriage: Panel to Examine Amendment in Series of Hearings*, WASH. TIMES, Mar. 5, 2004, at A3; Michael Hill, *Quiet Ministers' Actions Speak Loudly*, TIMES UNION (Albany), Apr. 17, 2004, at B3, 2004 WLNR 637982; Andrew Kramer, *Sides in Gay Marriage Fight File Briefs*, COLUMBIAN (Vancouver, Wash.), Apr. 15, 2004, at C5, 2004 WLNR 11256651.

³⁹² For “category one” states, see *supra* note 87. For “category two” states, see *supra* note 88.

³⁹³ See CAL. FAM. CODE §§ 297.5(j), 308.5 (West 2004); VT. STAT. ANN. tit. 15, § 1201(4) (2002); see also Cox, *supra* note 18, at 778; Sawyer, *supra* note 18, at 736.

³⁹⁴ VT. STAT. ANN. tit. 15, §§ 1201(4), 1202(2).

³⁹⁵ 2000 Vt. Acts & Resolves 91, § 1(10).

statute that was adopted by initiative.³⁹⁶ This statement presumably refers to section 308.5 of the California Family Code, codifying Proposition 22, which limited marriage in California to a man and a woman.³⁹⁷ Consequently, Sarah can argue that the DOMAs simply do not apply to bar recognition of her parental rights if she and Andrea entered into a civil union in Vermont or a domestic partnership in California.

Two judicial decisions that have addressed the interstate recognition of a civil union provide mixed support for this conclusion. In *Burns v. Burns*, a father sought and obtained an order of contempt against his ex-wife, alleging that she violated a trial court order which prohibited her from visiting with her children while cohabiting with an adult to whom she was not married, which in this case was her female lover.³⁹⁸ The mother argued that she had not violated the court order since she and her lover were parties to a civil union in Vermont.³⁹⁹ The appellate court affirmed, ruling that the civil union was not a "marriage."⁴⁰⁰

In *Rosengarten*, a party to a Vermont civil union sought to dissolve the union in Connecticut.⁴⁰¹ The trial court dismissed the action for lack of subject matter jurisdiction, finding that the civil union was neither a marriage nor any other category of family relations under Connecticut's jurisdictional statutes.⁴⁰² The appellate court affirmed, reasoning, in part, that the civil union was not a marriage under the Connecticut statutes or under Vermont law.⁴⁰³

³⁹⁶ CAL. FAM. CODE § 297.5(j).

³⁹⁷ *Id.* § 308.5.

³⁹⁸ 560 S.E.2d 47, 48 (Ga. Ct. App. 2002).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 48-49.

⁴⁰¹ 802 A.2d at 172.

⁴⁰² *Id.*

⁴⁰³ *Id.* at 175. The *Burns* court made clear that under its DOMA, the civil union, if it were a marriage, would not be recognized in Georgia. 560 S.E.2d at 49. In *Rosengarten*, the court found that the trial court had no jurisdiction to dissolve the petitioner's civil union as a "family relations matter" because a Connecticut statute approving same-sex adoptions expressly refused to endorse or to authorize same-sex civil unions. 802 A.2d at 177, 182. Neither of these conclusions, however, would preclude the court from recognizing the "incidents" of the union or the parental status created thereby, as discussed in *supra* notes 240-267 and accompanying text.

Apparently, trial judges in three other states, Iowa, Texas, and West Virginia, have granted a civil union "divorce," although one judge later reversed his decision after intervention by the Texas Attorney General. NAT'L CTR. FOR LESBIAN RIGHTS, *supra* note 7; Jeffrey Cottrill, *The Gay Divorcees*, DIVORCE MAGAZINE.COM, at <http://www.divorcemagazine.com/news/lesbiandivorce.shtml> (Dec. 15, 2003). No published judicial opinions have resulted from these cases.

By contrast, a New York case that ruled in favor of a gay plaintiff undercuts the claim that we can distinguish the civil union or domestic partnership from a marriage under the mini-DOMAs.⁴⁰⁴ In *Langan*, the court ruled that a partner to a civil union was a "surviving spouse" under the New York wrongful death statute.⁴⁰⁵ Relying on the comprehensive nature of the rights provided by the civil union statute, the court concluded that the civil union was "indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union."⁴⁰⁶ The court further noted that under the Vermont statute, the plaintiff-partner was considered a "literal spouse . . . not a functional or virtual one."⁴⁰⁷ New York had not enacted a mini-DOMA, so the court concluded that the plaintiff's spousal status would be recognized, giving the plaintiff standing to sue for the wrongful death of his partner.⁴⁰⁸

Same-sex partners in civil unions or domestic partnerships face a quandary then. They continue to be denied access to marriage, and thus full equality within their home states. Yet the extensive tangible benefits provided by these laws may render these unions, in practical terms, indistinguishable from marriage, and thus subject to non-recognition under various state DOMAs.⁴⁰⁹

The better argument would recognize that civil unions are *not* marriages, and that their recognition would not contradict the letter or the spirit of most state DOMAs.⁴¹⁰ An advisory opinion by the Supreme Judicial Court of Massachusetts supports this conclusion.⁴¹¹ The justices there considered a question posed by the Massachusetts Senate: whether a system of civil unions would be constitutional in light of the court's ruling in *Goodridge v. Department of Public Health*.⁴¹²

⁴⁰⁴ See *Langan*, 765 N.Y.S.2d at 422.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 417-18.

⁴⁰⁷ *Id.* at 422.

⁴⁰⁸ *Id.*

⁴⁰⁹ Indeed, the quandary has another dimension as well. From a broader perspective, advocates for gay rights face the prospect of arguing for the congruency of the civil union and marriage in certain contexts, for example, achieving "spousal" status in wrongful death actions, while highlighting the dissimilarities in family law cases being fought in DOMA jurisdictions.

⁴¹⁰ Although this rule would leave the door open for dismissal based on jurisdictional grounds, as in *Rosengarten*, this risk poses less of a concern in our situation, as family courts generally have jurisdiction to consider disputes concerning custody of children. See *supra* note 136 and accompanying text.

⁴¹¹ See *Opinions of the Justices*, 802 N.E.2d at 569-72.

⁴¹² *Id.* at 566-67.

The court concluded that it would not.⁴¹³ In doing so, the court reasoned as follows:

The bill's absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic. The dissimilitude between the terms "civil marriage" and "civil union" is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. . . . It would deny to same-sex "spouses" only a status that is specially recognized in society and has significant social and other advantages.⁴¹⁴

The granting of nearly identical tangible benefits by the civil union could not save it under the Massachusetts Constitution because civil marriage carries with it "*intangible* protections, benefits, rights, and responsibilities."⁴¹⁵ Even Justice Martha Sosman's dissenting opinion supports this argument.⁴¹⁶ As she noted, same-sex couples cannot enjoy the same rights as opposite-sex couples, even if they were allowed to marry, because a substantial cadre of federal rights remain unavailable to same-sex couples under the federal DOMA and because, as we have seen, many other states may refuse to recognize the marriage.⁴¹⁷

This argument is consistent with the purposes behind the mini-DOMAs. Most of the mini-DOMAs were passed in response to the *Bachr* cases and the prospect of Hawaii permitting same-sex marriages;⁴¹⁸ neither the Vermont civil union statute nor A.B. 205 even

⁴¹³ *Id.* at 572.

⁴¹⁴ *Id.* at 570.

⁴¹⁵ *Id.* at 571 (emphasis added).

⁴¹⁶ *Opinions of the Justices*, 802 N.E.2d at 575-76 (Sosman, J., dissenting).

⁴¹⁷ *Id.* (Sosman, J., dissenting). These differences also would include same-sex partners' rights or eligibility for federally-funded state programs. *Id.* (Sosman, J., dissenting). Justice Martha R. Sosman stated the following in her dissenting opinion:

It would be rational for the Legislature to give different names to the license accorded to these two groups, when the obligations they are undertaking and the benefits they are receiving are, in practical effect, so very different, and where, for purposes of the vast panoply of federally funded State programs, State officials will have to differentiate between them.

Id. (Sosman, J., dissenting). This difference in treatment by the federal government and other states would "give[] rise to a vast assortment of highly tangible, concrete consequences." *Id.* at 576 (Sosman, J., dissenting).

⁴¹⁸ LA. CIV. CODE ANN. art. 86 (West 1999) (Legislative Intent: Traditional Marriage).

existed at the time many of the DOMAs were passed.⁴¹⁹ Moreover, as we saw earlier, a number of the statutes contain specific expressions which support the view that the laws were designed to preserve the traditional institution of marriage, not to prevent any benefits from being provided to same-sex couples.⁴²⁰

Given the existence of cogent arguments on both sides of this issue, we can expect to see courts reach different conclusions regarding the equivalence of civil unions, domestic partnerships, and marriages in addressing choice of law questions when civil union or domestic partners seek rights in other jurisdictions.⁴²¹ If a state without a DOMA equates the civil union or domestic partnership with marriage, the analysis of the same-sex partner's parental rights laid out in Part II.A.1 applies essentially as set forth.⁴²² Even if a court were to view the union or partnership as distinct from a marriage, that conclusion should not substantially alter the analysis in the non-DOMA jurisdictions either. For all the reasons stated in Part II.A.1, those jurisdictions are likely to recognize the parental rights flowing from the solemnization of the relationship, whether by civil union, domestic partnership, or marriage.⁴²³

In the DOMA jurisdictions, however, a court's determination that civil unions and domestic partnerships are not essentially interchangeable with marriages could affect the analysis in ways both positive and negative. On the positive side, a same-sex partner like Sarah can argue that the union or partnership falls outside the scope of the DOMA, leaving the court free to recognize the civil union and all of the rights attendant to that status. The court then would apply whichever choice of law rules govern in its jurisdiction to determine whether to recognize the union. But even though the DOMA would not preclude recognition of the civil union per se, Sarah likely would fare best by seeking recognition of the union's effects, focusing on her parental rights, as we did in Part II.A.2.c.⁴²⁴ The policies in favor

⁴¹⁹ See NAT'L GAY & LESBIAN TASK FORCE, *supra* note 12 (showing dates of adoption of state DOMAs).

⁴²⁰ See *supra* notes 254–264 and accompanying text.

⁴²¹ See Katie Eyer, Note, *Related Within the Second Degree? Burns v. Burns and the Potential Benefits of Civil Union Status*, 20 YALE L. & POL'Y REV. 297, 297 (2002).

⁴²² See *supra* notes 91–127 and accompanying text.

⁴²³ See *supra* notes 91–127 and accompanying text.

⁴²⁴ See *supra* notes 240–267 and accompanying text. Even the pro-gay opinion of the Langan court consciously avoided a determination of the validity of the civil union per se, preferring instead to evaluate its relevance to the precise issue under consideration. See 765 N.Y.S.2d at 415.

of her parental rights are recognized widely, while an attempt to validate the union per se could prove more difficult. Moreover, opponents could argue that the DOMA, although not technically dispositive on the question of civil union or partnership recognition, nonetheless evinces a strong policy against providing marriage-like rights to gays. Alternatively, if a court recognized the civil union or partnership in its entirety, Sarah would be able to sue to dissolve the union, just as she could in Vermont or California. The court then would treat her as any other parent entitled to custody or visitation in a divorce proceeding according to the best interests of the child standard. Pursuing this approach would avoid potential jurisdictional and standing barriers to perfecting her claim.⁴²⁵

For this reason, it is worthwhile to recap briefly the most widely followed choice of law regimes and to posit arguments for recognition of the civil union or domestic partnership within those regimes.⁴²⁶ According to the *First Restatement*, the forum state would apply the law of the place where the most significant event leading to the cause of action arose.⁴²⁷ Here, that would be Vermont or California, the place where both parties celebrated their solemnization and were domiciled at the time.⁴²⁸ Under the *Second Restatement*, courts again would consider a variety of factors to determine which law to apply.⁴²⁹ The first factor—the needs of the interstate and international systems—favors recognition of the civil union or domestic partnership, at least in contrast to seeking marriage recognition, because only a few states have expressed a policy against civil unions.⁴³⁰ The second factor—the rele-

⁴²⁵ See *supra* notes 132–142 and accompanying text.

⁴²⁶ For an analysis of this issue in one state, see generally Elaine M. DeFranco, Comment, *Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union*, 85 MARQ. L. REV. 251 (2001) (questioning whether a Wisconsin court would have to recognize a civil union under its choice of law theories). The DOMA state following the governmental interests analysis, California, already specifically provides for recognition of out-of-state civil unions or partnerships. CAL. FAM. CODE § 299.2 (West 2004).

⁴²⁷ RESTATEMENT OF CONFLICT OF LAWS §§ 121, 129 (1934).

⁴²⁸ See *supra* notes 313–318 and accompanying text.

⁴²⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). Minnesota and Arkansas follow Robert Lefflar's "better rule of law" approach, a variation of the *Restatement (Second) of Conflict of Laws*. See *supra* notes 382–387. On the one hand, both these states have broad DOMAs; on the other hand, Minnesota already has granted standing to a lesbian co-parent seeking custody based at least in part on an agreement with the mother. *LaChapelle*, 607 N.W.2d at 160–61. But see *Kulla*, 472 N.W.2d at 184 (dismissing co-parent's petition for visitation for failure to establish basis for third-party visitation).

⁴³⁰ See NEB. CONST. art. I, § 29; FLA. STAT. ANN. § 741.212 (West Supp. 2004); OHIO REV. CODE ANN. § 3101.01 (West Supp. 2005) (prohibiting recognition of civil unions ex-

vant policies of the forum—is murkier when the goal is recognition of the civil union *per se*, rather than the parental rights flowing from it. Analysis of this factor would require an assessment of the forum state's treatment of gays and lesbians, as well as, perhaps, cohabitants. Clearly, the enactment of a DOMA would provide ammunition for those claiming a policy in the forum against recognizing same-sex unions. The interests of the original home state—the third factor—are the same as those we saw previously and include interests in ensuring equality for its citizens, should they move out of the jurisdiction, and in protecting especially the children in those relationships from instability and uncertainty regarding those adults responsible for them.⁴³¹ The fourth factor—the protection of justified expectations—arguably points more strongly toward recognition when dealing with civil unions and domestic partnerships, because most states have not enacted laws expressly declining to recognize them. Nonetheless, the novelty of these schemes weakens the contention that partners expect the status to be accepted without challenge in other jurisdictions.⁴³² The basic policies underlying family law applicable to civil union recognition include those related to children as well as the more general goal of encouraging family stability, clarifying familial obligations, and protecting family members' expectations, all of which support recognition. The final two factors—certainty, predictability, and uniformity of result, and ease of determination and application of the law—do not differ significantly when considering recognition of civil unions, as opposed to the earlier focus on parental rights.⁴³³ Neither would seem significant enough to sway the determination one way or the other.

Although on balance these factors should lead to recognition, the answer is not clear-cut. As we have just seen from the few cases decided, courts likely will disagree about whether and in what contexts to give effect to a foreign civil union or domestic partnership.⁴³⁴

If a court refused to apply Vermont or California law and to recognize the civil union or domestic partnership, the distinction between marriage and these alternate statuses could affect our same-sex partner negatively. In jurisdictions following the UPA, a co-parent like Sarah would no longer be able to argue for presumed motherhood

pressly); TEX. FAM. CODE ANN. § 6.204(c) (Vernon Supp. 2004); *supra* note 403 (discussing *Rosengarten*, 802 A.2d at 182).

⁴³¹ See *Opinions of the Justices*, 802 N.E.2d at 576.

⁴³² DeFranco, *supra* note 426, at 275–76.

⁴³³ See *supra* notes 344–346 and accompanying text.

⁴³⁴ See *Rosengarten*, 802 A.2d at 184; *Burns*, 560 S.E.2d at 49; *Langan*, 765 N.Y.S.2d at 422.

based on an invalid marriage, although she could try to achieve the same status by showing that she held out Madeleine as her own and received her into her home.⁴³⁵ Likewise, the decision not to treat the civil union or domestic partnership as a marriage could call into question arguments based on legitimacy. However, by granting partners to civil unions or domestic partnerships rights identical to their married counterparts, both statutes doubtless implicitly confer legitimacy on the children born to the couple.⁴³⁶

Moreover, any distinction between civil unions, domestic partnership, and marriages would be unavailable to litigants in the states that have adopted so-called "super-DOMAs," which explicitly prohibit recognition of civil unions and/or domestic partnerships.⁴³⁷ In these jurisdictions, co-parents would have to rely on the approaches outlined in Parts II.A.2.d and II.A.2.e.⁴³⁸ Unfortunately, three of these states—Florida, Ohio, and Texas—explicitly deny recognition not just to the alternate relationship, but also to any right or claim arising from the relationship.⁴³⁹ Hence, neither a civil union nor a domestic partnership would likely benefit a co-parent seeking parental rights in these jurisdictions. The co-parent's only hope would be to meet the

⁴³⁵ See ALA. CODE § 26-17-18 (1992); CAL. FAM. CODE § 7650 (West 2004); COLO. REV. STAT. § 19-4-122 (2003); HAW. REV. STAT. ANN. § 584-21 (Michie 1999); 750 ILL. COMP. STAT. ANN. 45/19 (West 1999); KAN. STAT. ANN. § 38-1126 (2000); MINN. STAT. § 257.71 (2003); MO. ANN. STAT. § 210.848 (West 2004); MONT. CODE ANN. § 40-6-121 (2003); NEV. REV. STAT. ANN. 126.231 (Michie 2004); N.M. STAT. ANN. § 40-11-21 (Michie 1999); N.D. CENT. CODE § 14-17-20 (2004); OHIO REV. CODE ANN. § 3111.17 (West 2003); R.I. GEN. LAWS § 15-8-26 (2003); see *Karen C.*, 124 Cal. Rptr. 2d at 681; *Rubano*, 759 A.2d at 971. *Contra K.M.*, 13 Cal. Rptr. 3d at 151 (finding paternity presumptions evidentiary and only applicable when needed to identify natural mother).

⁴³⁶ See VT. STAT. ANN. tit. 14, § 554 (2002) (child considered legitimate when parents intermarry); *id.* at tit. 15, § 1204(f) (rights of parties to a civil union identical to those of a married couple with respect to a child of one); *Langan*, 765 N.Y.S.2d at 417 (civil union statute includes a "presumption of legitimacy" for children born of the union).

⁴³⁷ NEB. CONST. art. I, § 29; FLA. STAT. ANN. § 741.212 (West Supp. 2004); OHIO REV. CODE ANN. § 3101.01 (West Supp. 2005); TEX. FAM. CODE ANN. § 6.204(c) (Vernon Supp. 2004). For discussion regarding whether Montana's statute also fits into this category, see *supra* note 89.

⁴³⁸ See *supra* notes 268–389 and accompanying text.

⁴³⁹ FLA. STAT. ANN. § 741.212(2); OHIO REV. CODE ANN. § 3101.01; TEX. FAM. CODE ANN. § 6.204(c)(2). Nebraska's "super-DOMA" simply provides that "[t]he uniting of two persons of the same sex in civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST. art. I, § 29. This provision still leaves open the possibility of seeking recognition of the parent-child relationship created by the civil union based on the arguments discussed in *supra* notes 128–390 and accompanying text.

state's qualifications for third-party visitation or to pursue one of the alternative strategies outlined in Part IV.⁴⁴⁰

III. SEEKING CUSTODY OR VISITATION AS A THIRD PARTY

If a court refused to grant Sarah standing as a parent based on the marriage, civil union, or domestic partnership, each of these statuses still might assist Sarah by helping to establish threshold requirements for standing based on other statutory or equitable grounds. Most states grant standing to petition for custody or visitation to certain individuals who do not meet the traditional definition of parent—biological or adoptive—in at least some circumstances.⁴⁴¹ The statutes and cases establishing this right vary from one state to the next, but they share certain features. Most require the person seeking some form of parental rights, either custody or visitation, to have acted as a parent to the child and to have developed a corresponding parent-child bond.⁴⁴² Depending on the wording of the statute or the judicial precedent, the petitioner may have to establish that she acted either *in loco parentis*, as a *de facto* custodian, or as a

⁴⁴⁰ See *supra* notes 453–467 and accompanying text.

⁴⁴¹ See, e.g., ARIZ. REV. STAT. ANN. § 25-415 (West 2000); CONN. GEN. STAT. ANN. § 46b-57 (West 2004); DEL. CODE ANN. tit. 13, § 721(e) (1999); HAW. REV. STAT. ANN. § 571-46(2), (7) (Michie Supp. 2003); KY. REV. STAT. ANN. § 405.020(3) (Michie 1999); ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(B), (C) (West 1998); MICH. COMP. LAWS § 722.26c (1998) (MICH. STAT. ANN. § 25.312(6c) (Michie Supp. 2000)); MINN. STAT. § 257C.03 subd. 7 (2003); MONT. CODE ANN. §§ 40-4-211(4)(b), 40-4-228 (2003); OR. REV. STAT. § 109.119 (2003); TEX. FAM. CODE ANN. § 102.003(9) (Vernon Supp. 2004); VA. CODE ANN. § 16.1-278.15(B) (Michie Supp. 2004), § 20-49.2 (Michie 2004); WASH. REV. CODE ANN. § 26.10.030 (West Supp. 2004); WYO. STAT. ANN. § 20-7-102(a) (Michie 2003); *Buness v. Gillen*, 781 P.2d 985, 987–88 (Alaska 1989); *Hardy v. Arcemont*, 444 S.E.2d 327, 329–30 (Ga. Ct. App. 1994); *In re Paternity of J.A.C.*, 734 N.E.2d 1057, 1060 (Ind. Ct. App. 2000); *Lamp v. Lamp*, 833 So. 2d 1224, 1227 (La. Ct. App. 2002); *LaChapelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000); *Smith v. Barbour*, 571 S.E.2d 872, 877–78 (N.C. Ct. App. 2002); *T.B.-v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959, 977 (R.I. 2000); *State ex rel. J.W.F.*, 799 P.2d 710, 715–16 (Utah 1990); *In re Custody of H.S.H.-K*, 533 N.W.2d 419, 435 (Wis. 1995). In addition, all fifty states provide for grandparent visitation, although a number of these statutes have been declared unconstitutional after *Troxel v. Granville*. *Dolgin*, *supra* note 305, at 396–401; *Dwyer*, *supra* note 305, at 977–81.

⁴⁴² See, e.g., MINN. STAT. § 257C.08 subd. 4 (visitation); MONT. CODE ANN. § 40-4-228 (any parental interest); OR. REV. STAT. § 109.119 (visitation, custody, or guardianship); NEV. REV. STAT. ANN. 125C.050(2) (Michie 2004) (visitation); *Hardy*, 444 S.E.2d at 330 (granting standing to “the physical custodian to whom the mother entrusted the child” and with whom the child had a parental relationship); *Tinsley v. Plummer*, 519 N.E.2d 752, 754 (Ind. Ct. App. 1988) (denying great aunt both custody and visitation when no custodial and parental relationship was shown); *J.W.F.*, 799 P.2d at 715 (noting that standing to pursue custody may be allowed based on the relationship to the child and whether that relationship signals that the petitioner likely has the child’s best interests at heart).

primary caregiver for a certain amount of time.⁴⁴³ Some statutes simply refer to “other person[s]” who may file suit for custody or visitation, although the statute or courts typically limit this language to those who can demonstrate an established relationship with the child.⁴⁴⁴ In addition, several states have explicitly allowed same-sex co-parents to petition for visitation on equitable grounds if they meet certain requirements:

(1) that the biological or adoptive parent consented to, and fostered, the parent-like relationship with the child; (2) that the [co-parent] and the child lived together in the same household; (3) that the [co-parent] assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.⁴⁴⁵

The same-sex marriage, civil union, or domestic partnership arguably establishes the first prong of the test—that the legal parent consented to the creation of a parent-like relationship with the child. The relationship also supplies some evidence of the second prong, because the marriage by law confers on the co-parent obligations to support the child. Likewise, some of the third-party statutes seem apt to afford

⁴⁴³ See, e.g., ARIZ. REV. STAT. ANN. § 25-415 (providing that a person other than legal parent, standing *in loco parentis*, can file petition for custody if detrimental to child to be placed with legal parent); COLO. REV. STAT. § 14-10-123(II)(c) (2003) (allowing petition by non-parent who had physical care for at least six months if filed within six months of termination of care); HAW. REV. STAT. ANN. § 571-46(2) (allowing custody to *de facto* custodian), § 571-46(7) (allowing visitation to “any person interested in the welfare of the child”); KY. REV. STAT. ANN. § 405.020(3) (allowing *de facto* custodian to petition for custody); TEX. FAM. CODE ANN. § 102.003(9) (allowing person who had “care, control, and possession of the child for at least six months ending not more than 90 days preceding” to file petition for custody); VA. CODE ANN. § 20-49.2 (allowing person *in loco parentis* to petition); WYO. STAT. ANN. § 20-7-102 (allowing primary caregiver for six or more months to sue for visitation if parents’ rights not substantially impaired).

⁴⁴⁴ See, e.g., MONT. CODE ANN. § 40-4-211(4)(b), (6); *Smith*, 571 S.E.2d at 877; *Ellison v. Ramos*, 502 S.E.2d 891, 894 (N.C. Ct. App. 1998) (interpreting N.C. GEN. STAT. § 50-13.1 (1995)). Likewise, courts have found a relationship with the child necessary to confer standing without relying on specific statutory language. See *Buness*, 781 P.2d at 988; *Seyboth v. Seyboth*, 554 S.E.2d 378, 381 (N.C. Ct. App. 2001); *J.W.F.*, 799 P.2d at 715.

⁴⁴⁵ E.g., *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000); *H.S.H.-K.*, 533 N.W.2d at 421; see *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891–94 (Mass. 1999); *T.B.*, 786 A.2d at 916–17.

standing to a lesbian co-parent whose marriage was invalidated, at least under the circumstances in our hypothetical, when the co-parent clearly acted as the primary caregiver and developed a parent-child relationship.

Nonetheless, there are several potential pitfalls to relying on these statutory provisions and precedents. First, some of them incorporate additional threshold requirements for standing which may be difficult if not impossible to prove, such as unsuitability of the legal parent.⁴⁴⁶ Others require a showing that no substantial interference with or significant impairment of the legal parent's rights will result, but may provide no guidance as to the meaning of those terms.⁴⁴⁷ Second, some statutes and even the cases recognizing a lesbian co-parent's standing explicitly limit third parties to suits for visitation, leaving them unable to pursue custody.⁴⁴⁸ Third, some explicitly limit third-party claims to members of designated groups, such as grandparents, stepparents, or relatives.⁴⁴⁹ Fourth, and perhaps most significantly, the person seeking parental rights as a non-legal parent likely will be treated as a third party, not as a co-equal parent.⁴⁵⁰ As a result, the co-parent will not be

⁴⁴⁶ See, e.g., ARIZ. REV. STAT. ANN. § 25-415 (requiring that placement with legal parent would be detrimental to child); DEL. CODE ANN. tit. 13, § 721(e) (requiring that child be dependent or neglected); MINN. STAT. § 257C.03 subd.7 (requiring that parent has abandoned or neglected child so child will be harmed or physical or requiring emotional danger to child or other extraordinary circumstances); WASH. REV. CODE ANN. § 26.10.030(1) (requiring that child is not in parent's physical custody or that parent is unsuitable); *In re Custody of S.H.B.*, 74 P.3d 674, 679 (Wash. Ct. App. 2003), review granted sub nom., *In re Custody of Brown*, 94 P.3d 959 (Wash. 2004) (affirming that non-parent petitioner must show that the parent is unfit, that living with the parent would harm the child's development, or that an award of custody to the non-parent is in the child's best interest); *In re Custody of Nunn*, 14 P.3d 175, 181 (Wash. Ct. App. 2000) (noting that non-parent petitioner must show unfitness of parent with custody in order to gain standing).

⁴⁴⁷ See, e.g., WYO. STAT. ANN. § 20-7-102; *Lindsie D.L. v. Richard W.S.*, 591 S.E.2d 308, 314 (W. Va. 2003).

⁴⁴⁸ See, e.g., NEV. REV. STAT. ANN. 125C.050(2) (Michie 2004); WYO. STAT. ANN. § 20-7-102; *H.S.H.-K.*, 533 N.W.2d at 423-24, 437 (holding that lesbian co-parent could bring visitation action, but had no standing to seek custody in the absence of parental unfitness).

⁴⁴⁹ See, e.g., LA. CIV. CODE ANN. art. 136(B) (West 1999) (allowing visitation only for those related by blood or affinity, former stepparents, or former grandparents); MICH. COMP. LAWS § 722.26c(b)(iii) (1998) (MICH. STAT. ANN. § 25.312(6c) (Michie Supp. 2000)) (requiring relation by blood, affinity, or marriage within fifth degree); *Worrell v. Elkhart County Office of Family & Children*, 704 N.E.2d 1027, 1029 (Ind. 1998) (limiting third-party standing to stepparents).

⁴⁵⁰ See, e.g., *Buness*, 781 P.2d at 988-89; *Scyboth*, 554 S.E.2d at 381; *Dwyer*, supra note 305, at 982. But see KY. REV. STAT. ANN. § 405.020(3) (Michie 1999) (providing that *de facto* custodian petition determined by best interests standard and that *de facto* custodian must take parents' place); *J.A.C.*, 734 N.E.2d. at 1060 (providing that once "custodial and parental" relationship is established by a third party, visitation should be determined by best interests

entitled to prevail by showing merely that custody or visitation would be in the child's best interests; rather, she will have to meet a considerably more difficult test, reflecting the constitutionally elevated status enjoyed by legal parents. Most states require a third party seeking custody to demonstrate that the legal parent is unfit, that custody would be detrimental to the child, or that other extraordinary circumstances justify interference with the legal parent's right to control the care, custody, and upbringing of his or her children.⁴⁵¹ Although some states have used the less stringent "best interests of the child" standard to award visitation to third parties, those statutes and rulings are subject to constitutional challenge under *Troxel*.⁴⁵²

standard). This argument might run into difficulty in the "category two" DOMA states. Those DOMAs prohibit use of the marriage for any purpose. On the one hand, a very broad reading of the statute conceivably could prevent a co-parent from relying on the marriage to establish any of the requirements for third-party standing. On the other hand, the biological parent's agreement to allow the co-parent to assume a parental role likely can be established in most of these cases by alternate means, including the conduct of the parties.

⁴⁵¹ See, e.g., NEV. REV. STAT. ANN. 125.500(1) (stating that non-parent must show parental custody would cause substantial harm to the child); *Thomas v. Thomas*, 49 P.3d 306, 309 (Ariz. Ct. App. 2002) (stating that third party seeking custody must show significant detriment to the child if a legal parent has custody); *Lamp v. Lamp*, 833 So. 2d 1224, 1229 (La. Ct. App. 2002); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 990 (App. Div. 1998) (holding that third party must show parental abandonment, neglect, or other extraordinary circumstances); *Owenby v. Young*, 579 S.E.2d 264, 267 (N.C. 2003) (concerning methods of showing natural parent forfeiting protected status); *Ellison*, 502 S.E.2d at 896 (holding that third party must show parent has taken actions inconsistent with his or her constitutionally protected status before considering best interests); *In the Interest of D.P.O.*, 667 N.W.2d 590, 592 (N.D. 2003) (noting that "[a]bsent exceptional circumstances triggering a best-interest analysis" the natural parent will prevail in a custody dispute with a non-parent); *Sinons v. Gisvold*, 519 N.W.2d 585, 587 (N.D. 1994) (stating that non-parent must show custody by legal parent would result in serious harm or detriment to the child); *T.B.*, 786 A.2d at 919 n.8 (noting that in third-party custody dispute "the burden of proof is not evenly balanced and . . . the evidentiary scale is tipped hard to the biological parent's side"); *Quinn v. Mouw-Quinn*, 552 N.W.2d 843, 846 (S.D. 1996) (holding that stepfather must show extraordinary circumstances justifying visitation). But see *Worrell*, 704 N.E.2d at 1028-29 (concluding that once standing established, visitation determined by best interests standard, but that standing limited to stepparents); *J.W.F.*, 799 P.2d at 715 (concluding that stepparent had standing to seek custody if in the best interest of the child).

⁴⁵² *Dwyer*, *supra* note 305, at 972-73, 978-80 (describing "prevailing standard" under grandparent visitation statutes as best interests of the child—standard in doubt since *Troxel*); see *In re Marriage of James and Claudine W.*, 7 Cal. Rptr. 3d 461, 463-65 (Ct. App. 2003) (declaring stepparent visitation statute applying best interests standard unconstitutional as applied); *Commonwealth ex rel. Husack v. Husack*, 417 A.2d 233, 235-36 (Pa. Super. Ct. 1979) (upholding custody award based on the best interests of the children). But see *Rideout v. Riendeau*, 761 A.2d 291, 303 (Me. 2000) (finding constitutional the awarding of visitation to grandparents acting as parents based on best interests standard); *Rubano*, 759 A.2d at 974-77 (holding that biological parent's agreement to have lesbian partner assume *de facto* parent status supported standing for partner to seek visitation).

IV. STRATEGIC ALTERNATIVES

The preceding analysis demonstrates that same-sex parents can garner important substantive parental rights by marrying or entering into a civil union or domestic partnership in their home states, and they can make powerful arguments for retaining those rights in other jurisdictions, even those with DOMAs. Nonetheless, the outcome for these parents is far from certain, and they remain vulnerable to destruction of their parental rights if they or the biological parent move outside the home jurisdiction.

Same-sex parents can solidify their rights by adopting their spouse or partner's child.⁴⁵³ Same-sex marriages, civil unions, and domestic partnerships each allow for adoption by the partner without termination of the biological parent's parental rights.⁴⁵⁴ Adoption would increase the likelihood of recognition by a sister state jurisdiction for two reasons.

First, an adoption constitutes a legal judgment. In interpreting the Full Faith and Credit Clause, the U.S. Supreme Court long has drawn a distinction between interstate recognition of laws and of judgments. The Full Faith and Credit Clause generally requires a state to recognize judgments of sister states, while allowing the state more latitude to avoid recognition of sister state laws that violate its public policy.⁴⁵⁵ States are not free to refuse to enforce a judgment on public policy grounds.⁴⁵⁶

This requirement would not apply to a Canadian adoption decree, as the Full Faith and Credit Clause governs interstate obligations, but not international ones.⁴⁵⁷ However, most states would recognize an adoption decree lawfully issued in a foreign jurisdiction

⁴⁵³ Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 *CARDOZO L. REV.* 299, 315–16 (2001).

⁴⁵⁴ Couples who marry in Massachusetts or Canada could complete a stepparent adoption, as can couples who enter into a civil union in Vermont or register as domestic partners in California. See *MASS. GEN. LAWS* ch. 210, § 2A (2002); *D.(A.N.S.), Re*, 1998 Carswell Sask 710; see also *CAL. FAM. CODE* § 297.5(d) (West 2004); *VT. STAT. ANN.* tit. 15, § 1204(e)(4) (2002). Indeed, each of these states allows same-sex partner adoptions even in the absence of marriage, union, or partnership. See *Sharon S. v. Superior Court*, 73 P.3d 554, 558 (Cal. 2003), *cert. denied*, 540 U.S. 1220 (2004); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *B.L.V.B. and E.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993).

⁴⁵⁵ Barbara J. Cox, *Adoptions by Lesbian and Gay Parents Must Be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate Against Same-Sex Couples*, 31 *CAP. U. L. REV.* 751, 764, 771 (2003); Strasser, *supra* note 453, at 323.

⁴⁵⁶ Strasser, *supra* note 453, at 323.

⁴⁵⁷ Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *COLUM. L. REV.* 249, 259–60 (1992).

based on principles of comity or statutes specifically providing for such recognition.⁴⁵⁸

Second, neither the federal DOMA nor state DOMAs tracking its language can block recognition of the adoption.⁴⁵⁹ The federal DOMA provides as follows:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or *judicial proceeding* of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.⁴⁶⁰

Although some have suggested that the federal DOMA's reference to judicial proceedings calls into question the longstanding conclusion that the Full Faith and Credit Clause obliges states to honor other states' judgments, an adoptive parent can argue that the DOMA would not apply.⁴⁶¹ Because adoption is available to same-sex partners who do not marry or enter into a civil union or domestic partnership in those jurisdictions,⁴⁶² the adoption would not constitute a right or claim "arising from" a marriage, civil union, or domestic partnership, and thus would fall outside even the broadest possible interpretation of the DOMA.⁴⁶³

Adoption thus offers another avenue for acquiring parental rights. It undoubtedly carries with it more likelihood of out-of-state recognition, but the DOMAs inject some uncertainty into this conclusion as well. Moreover, same-sex partners who marry or enter into one of the alternative state-sanctioned relationships should not *have* to undertake the added time and expense of an adoption. The whole point of these laws is to equalize the position of gay couples and families under the law. Requiring an adoption would impose a burden on these couples not suffered by their married heterosexual counterparts.⁴⁶⁴

⁴⁵⁸ Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 352 (1997).

⁴⁵⁹ See 28 U.S.C. § 1738C (Supp. 2004).

⁴⁶⁰ *Id.* (emphasis added).

⁴⁶¹ See generally, e.g., Whitten, *supra* note 18. Other scholars doubt the constitutionality of this interpretation. See, e.g., Cox, *supra* note 455, at 771-79.

⁴⁶² See *supra* note 454 (citing cases allowing same-sex partner adoption in Vermont, Massachusetts, and California).

⁴⁶³ See Strasser, *supra* note 453, at 321.

⁴⁶⁴ See Robson, *supra* note 147, at 31-33 (critiquing the lesbian movement for second-parent adoptions).

Ultimately, the best hope for consistent recognition of parental rights for same-sex parents probably lies with the U.S. Constitution. True uniformity can be achieved in two ways: by recognizing that the prohibition on same-sex marriage violates due process and equal protection⁴⁶⁵ or by recognizing that stripping a parent of parental rights based on choice of law or statutory principles impermissibly deprives her of due process and equal protection and may run afoul of the Full Faith and Credit and Privileges and Immunities Clauses.⁴⁶⁶ Of course, a legislative solution also could solve the problem, but is virtually unimaginable at this point, given the intense polarization of legislatures and the public on this issue.⁴⁶⁷

CONCLUSION

The opportunity for same-sex couples to marry and to enter into civil unions and domestic partnerships has brought gays and lesbians unprecedented rights, perhaps none more meaningful than legal recognition as parents. This development promises to strengthen families and to protect the best interests of children by ensuring that children will have two parents legally bound to care for them and that they will continue to enjoy meaningful contact with both parents who have loved, nurtured, and supported them, even in the face of dissolution of the parents' relationship. Although grave questions exist regarding the portability of the parents' marital status, particularly due to the proliferation of DOMAs throughout the nation, parental rights can survive the invalidation of the parents' marriage. The UPA, precedents regarding legitimacy of children, and general choice of law principles all provide potent arguments for advocates seeking to preserve the parental rights of a same-sex partner. Similar arguments can be adapted for couples from Vermont and California who enter into civil unions or register as domestic partners. As the courts grapple with this question in the years to come, we only can hope that the

⁴⁶⁵ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003). See generally Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 *FORDHAM L. REV.* 921 (1995) (arguing that the refusal to recognize same-sex marriages violates the due process and equal protection guarantees in the Constitution).

⁴⁶⁶ A full discussion of these challenges is beyond the scope of this Article, but is being addressed by me in a separate Article.

⁴⁶⁷ See Michael Christopher Brian, *Gay Fin. Network, Poll Show Americans Against Gay Marriage*, at <http://www.gfn.com/archives/story.phhtml?sid=15491> (Apr. 12, 2004); see also Frost, *supra* note 391; Sujo, *supra* note 391.

results will serve justice and promote the welfare of the children involved by affirming the parent-child relationship created by a marriage, civil union, or domestic partnership with the state's blessing.