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INTERNATIONAL HUMAN RIGHTS LAW, CO-PARENT ADOPTION, AND THE RECOGNITION OF GAY AND LESBIAN FAMILIES

*Elizabeth Burleson**

Abstract

Children would benefit substantially if governments legally recognized same sex marriages and parenting. This article analyzes international human rights law, co-parent adoption, and the legal recognition of gay and lesbian families. It addresses civil marriage and adoption challenges for same sex families and assesses European Court of Human Rights jurisprudence relating to same-sex adoption. This Article considers the international community's efforts to implement the best interest of the child standard concluding that recognition of same sex families is in the best interest of the child and should be facilitated in a timely manner by jurisdictions at all levels.

I. INTRODUCTION

There are at least 594,000 same-sex households in the United States and over 166,000 children being raised by same-sex couples.[1] These same-sex couples are currently ineligible for the 1,138 federal statutory provisions dependent upon marital status due to the Defense of Marriage Act (DOMA), which mandates that for all federal purposes marriage is only between one man and one woman.[2] Nancy J. Knauer notes that:

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1. Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children,* 48 SANTA CLARA L. REV. 999, 1000 (2008).

2. Nancy J. Knauer, *LGBT Elder Law: Toward Equity In Aging,* 32 HARV. J. L. & GENDER 1, 43 (2009). Knauer explains that

> [a]s a result of DOMA, same-sex partners are not entitled to a portion of their partner's Social Security benefit upon the death or disability of their partner even if they are legally married under state law. The Human Rights Campaign estimates that this exclusion of surviving same-sex partners costs LGBT elders $124 million annually in foregone benefits. This raises questions of equity and uniformity because the amount of the survivor's benefits

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> regardless of how individuals choose to order their lives and their relationships, the law continues to privilege those relationships defined by blood, marriage, and adoption. In the absence of recognition of same-sex relationships, a same-sex partner is a legal stranger because there is no way to make a same-sex partner legal family. For LGBT[3] elders with a chosen family, this legal disability extends beyond just their partner and includes all of their potential caregivers. A same-sex partner will be considered "next of kin" to some extent in eleven states, but the other members of a chosen family remain legal strangers in all fifty states.[4]

Children both in the United States and around the globe would benefit substantially if countries legally recognized same-sex marriages and parenting.

This Article analyzes international human rights law, co-parent adoption, and the recognition of gay and lesbian families. Part II addresses civil marriage and adoption challenges for same sex families. Part III assesses European Court of Human Rights jurisprudence relating to same-sex adoption. Part IV addresses the international community's efforts to implement the best interest of the child standard. This article concludes that recognition of same sex families is in the best interest of the child and should be facilitated in a timely manner by jurisdictions at all levels.

II. CO-PARENT ADOPTION

Recognizing legal parenthood facilitates parents' abilities to make medical and financial decisions on behalf of their children.[5] Co-parent

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> is determined by the amount the deceased partner paid into the program. Thus, a worker in a same-sex relationship who pays the same amount as a similarly situated worker in an opposite-sex marriage is entitled to fewer benefits because his or her partner is not eligible for survivor benefits.

Id. at 47; *see also* Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006).

3. "LGBT" is an initialism for lesbian, gay, bisexual or transgender. Likewise, "GBT" stands for gay, bisexual, or transgender.

4. Knauer, *supra* note 2, at 43. It is also important to note that marriage has not been a perfect institution. Melissa Murray, *Equal Rites And Equal Rights*, 96 CAL. L. REV. 1395, 1402 (2008) (noting that "[a]lthough marriage has served as a means of civic inclusion, it also has served as a means of social control and discipline . . . marriage often has been a vehicle for the disenfranchisement and subordination of women.").

5. Jurisdictions vary in the degree to which they have addressed LGBT relationship and parenting recognition. *See, e.g.*, GLAD, HOW TO GET MARRIED IN CONNECTICUT, 23 (2009), *available at* http://www.glad.org/uploads/docs/publications/how-to-get-married-ct.pdf. *See* E.B. v. France, App. No. 43546/02 (Eur. Cr. H.R. Jan. 22, 2008), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=43546/02&sessionid=41595631&skin=hudoc-en (holding that member states are not permitted to discriminate on the basis of sexual orientation in adoption proceedings); *see also* Kathleen A. Doty, *From Fretté To E.B.: The*

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adoption can minimize legal conflicts down the road. Second-parent adoptions generally involve a parent who is established as a legal parent already. The second parent petitions the court to adopt the child in a manner that does not end the existing rights of the first parent. Oddly, some states that allow same-sex second-parent adoptions have not established any legal recognition for the relationship between the same-sex parents.[6]

In many states it remains uncertain whether same-sex couples can file a joint petition to adopt a child. At least ten jurisdictions have permitted same-sex couples to jointly petition to adopt statewide: California, Connecticut, District of Columbia, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, and Vermont.[7] Additionally, same-sex couples have successfully petitioned to adopt in certain jurisdictions within Nevada and New Hampshire.[8]

The Human Rights Campaign notes that:

> Same-sex couples are prohibited from adopting in Florida, Mississippi and Utah. State courts in Michigan have ruled that unmarried individuals may not jointly petition to adopt. Florida is the only state that explicitly prohibits all GLB people, whether individuals or couples, from adopting. On Nov. 4, 2008, Arkansas voters approved a statutory ban on adoption and foster parenting by unmarried individuals cohabiting with a sexual partner.[9]

While equal rights-equal access to adoption and procreation rights for same-

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European Court of Human Rights on Gay and Lesbian Adoption, 18 LAW & SEXUALITY 121, 138 (2009). Specifically, Doty notes:

> With respect to relationship recognition, European Legislation is all over the map. Of the forty-seven Member States of the Council of Europe, four States allow marriage, twelve have some system of registered domestic partnerships, two recognize registered co-habitation, nine allow for unregistered co-habitation, and twenty-six provide no legal recognition for gay and lesbian relationships at all. There are bills in progress to recognize some legal status in two of the States that currently provide no protections (Ireland and Lichtenstein), and a marriage law is soon to be proposed in one registered domestic-partnership State (Sweden). There is clearly a huge range of approaches in the legislative step of LGBT relationship- recognition in Europe. With respect to gay parenting, the national laws are even more varied.

Id.; *see generally* International Lesbian and Gay Association-Europe, http://www.ilga-europe.org/europe/news.

6. Graham, *supra* note 1, at 1026.

7. HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION 1 (2009), *available at* http://www.hrc.org/documents/parenting_laws_maps.pdf.

8. *Id.*

9. *Id.* at 2; *see also* FLA. STAT. ANN. § 63.042(3) (West 2009) (prohibiting homosexuals from adopting); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (upholding FLA. STAT. ANN. § 63.042). Mississippi, Oklahoma and Utah specifically prohibit same sex couples from jointly adopting a child. MISS. CODE ANN. § 93-17-3 (2008); UTAH CODE ANN. §§ 78(B)-6-102(4), -117 (2009); *In re* Adoption of M.C.D., 42 P.3d 873 (Okla. Civ. App. 2001) (holding that unmarried couples may not adopt children).

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sex couples have become increasingly available,[10] Aaron Xavier Fellmeth notes that:

> The state typically grants many benefits to the married couple in the form of rights to community property, pensions, tenancy rights, inheritance, immigration rights, tax benefits, prison and hospital visitation rights, and the right to refuse to testify against one's spouse in a criminal prosecution. In the United States, for example, the federal government grants over a thousand benefits to married couples that are denied to unmarried couples (which includes all same-sex couples). In federal states, these benefits may be exclusive of provincial, state, or municipal benefits for married couples.[11]

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10. *See* Todd Brower, *American University Journal of Gender, Social Policy and the Law*, 17 AM. U. J. GENDER SOC. POL'Y & L. 1, 36 (2009). Brower notes that:

> [t]he Commonwealth of Massachusetts passed the Massachusetts Maternity Leave Act (MMLA), which provides eight weeks of unpaid employment leave to give birth or adopt a minor child. The law expressly applies only to mothers and not fathers; that gender distinction is written into both the statute and the agency guidelines interpreting it. In June 2008, a Commissioner at the Massachusetts Commission Against Discrimination (MCAD) announced that effective immediately, the MMLA would apply to new parents of either sex. This means that both mothers and fathers or both parents in marriages of same-sex couples in Massachusetts will be entitled to the statutory benefits.

Id.; *see also* Massachusetts Maternity Leave Act, MASS. GEN. LAWS. ANN. ch. 149, § 105D (West 2009). *But see* Aaron Xavier Fellmeth, *State Regulation of Sexuality In International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 931 (2008), who says that:

> [a]lthough international authorities have made moves toward recognition of a nondiscrimination principle, state practice indicates continued and widespread resistance to accepting a duty to protect sexual minorities against arbitrary government or private discrimination. Rights to family life and parental rights have been much less universally acknowledged. It would be premature, then, to declare that a substantial consensus of states recognizes the application of human rights to sexual minorities and unconventional sexuality on an equal basis.

Moreover, the United Nations Human Rights Committee ruled in *Joslin v. New Zealand* that the International Covenant on Civil and Political Rights (ICCPR) does not require states to recognize same-sex marriages. Joslin v. New Zealand, Hum. Rts. Comm., UN Communication No. 902/1999, Doc A/57/40 (July 17, 2002), *available at* http://www.bayefsky.com/pdf/newzealand_t5_iccpr_902_1999.pdf.

11. Aaron Xavier Fellmeth, *State Regulation of Sexuality In International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 847-48 (2008); *see also* Elizabeth Burleson, *From Nondiscrimination to Civil Marriage*, CORNELL J.L. & PUB. POL'Y (forthcoming 2010); Jane E. Cross et al., *Families Redefined: Kinship Groups That Deserve Benefits*, 78 MISS. L.J. 791, 797-98 (2009). The federal rights automatically granted to married persons include:

> employee-sponsored health benefits, spousal medical decision-making, family visitation rights for spouses, next-of-kin status for emergency medical decisions or filing wrongful death claims, funeral and bereavement leave, permission to make funeral arrangements for a deceased spouse, joint adoption and foster care, joint parenting rights, such as access to children's school records, access to 'family only' services, such as reduced membership to clubs or residency in certain neighborhoods, insurance coverage, joint tax filing and joint filing of bankruptcy. If one spouse dies, benefits accrue to the surviving spouse. For example, the surviving spouse may receive social security pensions, veteran's pensions, educational assistance, continuation of employer-sponsored health benefits, supplemental security income, income tax deductions, Medicaid disbursements, property tax exemptions, the right to inherit property, and spousal privilege in court. Of course, there are also the

Given the patchwork quilt of legal parental recognition across jurisdictions, same-sex families risk losing rights by crossing state borders. According to *Baker v. General Motors Corporation*, the "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[12] The following sixteen states considered initiatives in 2008 to ban gays and lesbians from adopting children: Alabama, Alaska, Arizona, Georgia, Indiana, Kansas, Kentucky, Michigan, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and West Virginia.[13] In states that do offer second-parent adoption, costs can be prohibitive for families that have already spent a great deal of money on international or domestic adoption.[14] Furthermore, the second parent cannot sign medical consent forms during the waiting period.[15] In states where same sex marriage or civil unions are unavailable, same sex couples are prevented from using the streamlined process of step-parent adoption.[16] Deirdre Bowen explains that:

> Legislatures should allow couples who have planned together for a child, worked together to bring a child into the world, and intend to parent the child together to apply for a parentage declaration. This

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> rights that continue despite the fact that the marriage has ended in divorce. These rights are custodial rights to children, shared property, child support and alimony, to name just a few.

Cross et al., *supra* at 797-99.

12. Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998) (quoting Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)); *see also* Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1, 21 (2008).

13. Andrea Stone, *Drives to Ban Gay Ban Adoption Heat Up in 16 States*, USA TODAY, Feb. 20, 2006, *available at* http://www.usatoday.com/news/nation/2006-02-20-gay-adoption_x.htm; *see also* Deirdre M. Bowen, *The Parent Trap: Differential Familial Power In Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 4-6 (2008).

14. Bowen, *supra* note 13, at 7.

15. *Id.* at 10. To quote Bowen:

> [T]his situation could leave the petitioning parent without any legal rights to the child. Similarly, should the petitioning parent change his or her mind about adopting the child during this waiting period, he or she has no legal obligations to the child he or she jointly intended to bring in to the family. Thus, the "birth" parent may also be put in a vulnerable position.

Id.

16. *Id.* at 10-11. Bowen specifies that:

> [n]ot only does every state in the nation allow married couples to jointly adopt, but all states also recognize step-parent adoption, in which a parent's new spouse may adopt the parent's child with consent and without terminating the other parent's legal rights. While second-parent adoptions require pre- and post-placement home studies, a waiting period and a psychological evaluation, these requirements are frequently waived in step-parent adoptions in favor of streamlining the process.

Id. at 10. Many commentators have focused upon the presumption of parentage in such termination of same sex relationship proceedings as *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007).

> declaration would require no judicial intervention, but rather the application would be completed by both parents, thereby establishing their intentions to parent the child prior to the birth of the child. In assisted reproduction cases, the application could occur at the time the couple selects a donor and just prior to the medically procedural attempts at conception. Most importantly, no adoption would be required; once parental responsibility is established, upon the birth of the child, the non-biological parent's status should be presumed and rebuttable under very limited circumstances.[17]

Currently, the European Court of Human Rights (ECHR) provides a model that other jurisdictions should consider in recognizing the legal status of same-sex families.

III. EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

A country adopting another country's law as one's own legal system can upgrade or downgrade provisions for same-sex families. For example, "a same-sex marriage concluded in the Netherlands, Belgium, or Spain will be downgraded in England and Wales to a civil partnership, whereas a German eingetragene Lebenspartnerschaft will be upgraded in Belgium to a marriage."[18] The ECHR protects the right to respect for family life, the right to marry, and the right not to be discriminated against on the basis of sex.[19] Katharina Boele-Woelki calls for all jurisdictions to enhance the

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17. Bowen, *supra* note 13, at 43-44 (2008). Bowen notes that:

> [a]llowing same-sex couples the option to marry, however, provides a social legitimacy to the whole family unit. Under the parental presumption, the non-biological parent would not have to adopt a child born to the marriage, and a same-sex couple could jointly adopt a child. There would be no "second" parent. It seems that in order to support the status of both parents in the family, legally and culturally, the idea of 'second' parent should be dismantled.

Id. at 46.

18. Katharina Boele-Woelki, *The Legal Recognition Of Same-Sex Relationships Within The European Union,* 82 TUL. L. REV. 1949, 1949 (2008). Boele-Woelki notes further that "two European directives recognize the rights of citizens of the European Union and their families to move and reside freely within the territory of the members states and on family reunification consider both spouses and registered partners to be family members." *Id.* at 1971; *see also* European Parliament and Council Directive 2004/38/EC, On the Right of Citizens of the Union and Their Family Members To Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158) 77, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF; Council Directive 2003/86, On the Right to Family Reunification, 2003 O.J. (L 251) 12, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:251:0012:0018:EN:PDF.

19. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 12, 14, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR], *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B4575C9014916D7A/0/English Anglais.pdf. For instance, Article 8(1) of the ECHR states that, "[e]veryone has the right to respect for his private and family life, his home and his correspondence." *Id.* Article 8(2) provides that:

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legal status of same-sex couples through a protocol adopted by the Hague Conference for Private International Law or through an international convention on the recognition of same-sex relationships.[20]

In the meantime, gay and lesbian families look to the ECHR, which has held that Member States are not permitted to discriminate on the basis of sexual orientation in adoption proceedings.[21] Kathleen Doty notes that:

> *E.B. v. France* has the potential to dramatically alter the landscape of gay and lesbian parental rights in Europe. By overruling *Fretté v. France*, the ECHR took a major step towards recognizing the full equality of gays and lesbians in Europe. Significantly, the case expands the applicability of Article 14 to the point of holding France, a nonsignatory, to the equality standards of Protocol 12. Additionally, in privileging the right to a private life free from discrimination over the national interest in protecting children, the ECHR narrowed the margin of appreciation it grants to States when it reviews State laws that have a discriminatory effect on gays and lesbians. While it remains to be seen what individual countries will do in response to *E.B. v. France*, the ECHR's decision sends a strong message to contracting States that provide rights to their citizens beyond those enumerated in the Convention: The provision of rights in a way that excludes gays and lesbians will not be tolerated.[22]

Located in Strasbourg, France, the ECHR was established in 1959 to hear cases brought pursuant to the Convention for the Protection of Human Rights and Fundamental Freedoms.[23] Known as the European Convention on Human Rights (ECHR), the current system involves a permanent full-

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> [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id. See generally Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909 (2005).

20. Boele-Woelki, *supra* note 18, at 1981.

21. E.B. v. France, App. No. 43546/02, slip op. at para. 96 (Eur. Cr. H.R. Jan. 22, 2008), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=43546/02&sessionid=41595631&skin=hudoc-en.

22. Doty, *supra* note 5, at 141; *see also* Linda C. McClain, *Red Versus Blue (And Purple) States and the Same-Sex Marriage Debate: From Values Polarization to Common Ground?*, 77 UMKC L. REV. 415, 421 (2008) (explaining that Dworkin's fundamental human rights notion of intrinsic value provides that "'each human life has a special kind of objective value,' such that 'once a human life has begun, it matters how it goes. It is good when that life succeeds and its potential is realized and bad when it fails and its potential is wasted.'").

23. *See* ECHR, *supra* note 19, at pmbl.

time Court that came into operation on November 1, 1998. This permanent Court superseded a two-tier, part-time Court and Commission. The Court is competent to hear both inter-state cases and individual applications, as long as domestic remedies have been exhausted.[24] The Court has the power to issue both advisory opinions and binding judgments, to which all Contracting Parties agree to abide.[25] Modeled on the United Nations' 1948 Universal Declaration of Human Rights, the Convention on Human Rights has been invoked to protect LGBT people primarily through Articles 8 and 14. Article 8(1) provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence"[26] while Article 14 prohibits discrimination "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[27]

ECHR same-sex family jurisprudence builds upon several decades of case law dismantling discriminatory laws on the basis of sexual orientation.[28] The European Court of Human Rights found in *Salgueiro da Silva Mouta v. Portugal* that a judge's denial of child custody to a gay father due to the father's sexual orientation was a discriminatory violation of privacy.[29] In 2004, the Court in *Fretté v. France* refrained from recognizing a gay man's right to adopt a child under the ECHR.[30] Several years later in *E.B. v. France*, the Court used the best interests of the child principle to hold that, "in rejecting the applicant's application for authorization to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not

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24. ECHR, *supra* note 19, at arts. 33-35.

25. *Id.* at arts. 44-47.

26. *Id.* at art. 8.

27. *Id.* at art. 14.

28. Doty, *supra* note 5, at 124. Doty notes:

> The jurisprudence of the ECHR as it relates to LGBT people began in 1981 with the landmark ruling that laws criminalizing homosexual conduct violated article 8 of the Convention and the notion of respect for private life. The ECHR also repeatedly found that laws that required higher ages of consent for homosexual sexual relations than heterosexual ones impermissibly discriminated on the basis of sexual orientation. In a subsequent line of cases, the ECHR decided that gender identification, name, sexual orientation, and sexual life are all protected under the Convention as aspects of private life, "which is a broad term 'not susceptible to exhaustive definition.'" Later, the ECHR ruled that the United Kingdom's exclusion of gays and lesbians from military service violated article 8.

Id.

29. Salgueiro da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309; 31 Eur. H.R. Rep. 1055; *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Salgueiro&sessionid=41654015&skin=hudoc-en.

30. Fretté v. France, 2002-I Eur. Ct. H.R. 345; (2004) 38 Eur. H.R. Rep. 21, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Frette&sessionid=41654015&skin=hudoc-en.

acceptable under the Convention."[31] Between the *Fretté* and *E.B.* decisions, the European scientific community clarified that gay parenting was healthy and deserved support.[32]

In the years between *Fretté* and *E.B. v. France*, ECHR anti-discrimination law developed substantially. In particular, Protocol 12 now provides a widespread prohibition on discrimination while Article 7 of a new European Convention on the Adoption of Children recognizes a much broader notion of family than when *Fretté* was decided. While it had been opened for signature several years prior to the final decision in *Fretté*, Protocol 12 did not come into force until 2005.[33] It is important to note that Protocol 12 is a much broader anti-discrimination provision than Article 14. The latter prohibits discrimination in relation to a right under the

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31. E.B. v. France, App. No. 43546/02, slip op. at para. 96 (Eur. Cr. H.R. Jan. 22, 2008), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=43546/02&sessionid=41595631&skin=hudoc-en.

32. For an up to date country-by-country analysis of adoption provisions see ILGA -Europe, Country-by-Country, http://www.ilga-europe.org/europe/guide/country_by_country (last visited December 28, 2009); *see also* Doty, *supra* note 5, at 135 (discussing a brief filed jointly by the Federation Internationale des Ligues des Droits de l'Homme, the European Region of the International Lesbian and Gay Association, the British Agencies for Adoption and Fostering, and the Association des Parents et Futurs Parents Gays et Lesbiens in *E.B. v. France*). Doty explains that:

> Professor of Law Robert Wintemute wrote the brief. He encouraged the court to consider that, since the decision in Fretté, a "gradual trend towards full equality for same-sex couples with regard to second-parent adoption and joint adoption has begun." Wintemute points to a number of European states, including Denmark, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the UK (England and Wales) that, between 2004 and 2005, began permitting second-parent or joint adoption to gay couples. This increase in the number of States that specifically approved of gay and lesbian parenting could not have been lost on the court. Furthermore, after Fretté, the scientific community began publicizing its approval of gay and lesbian parenting. For example, a 2004 study in the Netherlands compared children in 100 two-mother families with children in 100 mother-father families and found "no differences between the psychological adjustment of children in lesbian and those in heterosexual families." Additionally, a 2005 statement by the Colegio Oficial de Psicólogos de Madrid (Official School of Psychologists of Madrid) announced that "[a]ccording to existing scientific studies . . . it cannot be claimed that children raised by lesbian or gay families suffer harm in their psychological development." Going further, in 2002, the British Agencies for Adoption and Fostering "stated its strong support for an amendment to adoption legislation that would extend joint adoption to unmarried different-sex or same-sex couples."

Id. at 135.

33. Protocol No. 12 to Amend the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, http://www.governo.it/Presidenza/USRI/confessioni/normativa%20europea/Protocollo%2012%20Convenzione%20europea.pdf (last visited Dec. 30, 2008) [hereinafter Protocol No. 12]. Protocol No. 12 contains a general prohibition of discrimination:

> The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour [sic], language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Id. at arts. 1-2.

Convention while Protocol 12 prohibits discrimination in relation to any right recognized by Member States that accede to the Protocol.[34] Another important development was the Council of Europe's formation of a Working Group on Adoption, which has led to a revised European Convention on the Adoption of Children that is open for signature.[35] Article 7 explains that countries can extend the scope of the Convention to different or same-sex couples living together in a stable relationship or to individuals.[36] *E.B. v. France* cites the European Convention on the Adoption of Children, further strengthening support for same-sex families.[37]

IV. BEST INTEREST OF THE CHILD STANDARD

Expounding upon the best interest of the child standard, UNICEF states that:

> All decisions relating to children, including adoptions, should be made with the best interests of the child as the primary consideration. The Hague Convention on International Adoptions is an important development, for both adopting families and adopted children, because it promotes ethical and transparent processes, undertaken in the best interests of the child. UNICEF urges national authorities to ensure that, during the transition to full implementation of the Hague Convention, the best interests of each individual child are protected.
>
> The Convention on the Rights of the Child, which guides UNICEF's work, clearly states that every child has the right to know and be cared for by his or her own parents, whenever possible. Recognising this, and the value and importance of families in children's lives, UNICEF believes that families needing support to care for their children should receive it, and that alternative means of caring for a child should only be considered when, despite this assistance, a child's family is unavailable, unable or unwilling to care for him or her.
>
> For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in

34. Protocol No. 12, *supra* note 33, at arts. 1-2.

35. The European Convention on the Adoption of Children (Revised) (CETS No. 202) opened for signature and was signed by Armenia, Denmark, Finland, Iceland, Norway and the United Kingdom. Council of Europe, European Convention on the Adoption of Children (Revised), http://www.coe.int/t/transversalprojects/children/News/AdoptionConvention_en.asp (last visited Dec. 28, 2009).

36. Draft European Convention on the Adoption of Children (Revised), art. 7. http://www.afo.se/EuropeanConventionontheAdoptionofChildren.pdf.

37. E.B. v. France, App. No. 43546/02, slip op. at para. 96 (Eur. Cr. H.R. Jan. 22, 2008), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=43546/02&sessionid=41595631&skin=hudoc-en.

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> preference to institutional care which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption.[38]

As the demand for infants grows, so do abuses such as abduction of children.[39] UNICEF supports the Hague Convention of 1993 on Protection of Children and Co-Operation in Respect of Inter-Country Adoption. In particular, UNICEF notes that every effort should be made to reunite children separated from their parents during armed conflicts and that international adoption should be a last resort.[40]

The Hague Conference on Private International Law explains that:

> The Convention recognizes that growing up in a family is of primary importance and is essential for the happiness and healthy development of the child. It also recognizes that intercountry adoption may offer the advantage of permanent family to a child for whom a suitable family cannot be found is his or her country of origin. By setting out clear procedures and prohibiting improper financial gain, the Convention provides greater security, predictability and transparency for all parties to the adoption, including prospective adoptive parents. The Convention also establishes a system of co-operation between authorities in countries of origin and receiving countries, designed to ensure that intercountry adoption takes place under conditions, which

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38. UNICEF, UNICEF's Position on Inter-Country Adoption, *available at* http://www.unicef.org/media/media_41918.html (last visited Aug. 11, 2009).

39. *Id.*

40. *Id.* UNICEF states:

> The case of children separated from their parents and communities during war or natural disasters merits special mention. It cannot be assumed that such children have neither living parents nor relatives. Even if both their parents are dead, the chances of finding living relatives, a community and home to return to after the conflict subsides exist. Thus, such children should not be considered for inter-country adoption, and family tracing should be the priority. This position is shared by UNICEF, UNHCR, the International Confederation of the Red Cross, and international NGOs such as the Save the Children Alliance.

Id. See also Benyam Mezmur, *From Angelina (To Madonna) to Zoe's Ark: What Are the 'A-Z' Lessons For Intercountry Adoptions in Africa?*, 23 INT'L J.L. & POL'Y & FAM. 145, 163-64 (2008). Mezmur notes that:

> unaccompanied or separated refugee children must not be adopted in haste at the height of an emergency. In fact, adoption should not be considered where there is reasonable hope of successful tracing and family reunification is in the child's best interests, and unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members have been carried out.

Id.

help to guarantee the best adoption practices and elimination of abuses.

> The 1993 Hague Convention gives effect to Article 21 of the United Nations Convention on the Rights of the Child by adding substantive safeguards and procedures to the broad principles and norms laid down in the Convention on the Rights of the Child. The 1993 Convention establishes minimum standards, but does not intend to serve as a uniform law of adoption. While making the rights and interests of the child paramount, it also respects and protects the rights of families of origin and adoptive families.[41]

Cultural heritage and avoidance of institutionalization are both valid objectives when considering the best interests of the child. Ultimately, the international community recognizes that in-country adoptions do not offset the number of international families seeking children. In-country adoptions throughout the developing world are impeded by poverty as well as worries regarding health of the child and the stigma of illegitimacy.[42] Orphanages seldom provide the nurture and protection that every child deserves. An international legal consensus is emerging that the best interest of the child can encompass international adoption and that suitability should not be gender based. International law can provide a framework with which private-public partnerships can facilitate optimal family lives for children.

V. CONCLUSION

Children would benefit substantially if governments broadly recognized same sex marriages and parenting. In the U.S., same-sex married partners soon will be counted in the census for the first time. The Economist notes "the 2010 census will provide the federal government's first official recognition of gay marriage, which is legal in six states. Past censuses have not reported data on gays."[43] Internationally, information is

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41. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, OUTLINE: HAGUE INTERCOUNTRY ADOPTION CONVENTION 1 (2008), *available at* http://www.hcch.net/upload/outline33e.pdf. The Hague Conference says that

> [s]tates, must: consider national solutions first (implement the principle of subsidiarity); ensure the child is adoptable; preserve information about the child and his/her parents; evaluate thoroughly the prospective adoptive parents; match the child with a suitable family; impose additional safeguards where needed. This fundamental principle of the child's best interests should guide the development of an integrated national child care and protection system, of which one part is an ethical, child-centred [sic] approach to intercountry adoption.

Id.

42. Mezmur *supra* note 40, at 145.

43. *Gays and the Census Counting Them In*, THE ECONOMIST, June 25, 2009, at 1 (on file with author), *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=13915838&fsrc=rss (subscription required to access article). To quote:

> In the 2000 census, gay couples who ticked the box "married" were reclassified as unmarried partners. In the 1990 census, the Census Bureau changed the sex of one of the partners so

even scarcer. United Nations High Commissioner for Human Rights, Navi Pillay, lamented that ten countries still have laws making homosexual activity punishable by death, explaining "[t]hose who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family and are entitled to be treated as such."[44]

There has been significant progress in recognizing LGBT rights. In December 2008, sixty countries signed a UN declaration to decriminalize homosexuality.[45] In July 2009, the Delhi High Court in India struck down its gay sex ban.[46] Yet the daily lives of millions of people are impacted by the legal invisibility of LGBT identity and discrimination. Children remain the silent victims of this widespread ambivalence. The time has come to recognize and support same-sex families.

> they were counted as heterosexual—on the grounds the form-filler had doubtless made a mistake . . . . There are some 780,000 same-sex couples in the United States, around 10% of whom are officially married or in civil partnerships, estimates Gary Gates, a demographer in the law school of the University of California, Los Angeles. But no actual federal statistics have been available on the number of gay married couples, or their race or family size. . . . On June 17th, Mr. Obama announced that he will extend some (although not full) benefits to the same-sex partners of federal employees. But some gays worry that Mr. Obama has not touched bigger issues, like his campaign pledge to repeal the "don't ask, don't tell" policy that bars openly gay people from serving in the armed forces, and the Defense of Marriage Act.

Id.

44. *Gays, Lesbians Must be Treated as Equal Members of Human Family – UN Rights Chief*, UN NEWS CENTRE, Dec. 18, 2008, http://www.un.org/apps/news/story.asp?NewsID=29364&Cr=pillay&Cr1=; *see also Scans See "Gay Brain" Differences*, BBC NEWS, June 16, 2008, http://news.bbc.co.uk/2/hi/health/7456588.stm (noting that the brains of gay men and women look like those found in heterosexual people of the opposite sex, the brains of gay men were more like heterosexual women, and gay women more like heterosexual men); The Evolution of Homosexuality, THE ECONOMIST, Oct. 23, 2008 (on file with author), *available at* http://www.economist.com/science/displaystory.cfm?story_id=12465295&fsrc=rss (subscription required to access article) (noting that evidence suggests that homosexual behavior is partly genetic).

45. Laura Trevelyan, *UN Split Over Homosexuality Laws*, BBC NEWS, Dec. 19, 2008, http://news.bbc.co.uk/2/hi/europe/7791063.stm (noting that the "US was the only major Western nation not to sign the declaration—sixty-six countries at the United Nations have called for homosexuality to be decriminalized").

46. Heather Timmons & Hari Kumar, *Indian Court Overturns Gay Sex Ban*, N.Y. TIMES, July 2, 2009, *available at* http://www.nytimes.com/2009/07/03/world/asia/03india.html?_r=1&partner=rss&emc=rss (noting that New Delhi's highest court has decriminalized homosexuality).

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