

ADOPTION: UPSIDE DOWN AND SIDEWAYS?  
SOME CAUSES OF AND REMEDIES FOR DECLINING  
DOMESTIC AND INTERNATIONAL ADOPTIONS

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#### I. THE NEED TO RECOGNIZE ADOPTION SUCCESSES, PROBLEMS, AND SOLUTIONS

There are few government-regulated transactions that morally compare with the selfless, charitable, and compassionate act of responsible adults taking parentless children from foreign countries into their homes. Adoption is usually a magnificent and wonderfully humane commitment of service and love. However, there are some unexpected obstacles to adoption today. To identify those obstacles requires consideration of reliable adoption data and relevant social trends. Obtaining access to reliable and complete data about adoption trends in the United States, and about what is driving those trends, however, is surprisingly challenging.<sup>1</sup>

Social trends and government programs influence the number of adoptions significantly. For example, the dramatic drop in adoptions from 1970 to the mid-1980s undoubtedly was due, to some extent, to the Supreme Court’s decision in January 1973 in *Roe v. Wade*.<sup>2</sup> This case

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<sup>1</sup> See National Adoption Information Clearinghouse, *How Many Children Were Adopted in 2000 and 2001?*, in NATIONAL COUNCIL FOR ADOPTION, ADOPTION FACTBOOK IV 79, 97 (Thomas C. Atwood et al. eds., 2007); see also Paul J. Placek, *National Adoption Data Assembled by the National Council For Adoption*, in NATIONAL COUNCIL FOR ADOPTION, ADOPTION FACTBOOK V 3, 4 (Elisa A. Rosman et al. eds., 2011) [hereinafter FACTBOOK V].

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113, 164–65 (1973); see Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 25, 31–32 (2002); Lisa A. Gennetian, *The Supply of Infants Relinquished for Adoption: Did Access to Abortion Make*

mandated the legalization of abortion on demand<sup>3</sup> which arguably caused the significant, dramatic rise in the number of abortions<sup>4</sup> and which correlated with a dramatic drop in the number of children being placed for adoption.<sup>5</sup> Likewise, the increase in public agency adoptions of children in foster care in the past dozen years is largely attributable to the passage of a federal law<sup>6</sup> that gives welfare-funding incentives to states that reduce the time that foster children are in “limbo” in foster care and increase the number of foster children placed in adoptive homes.<sup>7</sup>

This Article examines a developing social trend and adoption policy changes that may have long-term consequences for adoption in the United States and globally. It considers whether and how the growth in the practice of placing children for adoption with same-sex partners may be impacting both domestic and international adoptions in the United

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*a Difference?*, 37 ECON. INQUIRY 412, 427 (1999); see also FACTBOOK V, *supra* note 1, at 28 tbl.9 (tabulating total unrelated adoptions in the United States by year from 1951–2007).

<sup>3</sup> See *Roe*, 410 U.S. at 164–65. Though *Roe* did not explicitly legalize abortion on demand, that was its ultimate effect. Clarke D. Forsythe, *A Legal Strategy to Overturn Roe v. Wade After Webster: Some Lessons from Lincoln*, 1991 BYU L. REV. 519, 520 n.7 (1991) (“In reality, *Roe* ushered in abortion on demand from conception to birth for any reason or no reason in every state.”); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1022 (2003) (“[I]t is clear to all today that *Roe*, in tandem with *Doe v. Bolton*, in fact created a regime of abortion-on-demand throughout all nine months of pregnancy for any reason agreed to by the mother and abortionist . . .”).

<sup>4</sup> See Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *Abortion Surveillance—United States, 2005*, MORBIDITY & MORTALITY WKLY. REP., Nov. 28, 2008, at 1, 16 tbl.2; see also John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion—A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL’Y 219, 281–82 (2008) (attributing the rise in abortion rates to the legalization of abortion) *By Most Measures, Abortions Have Declined in Recent Decades*, FAMILYFACTS.ORG, <http://familyfacts.org/charts/230/by-most-measures-abortions-have-declined-in-recent-decades> (last visited Nov. 11, 2013) (comparing abortion statistics from two different sources). Several states had already legalized abortion before *Roe*, causing some of the increase in abortion rates to occur in the early 1970s prior to the Court’s decision. See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY*, 556–57 (2006).

<sup>5</sup> See sources cited *supra* note 2.

<sup>6</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). For further discussion of the Act’s effects, see Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, in CTR. FOR THE STUDY OF SOC. POLICY, *INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT* 8, 32 (2009).

<sup>7</sup> See LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318, 355 n.195 (2010) (“The Adoption Incentive Program, created in 1997 by the Adoption and Safe Families Act, provides a financial reward to states that increase the number of finalized adoptions from foster care. For each foster care adoption that exceeds an established baseline number, the state receives \$4,000, which can be used for any child welfare purpose.”); see also 42 U.S.C. § 673b (2006 & Supp. V 2012).

States. It suggests that there is a way to legalize and recognize same-sex, second-parent legal status without allowing same-sex partner adoptions which appear to have a negative impact upon relinquishment and placement of both domestic and foreign children for adoptions.

This Article makes several connected points. First, it briefly notes in Part II that there has been a clear decline in the number of intercountry adoptions, both globally and in the United States, and in the domestic adoption of unrelated, parentless children in the United States. It reviews briefly why that decline in adoptions is serious and how it harms parentless children. Adoption is a very important solution to that problem for many children, and both domestic and intercountry adoption provide many homes for many children who would never otherwise be raised in families.

Second, in Part III, this Article reviews how the drafting and adoption of the Hague Convention on Intercountry Adoption has caused some reduction in intercountry adoptions. The Hague Convention was intended to facilitate and encourage intercountry adoption, but it has increased the bureaucracy and expense of time of intercountry adoptions in a way that has discouraged intercountry adoption.

Next, Part IV reviews the legalization of adoption by same-sex individuals, partners, and couples in American family law. It notes that individuals with same-sex orientation are allowed to adopt in practically all states, and although fewer than half of the states allow same-sex partners or couples to adopt, there is a growing trend toward allowing these adoptions. It also notes the connection between allowing same-sex couples and partners to adopt and the legalization of same-sex marriage.

Fourth, this Article suggests in Part V that placing children for adoption with gay or lesbian parents may be a contributing factor to the reduction in both domestic and intercountry adoptions. Unless these adoptions are very carefully regulated and closely monitored, it is contrary to the best interests of promoting intercountry adoption. While the Hague Convention itself is “neutral” about lesbian, gay, bisexual, and transgender (collectively “LGBT”) adoption, the Convention reinforces, protects, and requires compliance with the subscribing nations’ policies. Most nations in the world, including nations that have adopted the Hague Convention on Intercountry Adoption, prohibit placing children for adoption with LGBT partners or couples (and sometimes singles).

Next, in Part VI, this Article asserts that deceptive, misleading, and fraudulent adoption practices intended to circumvent national policies barring placement of children for adoption with LGBT singles, partners, or couples not only violate the principles of the Hague Convention but also reduce the number of intercountry adoptions.

Part VII proposes that “sideways” adoption status (“uncle” or “aunt” adoptive status rather than co-parent status) may be a method to allow some adoptions that might not be allowed as traditional two-parent or single-parent intercountry adoptions. This may be a practical compromise that benefits children, prospective adopters, and traditional values regarding family integrity.

This Article concludes in Part VIII by reiterating the need to recognize the successes and failures of the Hague Convention on Intercountry Adoption. It also examines the need to explore the causes of and possible solutions to the current impediments to the practice of intercountry adoption. Small changes might remedy problems that are now significantly depressing responsible intercountry adoption and perhaps indirectly drive some possible responsible-but-impecunious adoptions underground (and, ironically, into child-trafficking).

## II. THE DECLINE OF DOMESTIC AND INTERCOUNTRY ADOPTIONS OF UNRELATED CHILDREN

### A. *The Decline in Intercountry Adoptions to the United States*

For the past six decades, “[t]he United States has been the largest receiving country . . . , accounting for more than half of all international adoptions.”<sup>8</sup> Historically, Americans adopt more children than all of the other nations of the world combined.<sup>9</sup> For example, best estimates suggest that the top twenty adopting countries adopted just over 32,000 children from other nations in 1999,<sup>10</sup> and over half of those children (16,363) entered the United States.<sup>11</sup> Of course, if relative populations are compared, the Scandinavians are doing even better in the practice of intercountry (and domestic) adoption. For example, in 1998 the rate of

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<sup>8</sup> Ann Laquer Estin, *Families Across Borders: The Hague Children’s Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 80 (2010).

<sup>9</sup> See Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 597 (2005); Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT’L L. 465, 468–69 (1995) (stating that since the mid-1950s American couples successfully completed over 100,000 intercountry adoptions); Caeli Elizabeth Kimball, Student Article, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 564–65 (2005) (citing Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov.—Dec. 2003, at 115, 117) (“In 2001, over 34,000 intercountry adoptions took place worldwide, with the United States receiving over 19,000 adoptees.”).

<sup>10</sup> Peter Selman, *Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004*, 23 J. POPULATION RES. 183, 187 tbl.2 (2006).

<sup>11</sup> *Id.*

adoption in the United States was 5.8 children per 100,000 people while it was 10.5 in Sweden and 14.6 in Norway.<sup>12</sup> About two thirds of the children brought to the United States by intercountry adoption are females.<sup>13</sup> Also, about 40% of the children are under the age of one, about 35% of the children are one to two years old, and about 25% of the children are aged three to seventeen.<sup>14</sup>

The United States was one of the early signatories of the Hague Convention, formally signing on March 31, 1994.<sup>15</sup> The Hague Convention came into effect in the United States on April 1, 2008.<sup>16</sup> Tragically, the Hague Convention has substantially reduced the number of intercountry adoptions.<sup>17</sup> As the date for implementing the Hague Convention approached, three years before it took effect in the United States, the numbers of intercountry adoptions in the United States began to fall as new regulations, drafted in preparation for compliance with the Hague Convention, took effect. The numbers of intercountry

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<sup>12</sup> *Id.* at 189 tbl.4.

<sup>13</sup> See *Statistics, Intercountry Adoption*, U.S. DEP'T ST., [http://adoption.state.gov/about\\_us/statistics.php](http://adoption.state.gov/about_us/statistics.php) (last visited Oct. 30, 2013); see also FACTBOOK V, *supra* note 1, at 29 tbl.10.

<sup>14</sup> See *Statistics*, *supra* note 13.

<sup>15</sup> Rachael M. Schupp-Star, Note, *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: The Need for a Uniform Standard for Intercountry Adoption by Homosexuals*, 16 ROGER WILLIAMS U. L. REV. 139, 145 (2011). See generally Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, S. TREATY DOC. NO. 105-51 (1998) [hereinafter Convention on Intercountry Adoption].

<sup>16</sup> Schupp-Star, *supra* note 15, at 145 (The Hague Convention “was transmitted to the Senate for its advice and consent on June 11, 1998. . . . The United States Senate gave its advice and consent to the United States’ ratification of the Convention on September 20, 2000.”); see also 146 CONG. REC. 18,766 (2000) (explaining that “the hard work of putting the promise of the Hague Convention into reality begins” and the actions taken for recognizing the Convention as having passed through parliamentary procedure up to ratification); Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT’L L. REV. 483, 521 (2004) (“On September 20, 2000, the Senate provided advice and consent to ratification of the Convention, subject to the passage of implementing legislation . . .”). Also in 2000, both Houses of Congress passed the Intercountry Adoption Act of 2000 (“IAA”), which provides for the implementation of the Hague Convention. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, §§ 1–2, 114 Stat. 825, 825–26 (codified at 42 U.S.C. § 14901 (2006)). Congress assigned primary responsibility for implementation of the Hague Convention “to the State Department, because of its experience ‘on the ground’ with international adoptions. Beyond the State Department’s role as Central Authority, the Bureau of Citizenship and Immigration Services (CIS) in the Department of Homeland Security also has responsibility for implementing the immigration and visa aspects of the law.” Estin, *supra* note 8, at 81–82. “The United States completed the formal ratification procedures for the [Hague Convention] on December 12, 2007 . . . .” Schupp-Star, *supra* note 15 at 145.

<sup>17</sup> See *infra* Part III.

adoptions bringing children to the United States have continued to fall dramatically.<sup>18</sup>

Table 1: Intercountry Adoptions in the United States from All Foreign Countries Combined, 1999–2012<sup>19</sup>

Year	Adoptions
1999	15,719
2000	18,857
2001	19,647
2002	21,467
2003	21,654
2004	22,991
2005	22,734
2006	20,680
2007	19,608
2008	17,456
2009	12,744
2010	11,058
2011	9,319
2012	8,668
Total	242,602

Since 2004, “[t]he number of ‘orphan’ visas granted by the United States has fallen by more than half,<sup>20</sup> and the number of intercountry adoptions by American families has fallen by sixty-two percent from their decade high.<sup>21</sup>

### B. The Global Decrease in Intercountry Adoptions

Information on the number of intercountry adoptions worldwide is often less than precise.<sup>22</sup> In 2001, the leading international authority on this subject, Dr. Peter Selman,<sup>23</sup> reported that the best data indicate that during the 1980s there was a minimum of about 162,000 intercountry

<sup>18</sup> See *infra* Table 1.

<sup>19</sup> See *Statistics*, *supra* note 13 (select “Adoptions by Year” tab).

<sup>20</sup> Peter Selman, *Global Trends in Intercountry Adoption: 2001–2010*, ADOPTION ADVOC., Feb. 2012, at 1, 2–3 [hereinafter Selman, *Global Trends*], available at [https://www.adoptioncouncil.org/images/stories/documents/NCFA\\_ADOPTION\\_ADVOCATE\\_NO44.pdf](https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO44.pdf).

<sup>21</sup> See *supra* Table 1.

<sup>22</sup> Peter Selman, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, at 3–4 (Aug. 18–24, 2001) (unpublished manuscript) [hereinafter Selman, *Movement of Children*], available at [http://www.archive-iussp.org/Brazil2001/s20/S27\\_P05\\_Selman.pdf](http://www.archive-iussp.org/Brazil2001/s20/S27_P05_Selman.pdf).

<sup>23</sup> See Selman, *Global Trends*, *supra* note 20, at 16 note (sidebar titled “About the Author”).

adoptions, averaging 16,000 per year.<sup>24</sup> A decade ago, Dr. Selman estimated that during the 1990s the number of intercountry adoptions ranged from about 19,000 to a little over 32,000 per year.<sup>25</sup> Dr. Selman's most recent report (in 2012) found that "[i]n 1998 there were just under 32,000 adoptions; by 2004 this number had risen to over 45,000; by 2009 the world total had fallen to under 30,000—less than in 1998—and the decline continued in 2010."<sup>26</sup> Clearly, the number of children adopted in intercountry adoptions increased through the 1990s—the decade in which the Hague Convention was ratified—and has significantly declined since the 21st century began, both globally and in the United States.

The National Council for Adoption has confirmed that the reduction in intercountry adoptions has occurred *around the world*, not just in the United States.<sup>27</sup> In surveying data on twenty-three receiving states between 2001 and 2010, the report confirms the massive depression of intercountry adoption:

The global number of intercountry adoptions peaked in 2004 after a steady rise in annual numbers from the early 1990s. Since then, annual numbers have decreased to the point that by 2008 the total was lower than it had been in 2001, and by 2009 lower than it was in 1998.<sup>28</sup>

Beginning in 2009, more children were going to Europe for adoption than were going to the United States,<sup>29</sup> reversing a sixty-year adoption pattern.<sup>30</sup> "Global numbers [of intercountry adoptions] fell by 35 percent between 2004 and 2009."<sup>31</sup> The top sending countries have changed significantly between 1980 and 2010,<sup>32</sup> and the adoption numbers from most Eastern European nations also have dramatically fallen between 2003 and 2010.<sup>33</sup> In Africa, only Ethiopia has shown any significant increase in intercountry adoption placements since 2004.<sup>34</sup>

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<sup>24</sup> Selman, *Movement of Children*, *supra* note 22, at 5.

<sup>25</sup> *Id.*

<sup>26</sup> Selman, *Global Trends*, *supra* note 20, at 2.

<sup>27</sup> *See id.* at 1–3, 6–7, 9–12, 14–15.

<sup>28</sup> *Id.* at 1 (citations omitted).

<sup>29</sup> *See id.* at 2.

<sup>30</sup> *See id.* at 2, 4.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *See id.* at 5 tbl.4 (showing that only Columbia was among the top seven sending countries in both 1980 and 2010).

<sup>33</sup> *See id.* at 11 tbl.13.

<sup>34</sup> *See id.* at 12 tbl.18.



Figure 1: Trends in Intercountry Adoption to Twenty-three Receiving States, 2001–2010<sup>35</sup>

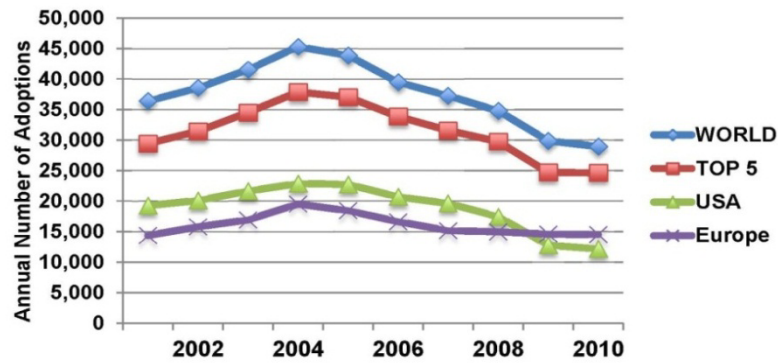


Table 2: Intercountry Adoptions to Twenty-three Receiving Countries, 1998 to 2010, by Rank in 2004 (Peak years highlighted in bold)<sup>36</sup>

Country	1998	2001	2004	2006	2008	2009	2010
USA (FY)	15,774	19,237	<b>22,884</b>	20,679	17,438	12,753	12,149
Spain	1,487	3,428	<b>5,541</b>	4,472	3,156	3,006	2,891
France	3,769	3,094	<b>4,079</b>	3,977	3,271	3,017	3,504
Italy	2,374	1,797	3,402	3,188	3,977	3,964	<b>4,130</b>
Canada	<b>2,222</b>	1,874	1,955	1,535	1,916	2,129	1,946
<b>Total to all states</b>	<b>31,875</b>	<b>36,391</b>	<b>45,298</b>	<b>39,460</b>	<b>34,785</b>	<b>29,867</b>	<b>29,095</b>
<b>% to USA</b>	49%	53%	51%	52%	50%	43%	42%
<b>% to Europe</b>	41%	39%	43%	42%	43%	49%	50%

<sup>35</sup> Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century: Global Trends from 2001 to 2010*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 7, 9 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) [hereinafter *Rise and Fall*] (Copyright 2012 Ashgate Publishing Ltd., figure reprinted with permission). The original source for this figure is the preceding book; however, the graphic was provided by and has been reprinted with permission from the National Council for Adoption. Peter Selman, *Global Trends in Intercountry Adoption: 2001–2010*, NAT'L COUNCIL FOR ADOPTION, <http://www.adoptioncouncil.org/publications/adoption-advocate-no-44.html> (last visited Oct. 30, 2013).

<sup>36</sup> *Rise and Fall*, *supra* note 35, at 8 tbl.1.1 (The 2010 United States data includes 1,090 emergency visas for Haiti. Eighteen other countries are included in the grand total: Australia, Belgium, Cyprus, Denmark, Finland, Germany, Iceland, Ireland, Israel, Luxembourg, Malta, Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom, and including Andorra beginning in 2001) (Copyright 2012 Ashgate Publishing Ltd., reprinted with permission).

*C. The Decline in Domestic Adoptions of Unrelated Children in the United States*

The United States Department of Health and Human Services reports that, of 1,782,000 total number of adoptions over the time of which it has record, the largest share (38%) have been domestic private adoptions, accounting for 677,000 adoptions; followed closely by domestic foster care adoptions (37%) numbering 661,000; followed by intercountry adoptions totaling 25% (444,000 in number).<sup>37</sup> The Department of Health and Human Services also reports that 69% of all adoptions are by married couples, approximately 29% are by single individuals, and 2% are by unmarried couples.<sup>38</sup>

However, the U.S. government does not generally collect adoption data, let alone comprehensive adoption information.<sup>39</sup> By default, therefore, the most reliable sources of thorough information about adoption in the United States are private adoption organizations, especially the National Council for Adoption (“NCFA”) whose *Adoption Factbook V* in 2011 contains the most comprehensive (and the most recent) data about adoption in the United States.<sup>40</sup> Reporting on the period from 1951 to 2007, the NCFA reports: “[A]doptions rose from 72,000 in 1951 to a peak of 175,000 in 1970, declined to 108,463 in 1996, and rose to 133,737 in 2007.”<sup>41</sup> In 2007, the NCFA reports that there were 57,248 related domestic adoptions and 76,489 unrelated domestic adoptions (for a total of 133,737 domestic adoptions); in addition, there were another 19,442 foreign children adopted in the United States through intercountry adoption—for a grand total of 153,179 children adopted in the United States in 2007.<sup>42</sup>

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<sup>37</sup> SHARON VANDIVER ET AL., U.S. DEPT OF HEALTH & HUM. SERVS., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 3 fig.1 (2009), available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf>.

<sup>38</sup> *Id.* at 9, 17, 62 tbl.5.

<sup>39</sup> See FACTBOOK V, *supra* note 1, at 3.

<sup>40</sup> See *id.* at 4; Elisa Rosman, *Forward* to NATIONAL COUNCIL FOR ADOPTION, FACTBOOK V, at iii, iii (Elisa A. Rosman et al. eds., 2011).

<sup>41</sup> FACTBOOK V, *supra* note 1, at 9, 27 tbl.8; see also Paul Placek, *National Adoption Data*, in ADOPTION FACTBOOK IV 3, 9 (Thomas C. Atwood et al. eds., 2007) [hereinafter FACTBOOK IV] (reporting similar data in 2002: “Adoptions rose from 72,000 in 1951, to a peak of 175,000 in 1970, declined to 104,088 in 1986, and rose to 130,269 in 2002.”).

<sup>42</sup> FACTBOOK V, *supra* note 1, at 11 tbl.1. Total adoption figures can be ambiguous because they combine domestic adoptions (in which the adoptive parents and the adopted child are from the same nation) and intercountry adoptions; adoptions of related children (often step-parent adoptions but also including adoptions by grandparents, aunts and uncles, and other relatives) and adoptions of unrelated children; and public adoptions (through child welfare agencies, generally of children in foster care) and private adoptions

However, total adoption figures can be ambiguous because they combine various categories of adoption. For example, if one looks only at the total adoption data, an increase in related adoptions may offset and mask a decrease in unrelated adoptions (and vice versa). Similarly, looking at total adoption figures, a decrease in international adoptions may be hidden by an increase in domestic adoptions. The reported rise in total adoptions between 1996 and 2007<sup>43</sup> masks some profound reductions in certain categories of adoption that bode ill for the future. For example, the number of unrelated infant domestic adoptions in the United States fell steadily from 1992 (26,672) to 2007 (only 18,078).<sup>44</sup> Likewise, the total number of private adoptions fell from 1992 to 2007 (from 17,136 to 13,257).<sup>45</sup> Most disturbingly, since 1994 there has been a steady, profound decline in the number of adoptions by American families of children from other nations, reversing a sixty-year pattern.<sup>46</sup>

The Evan B. Donaldson Adoption Institute reported in the 1990s that “adoptions by unrelated adults [were] declining” and that the “number of infants available for private adoption [was] decreasing.”<sup>47</sup> In 2000, the Census Bureau reported that 2.5% of all children in the United States had been adopted by the householder, totaling 2,058,915 adopted children living in homes in the United States, including 1,586,004 who were age 17 or younger.<sup>48</sup> In 2008, the Centers for Disease Control and Prevention reported a significant long-term drop (trend) in the percent of ever-married U.S. women who had adopted (from 2.2% in 1982 to 1.4% in 2002).<sup>49</sup> Consistently, the percentage of American women who ever

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(including both private-agency-involved adoption and independent placements by the mother). *See, e.g.*, FACTBOOK IV, *supra* note 41, at 4–5.

<sup>43</sup> *See supra* text accompanying note 41.

<sup>44</sup> FACTBOOK V, *supra* note 1, at 5 fig.2.

<sup>45</sup> *Id.* at 6 fig.6.

<sup>46</sup> *See infra* Part III.

<sup>47</sup> *Private Domestic Adoption Facts*, EVAN B. DONALDSON ADOPTION INST., <http://www.adoptioninstitute.org/FactOverview/domestic.html> (last visited Oct. 30, 2013); *see also* VICTOR E. FLANGO & CAROL R. FLANGO, THE FLOW OF ADOPTION INFORMATION FROM THE STATES 22 tbl.3. (1994) (tabulating adoption data showing around 120,000 adoptions of children per year in the late 1980s and early 1990s). This data is dated, but recent evidence shows that trends are similar. *Compare* FACTBOOK IV, *supra* note 41, at 30 tbl.5 (reporting 5.5 infant adoptions per 1,000 live births, and 16.3 infant adoptions per 1,000 nonmarital live births in 2002), *with*, FACTBOOK V, *supra* note 1, at 20 tbl.5 (reporting 4.2 infant adoptions per 1,000 live births, and 10.3 infant adoptions per 1,000 nonmarital live births in 2007).

<sup>48</sup> ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, 2 tbl.1 (2003), *available at* <http://www.census.gov/prod/2003pubs/censr-6.pdf>.

<sup>49</sup> Jo Jones, U.S. Dep’t of Health & Human Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United*

had taken steps to adopt was highest among older women (age range groups of 40–44 years old, 35–39 years old, and 30–34 years old), reflecting, *inter alia*, that more women tried to adopt in past years.<sup>50</sup>

#### D. Why the Decrease in Adoption Matters

The suffering and deprivations of parentless children is a terrible tragedy that mocks our pretensions of progress toward international human rights. This suffering also undermines the needs and basic human dignity of children and our aspirations for international social justice.<sup>51</sup> In 1993, “UNICEF estimate[d] about 100 million street children exist[ed] in the world . . . . About forty million [we]re in Latin America, twenty-five to thirty million in Asia, and ten million in Africa.”<sup>52</sup> The numbers are rising.<sup>53</sup> In 2006, UNICEF revised its report and admitted that “[t]he exact number of street children is impossible to quantify, but the figure almost certainly runs into tens of millions across the world. It is likely that the numbers are increasing as the global population grows and as urbanization continues apace.”<sup>54</sup> In 2012, UNICEF reported that “[e]stimates suggest that tens of millions of children live or work on the streets of the world’s towns and cities—and the number is rising with global population growth, migration and increasing urbanization.”<sup>55</sup>

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*States, 2002*, VITAL & HEALTH STAT., Aug. 2008, at 1, 19 tbl.1. *But see id.* at 28 tbl.10 (comparing 1995 and 2002 numbers of women seeking adoption, showing higher numbers in 2002).

<sup>50</sup> *Id.* at 23 tbl.5. Of course, adoption demand tends to increase as women age beyond their child-bearing years. *See id.* at 27 tbl.9.

<sup>51</sup> For further discussion by the author of the topics in this Section, see generally Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 IND. INT’L & COMP. L. REV. 113 (2008) [hereinafter Wardle, *HCIA Implementing Law*]; Lynn D. Wardle, *Protecting Children by Protecting Domestic and International Adoption*, in *LEBENDIGES FAMILIENRECHT: FESTSCHRIFT FÜR RAINER FRANK [LIVING FAMILY LAW: CELEBRATION IN HONOR OF RAINER FRANK]* 313 (2008) [hereinafter Wardle, *Protecting Adoption*].

<sup>52</sup> Susan O’Rourke von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children’s Convention and International Response to Children’s Human Rights*, 18 SUFFOLK TRANSNAT’L L. REV. 589, 616 (1995); *see also* Marc D. Seitles, *Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 PUB. INT. 159, 159 (1997).

<sup>53</sup> *See* von Struensee, *supra* note 52, at 616–17.

<sup>54</sup> UNICEF, *THE STATE OF THE WORLD’S CHILDREN 2006*, at 40–41 (2005) (endnote omitted), available at [http://www.unicef.org/sowc06/pdfs/sowc06\\_fullreport.pdf](http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf).

<sup>55</sup> UNICEF, *THE STATE OF THE WORLD’S CHILDREN 2012* 32 (2012) [hereinafter *THE WORLD’S CHILDREN 2012*], available at [http://www.unicef.org/iran/SOWC\\_2012-Main\\_Report\\_EN\\_13Mar2012.pdf](http://www.unicef.org/iran/SOWC_2012-Main_Report_EN_13Mar2012.pdf).

Parentless children in poor nations often become homeless persons or “street children.”<sup>56</sup> A UNICEF study reported that in 2009 there were 153 million orphans worldwide that year, which included 145 million orphans (among them 16.9 million AIDS orphans) in developing countries and 41.7 million orphans (including 7.4 million AIDS orphans) in the least developed countries.<sup>57</sup> The number of orphans is substantially higher than the estimate of the total number of orphans predicted less than a decade earlier by a 2002 UNAIDS-UNICEF study.<sup>58</sup> This study suggests that the crisis may be expanding faster than experts have anticipated.<sup>59</sup>

The plight of parentless children, especially in third-world countries, is extreme. Many of them are unable to survive. They die ignominiously, often from starvation, with bloated bellies, listless, bony bodies, pain-drenched eyes, with cries of hunger and fear. Their suffering and death indicts us. The United Nations estimates that approximately 50,000 human beings die every day “as a result of poor shelter, water, or sanitation,”<sup>60</sup> and parentless children are especially vulnerable to these ravages.<sup>61</sup> They are also vulnerable to many kinds of miserable exploitations, abuses, and even murder, especially when living on the street.<sup>62</sup> They often desperately exploit their bodies or turn to crime to

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<sup>56</sup> Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 885 (2004).

<sup>57</sup> THE WORLD'S CHILDREN 2012, *supra* note 55, at 103 tbl.4.

<sup>58</sup> Compare *id.* (tabulating the estimated worldwide number of orphans in 2009 at 153 million, 17 million of which were caused by AIDS), with UNAIDS & UNICEF, CHILDREN ON THE BRINK 2002: A JOINT REPORT ON ORPHAN ESTIMATES AND PROGRAM STRATEGIES 3 (2002), available at [http://data.unaids.org/Topics/Young-People/childrenonthebrink\\_en.pdf](http://data.unaids.org/Topics/Young-People/childrenonthebrink_en.pdf) (predicting that by 2010 there would be 106 Million orphans worldwide, 25 million of which would be orphaned by AIDS).

<sup>59</sup> See *supra* note 58; see also *AIDS Creating Global 'Orphans Crisis'*, CBS NEWS, Feb. 11, 2009, <http://www.cbsnews.com/stories/2002/07/09/health/main514560.shtml> (“Another report . . . by the Swiss-based advocacy and research group Association Francois-Xavier Bagnoud[] predicted an even worse scenario—as many as 100 million orphans by 2010.” Such predictions from “[i]nternational agenc[ies] . . . only count children up to the age of 15 because government statistics classify people in 5-year age groups.”).

<sup>60</sup> Janet Ellen Stearns, *Urban Growth: A Global Challenge*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 141 (1999).

<sup>61</sup> Seugling, *supra* note 56, at 882.

<sup>62</sup> See Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines*, 11 INT'L J. REFUGEE L. 84, 86 (1999); Ariel E. Dulitzky & Luguely Cunillera Tapia, *A Non-governmental Perspective Regarding the International Protection of Children in the Inter-american System of Human Rights*, 8 J. TRANSNAT'L L. & POL'Y 265, 266 (1999).

survive—and to die.<sup>63</sup> UNICEF reported last year that “[n]early 8 million children died in 2010 before reaching the age of 5, largely due to pneumonia, diarrhea and birth complications. Some studies show that children living in informal urban settlements are particularly vulnerable.”<sup>64</sup> The global problem of parentless children cannot be ignored. “[H]idden inside cities, wrapped in a cloak of statistics, are millions of children struggling to survive. . . . They live in squalor . . . [and] in slums . . . .”<sup>65</sup>

The plight of parentless children in the United States is also severe. The major collection of such children who need permanent homes with permanent, committed-to-them parents is in the child welfare system of the various states.<sup>66</sup> Over 100,000 legally-parentless children are currently potentially available for adoption in the United States and are languishing in the limbo of long-term foster care.<sup>67</sup>

### III. HOW THE HAGUE CONVENTION CAUSED A REDUCTION IN INTERCOUNTRY ADOPTIONS

The 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, sometime known as “the Hague Convention on Intercountry Adoption” (herein “Hague Convention”), was a significant advance in international adoption law

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<sup>63</sup> See Tracy Agyemang, Note, *Reconceptualizing Child Sexual Exploitation as a Bias Crime Under the Protect Act*, 12 CARDOZO J.L. & GENDER 937, 951–52 (2006); Laura P. Wexler, Note, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT’L L.J. 545, 547 (2008).

<sup>64</sup> THE WORLD’S CHILDREN 2012, *supra* note 55, at 14 (footnote omitted).

<sup>65</sup> Queen Rania Al Abdullah, *Out of Sight, Out of Reach*, in THE WORLD’S CHILDREN 2012, *supra* note 55, at 15, 15.

<sup>66</sup> See Elisa Rosman et al., *Finding Permanence for Kids: NCFR Recommendations for Immediate Improvement to the Foster Care System*, ADOPTION ADVOC., Sept. 2009, at 3, 3–4 (“In 2008 . . . there were 463,000 children in foster care, of which 123,000 were waiting to be adopted.”).

<sup>67</sup> *Id.*; *Meet the Children*, ADOPTUSKIDS, <http://www.adoptuskids.org/meet-the-children> (last visited Oct. 30, 2013) (“Today there are 104,000 children in foster care waiting to be adopted . . . .”); see also U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT (2009), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport16.pdf> (stating 17% of children in foster care waiting to be adopted had been waiting for more than 5 years). *But see* David M. Smolin, *Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 REGENT J. INT’L L. 267, 271, 320–21 (2012) (noting that “both Christian and secular sources promoting adoption commonly claim that there are more than 100 million orphans in the world, a staggering figure indicating a virtually limitless need for adoptive families. Those focused on adoption from the United States foster care system estimate more than 100,000 children in the United States in need of adoption” but arguing that such numbers should not be the driving force behind the adoption movement).

and practice.<sup>68</sup> The Hague Convention grew out of a consensus by the representatives of the dozens of nations from around the world that comprise the Hague Conference on Private International Law (currently 72 nations).<sup>69</sup> They agreed that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,”<sup>70</sup> and that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>71</sup> They were “[c]onvinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children.”<sup>72</sup> Thus, the Hague Conference drafted the Hague Convention with two overarching goals: first, to promote intercountry adoption for children without families in their states of origin; and second, to prevent abusive practices such as the selling of children.<sup>73</sup> International adoption is one important component in protecting the welfare of parentless children, especially those in third-world countries.<sup>74</sup> While it operates one child at a time, it makes a huge difference to each of those children as well as future children.<sup>75</sup>

The Hague Convention governs intercountry adoptions among nations who have adopted the convention.<sup>76</sup> As of September 6, 2013, ninety-four nations had signed, ratified, or acceded to the Hague Convention,<sup>77</sup> and it had entered into force in all but four of those nations.<sup>78</sup>

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<sup>68</sup> Convention on Intercountry Adoption, *supra* note 15; Cynthia Ellen Szejner, Note, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOBAL STUD. L. REV. 211, 213 (2006).

<sup>69</sup> HAGUE CONFERENCE ON PRIVATE INT'L LAW, ANNUAL REPORT 2012, at 25 (2013).

<sup>70</sup> Convention on Intercountry Adoption, *supra* note 15, at pmb1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Maarit Jänterä-Jareborg, *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 63 NORDIC J. INT'L L. 185, 188 (1994).

<sup>74</sup> See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 158 (2007).

<sup>75</sup> See *id.*

<sup>76</sup> Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 129 (2007).

<sup>77</sup> *Status Table*, THE HAGUE CONF. ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Oct. 30, 2013). Sixty-one nations belonging to the Hague Conference have signed or given effect to this Convention (forty-

The Hague Convention has been a good starting point for reducing illegal practices such as baby-selling and extra-legal child trafficking.<sup>79</sup> At its inception, there was hope that adopting the Hague Convention would reduce bad policy practices and adoption process abuses in those nations that ratified or acceded to the Convention.<sup>80</sup> However, it has failed to facilitate and promote intercountry adoption—the other major purpose for the Convention.<sup>81</sup>

The Hague Convention on Intercountry Adoption was, *inter alia*, intended to reduce the “delays, complications and [the] considerable costs” of intercountry adoption.<sup>82</sup> However, it requires implementing bureaucracy and extensive regulations that are quite complicated and difficult.<sup>83</sup> These elements increase bureaucratic complexity, costs, and

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seven by ratification, twelve by accession, and two by signing) and thirty-three other sovereign nations have signed or given effect to it (six by ratification, twenty-five by accession, and two by signing), for a total of ninety-four nations that have taken some step to join by signing, ratifying, or acceding. *See id.*

<sup>78</sup> *Id.*; *see also* Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8064–65 (Feb. 15, 2006) (to be codified at 22 C.F.R. pt. 96) (explaining how the United States has enforced the Hague Convention through the Intercountry Adoption Act of 2000); Anna Mary Coburn et al., *International Family Law*, 38 INT’L LAW. 493, 494 (2004) (“The Hague Convention will . . . enter into force between the United States and other party countries approximately three months after . . . ratification . . . .”) Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 358–59 (2005) (noting a surprising amount of support in the first eight years of the Hague Convention’s existence); Rosanne L. Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT’L LAW. 545, 572–73 (1994) (noting the pioneering nature of the Hague Convention and the general procedural process for countries to ratify it). Two of the *International Family Law* co-authors, Anna Mary Coburn and Mary Helen Carlson, were attorneys for the United States Department of State, which participated in the Hague Convention proceedings, Coburn, *supra*, at 1 n.\*; one of the article’s co-authors, Adair Dyer, is the former Deputy Secretary General of the Hague Conference, who participated in the drafting of the Hague Convention, *see* Hans van Loon, *Preface to GLOBALIZATION OF CHILD LAW: THE ROLE OF THE HAGUE CONVENTIONS*, at VII, VII–VIII (Sharon Detrick & Paul Vlaardingerbroek eds., 1999).

<sup>79</sup> *See* Kate O’Keeffe, Note, *The Intercountry Adoption Act of 2000: The United States’ Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT’L L. 1611, 1615 (2007).

<sup>80</sup> *See* Elizabeth Long, Note, *Where Are They Coming From, Where are They Going: Demanding Accountability in International Adoption*, 18 CARDOZO J.L. & GENDER 827, 827–28 (2012). *See generally* Wardle, *HCIA Implementing Law*, at 145–46 (discussing early hopes of success in procedural reforms of international adoption).

<sup>81</sup> Elisabeth M. Ward, Note, *Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children*, 17 MICH. ST. J. INT’L L. 729, 734–35 (2009).

<sup>82</sup> William Duncan, *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, in INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS, AND PERSPECTIVES 40, 46–47 (Peter Selman ed., 2000).

<sup>83</sup> *See* O’Keeffe, *supra* note 79.



delays.<sup>84</sup> Those bureaucracies and regulations “impose costs (the cost of the accreditation process itself and supervision of accreditors by the State Department) that [are] passed on to adoptive families and taxpayers.”<sup>85</sup> Thus, one common criticism of the Hague Convention is that it has increased and “will [continue to] increase the costs of adoption services.”<sup>86</sup> Both public and private costs of intercountry adoption have jumped and are predicted to increase under the Hague Convention, and “[t]he addition of new costs and fees will probably put the choice of intercountry adoption beyond the reach of the middle class.”<sup>87</sup>

For example, a recent study by the European Commission Study on Adoption reported that even in Europe this is a problem: “The *cost of adoption* is an important issue and sometimes forces the prospective adoptive parents to give up the procedure. Other complaints include excessive bureaucracy, the duration of the procedure, and the disparity of case law, even at [a] national level, which often leads to discrimination.”<sup>88</sup>

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<sup>84</sup> See Katherine Sohr, Comment, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega’s Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT’L L. REV. 559, 578, 587 (2006) (“Implementation of the Hague Convention’s requirements proves difficult for both sending and receiving countries.”).

<sup>85</sup> Mary Eschelbach Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption*, 45 BRANDEIS L.J. 105, 122 (2006).

<sup>86</sup> *Id.* at 106, 122. Other authors have arrived at the same conclusion:

[A]nother potential impact of the Hague Convention on adoptive families is the increased cost of adopting from Hague Convention countries. Adoption practitioners and agencies will experience increased costs in order to meet the Hague requirements and these costs will likely be transferred to the adoptive families through adoption fees.

... [T]he Hague Convention . . . does not provide adequate assurances of smooth and functional implementation in countries, particularly in the sending countries who face an insurmountable hurdle of costly implementation.

Sohr, *supra* note 84, at 579, 591; *see also* Gina M. Croft, Note, *The Ill Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 GA. J. INT’L & COMP. L. 621, 642 (2005) (predicting costs will increase).

<sup>87</sup> Croft, *supra* note 86, at 642–43; *see also* Paige Tackett, Note, “*I Get By With A Little Help From My Friends*”: *Why Global Cooperation Is Necessary to Minimize Child Abduction and Trafficking in the Wake of Natural Disaster*, 79 UMKC L. REV. 1027, 1032 (2011) (“[T]he requisite costs [of complying with the Hague Convention] have been astronomical. . . . Compliance with the Hague Convention is expensive and time consuming . . .”).

<sup>88</sup> Patrizia De Luca, Team Leader, Civil Justice Unit, Directorate Gen. Justice, Freedom & Sec., Eur. Comm’n, Presentation at the Joint Council of Europe and European

The Hague Convention has inflated the adoption bureaucracy. As Professor Sara Dillon noted a decade ago:

[T]he Hague Convention does not set down . . . [standards] designed to prevent children from languishing in orphanages. It does not state that countries should avoid creating unnecessary bureaucratic hurdles to adoption . . . before institutionalization has caused real developmental damage. In this sense, even the Hague Convention emphasizes the dangers of unethical adoption over the dangers of no adoption at all, and fails to provide a proper balance between the two poles of this human rights dilemma.<sup>89</sup>

In fact, the Hague Convention has priced responsible intercountry adoption out of the reach of many poor, third-world nations.<sup>90</sup> Ironically, those are the very nations from which children are most likely to be sought for intercountry adoption.<sup>91</sup>

It should be emphasized that many factors have undoubtedly contributed to the decline in adoption globally and within particular nations in recent years.<sup>92</sup> This Article does not suggest that only one factor has impacted the reduction in international (and intra-national) adoption. For example, the increasing availability of assisted reproductive technologies (“ART”) and the increase in the use of ART by otherwise infertile couples (as well as by non-married individuals) to obtain biological, partially-related, or “designer” babies has probably impacted the number of intercountry and domestic adoptions.<sup>93</sup>

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Commission Conference: European Commission Study on Adoption, (Dec. 1, 2009) (emphasis in original).

<sup>89</sup> Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 213–14 (2003); see also Laura McKinney, *International Adoption and The Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 389–90 (2007) (implying that while the Hague Convention has the potential to regulate and facilitate international adoption, implementation appears to be more effective at preventing corruption and abuse than at facilitating the adoption of children who are in need of a family).

<sup>90</sup> Colin Joseph Troy, Comment, *Members Only: The Need for Reform in U.S. Intercountry Adoption Policy*, 35 SEATTLE U. L. REV. 1525, 1538–39 (2012); see O’Keeffe, *supra* note 79, at 1615.

<sup>91</sup> See Troy, *supra* note 90, at 1539–40.

<sup>92</sup> See Selman, *Global Trends*, *supra* note 20, at 14–15 (discussing possible factors that have contributed to the downward trend in adoptions both globally and within particular nations).

<sup>93</sup> Gulcin Gumus & Jungmin Lee, *Alternative Paths to Parenthood: IVF or Child Adoption*, 50 ECON. INQUIRY 802, 803–04 (2012); see ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 24, 28, 34–37 (1993) (discussing societal bias for biological children over adoption and the difficulties of adopting after seeking infertility treatments); Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 408 (2004).

IV. THE STATUS OF ADOPTION BY LGBT PARTNERS AND COUPLES IN  
AMERICAN LAW AND THE CONNECTION TO LEGALIZING SAME-SEX  
MARRIAGE

*A. Status of Adoption by LGBT Partners and Couples in the United States*

The legality of adoption of children by same-sex partners and couples is changing in the United States. For example, in 1995, one prominent professor (supportive of LGBT parenting) found only nine states in which adults who were openly gay or lesbian had been allowed to adopt.<sup>94</sup> In most states they were deemed “unfit parents” as lawmakers “consider[ed] parenthood [to be] incompatible with gay identity.”<sup>95</sup> In 1998, the student author of another piece identified four states that barred LGBT adoptions but noted that “about eighteen states allow gay partners to adopt children, [but] they may not adopt at the same time. One parent can legally adopt and the other parent can apply for joint rights.”<sup>96</sup> In 2008, “[s]ixteen states contemplated initiatives . . . to ban gays and lesbians from adopting children.”<sup>97</sup>

Today, all states except one clearly allow otherwise-qualified gay and lesbian adults to adopt by themselves.<sup>98</sup> Seventeen states (plus the District of Columbia) allow joint adoption by LGBT couples.<sup>99</sup> Fifteen states (plus the District of Columbia) permit so-called “second-parent” adoptions by a same-sex partner of the biological parent.<sup>100</sup> “Some states

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<sup>94</sup> Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191, 195–96 (1995) (number of states includes the District of Columbia).

<sup>95</sup> Karla J. Starr, Note, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1498 (1998); see also *id.* at 1499; Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 352–55 (1991) (discussing the inability of homosexuals to adopt); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN’S L.J. 329, 344–45 (1995) (“Heterosexism also affects adoption and foster parenting. Although there has been some liberalization in foster parenting laws concerning gays and lesbians, adoption laws remain restrictive.”). *But see In re Adoption of Charles B.*, 552 N.E.2d 884, 885–86 (Ohio 1990) (allowing a homosexual man to adopt a child); *id.* at 890 (Resnick, J., dissenting) (“Existing Ohio law is very clear that a homosexual is not as a matter of law barred from adopting a child.”); Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 6 n.25 (1996) (“numerous states . . . allow second-parent adoptions”).

<sup>96</sup> Joyce F. Sims, Note, *Homosexuals Battling the Barriers of Mainstream Adoption—and Winning*, 23 T. MARSHALL L. REV. 551, 564–65 (1998) (footnote omitted).

<sup>97</sup> Deirdre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 5–6 (2008).

<sup>98</sup> See *infra* Table 6.

<sup>99</sup> See *infra* Table 6.

<sup>100</sup> See *infra* Table 6.

that permit same-sex couple adoptions through the second-parent adoption process do not give legal recognition to same-sex partnerships through marriage, civil union or partnership law. There is, as one author says, an odd ‘irony’ to the inconsistent positions taken in some jurisdictions.”<sup>101</sup>

A state-by-state review of the laws and judicial decisions provides more detail about the varying approaches, standards, and policy positions taken in each of the states and in the District of Columbia. It reveals that the allowance of adoption of children by LGBT couples and partners is a very recent phenomenon and still a minority position in American states.<sup>102</sup> But the number of states that allow such adoptions has been increasing steadily.

### *Alabama*

The Alabama Code provides: “Any adult person or husband and wife jointly who are adults may petition the court to adopt a minor,” with no preclusion of homosexual singles.<sup>103</sup> By allowing “any adult person” to adopt without any preclusion based on sexual orientation, it can be assumed that homosexual singles can adopt. The Code is otherwise silent on whether homosexual adoption is legal. Since the Code refers to a “husband and wife” as a requirement for joint adoption, it can be inferred that this precludes same-sex couples from adopting children. Neither the Alabama Constitution nor any court decisions directly address homosexual adoption under the Code.<sup>104</sup> Alabama law is silent on same-sex, second-parent adoption and on second-parent adoptions in general, only allowing for stepparent adoption: “Any person may adopt his or her spouse’s child according to the provisions of this chapter.”<sup>105</sup> Since this section requires the stepparent to be a “spouse” of the other parent and because Alabama does not provide for or recognize same-sex

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<sup>101</sup> Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children’s Rights as Children*, 48 SANTA CLARA L. REV. 999, 1020 (2008) (quoting Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 287 (2007)).

<sup>102</sup> See *infra* paragraph accompanying note 311.

<sup>103</sup> ALA. CODE § 26-10A-5(a) (Westlaw through 2013 Reg. Sess.).

<sup>104</sup> *But see Ex parte J.M.F.*, 730 So. 2d 1190, 1195–96 (Ala. 1998) (quoting *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998)) (granting heterosexual father’s petition for custody over lesbian mother because of the mother’s open relationship, relying on studies showing that homosexual parenting may have negative consequences on children, and noting that the mother’s lifestyle, was “neither legal in [Alabama], nor moral in the eyes of most of its citizens.”); *L.A.M. v. B.M.*, 906 So. 2d 942, 946 (Ala. Civ. App. 2004) (stating the Supreme Court’s holding in *Lawrence v. Texas*, 539 U.S. 558 (2003), does not overrule the Alabama Supreme Court’s decision in *Ex parte J.M.F.*).

<sup>105</sup> § 26-10A-27 (Westlaw).

marriage,<sup>106</sup> it can be inferred that Alabama does not allow for same-sex, second-parent adoptions.

#### *Alaska*

The Alaska Code allows an “unmarried adult” to petition for adoption, with no prohibition of homosexual singles.<sup>107</sup> The Supreme Court of Alaska also stated that it was improper to consider a mother’s lesbian relationship in a custody determination when there was no evidence that her relationship adversely affected the child.<sup>108</sup> Alaska law also states that a “husband and wife” may adopt together.<sup>109</sup> Since Alaska does not allow same-sex marriage,<sup>110</sup> nor recognize out-of-state same-sex marriages,<sup>111</sup> this implies that same-sex couples cannot jointly adopt. Alaska law does allow for stepparent adoption if the petitioner is the “spouse”<sup>112</sup> of the child’s natural parent, which seems to preclude second-parent adoptions by homosexuals since, again, Alaska does not allow same-sex marriage. No other Alaska law deals with second-parent adoption by a homosexual.

#### *Arizona*

Arizona allows “[a]ny adult resident of this state” to petition for adoption, with no preclusion of homosexual singles.<sup>113</sup> According to the same statute, the only people who may jointly petition for adoption are a “husband and wife.”<sup>114</sup> Since Arizona does not allow or recognize same-sex marriage,<sup>115</sup> this means that Arizona probably does not allow for same-sex couples to jointly adopt. And since the stepparent provision in Arizona’s law requires the petitioner to be the “spouse” of the child’s legal parent,<sup>116</sup> same-sex couples probably will not be able to accomplish a second-parent adoption through the stepparent provision.<sup>117</sup> There is

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<sup>106</sup> ALA. CONST. amend. 774(d)–(e).

<sup>107</sup> ALASKA STAT. § 25.23.020(a)(2) (LEXIS through 2012, 3d Spec. Sess.).

<sup>108</sup> *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985).

<sup>109</sup> § 25.23.020(a)(1) (LEXIS).

<sup>110</sup> *Id.* § 25.05.013 (LEXIS).

<sup>111</sup> *Id.* § 25.05.013(a) (LEXIS).

<sup>112</sup> *Id.* § 25.23.020(a)(4)(A) (LEXIS); *see also id.* § 25.23.130(a)(1) (LEXIS).

<sup>113</sup> ARIZ. REV. STAT. ANN. § 8-103(A) (Westlaw through 2013 Reg. Sess.).

<sup>114</sup> *Id.*

<sup>115</sup> ARIZ. CONST. art. XXX, § 1; ARIZ. REV. STAT. ANN. §§ 25-101, 25-125 (Westlaw through 2013 Reg. Sess.).

<sup>116</sup> § 8-117(C) (Westlaw).

<sup>117</sup> *See also In re Appeal in Pima Cnty. Juvenile Adoption Action No. B-13795*, 859 P.2d 1343, 1344 (Ariz. Ct. App. 1993) (“The statutory exception [for step-parent adoption] applies only in the context of a marriage between the natural parent and the adoptive parent.”).

no other statutory or judicial authority on point for either joint or second-parent adoption by same-sex couples.

### *Arkansas*

Under the Arkansas Code, “an unmarried adult” and “the unmarried father or mother of the individual to be adopted” can adopt.<sup>118</sup> There is no preclusion of homosexual singles. In 2008, Arkansas voters approved a law that would ban any person cohabiting outside a valid marriage from adopting.<sup>119</sup> This law was eventually overturned by the Arkansas Supreme Court because it violated the right to privacy that is implicit in the Arkansas Constitution.<sup>120</sup> The Arkansas Code states that a “husband and wife together” may petition for adoption, which seems to preclude same-sex couples from jointly adopting.<sup>121</sup> No other case law or statute deals with joint, same-sex couple adoption. The Code does not specifically address second-parent adoptions, only allowing for stepparent adoption if the second parent is married to the parent of the child to be adopted.<sup>122</sup> Since Arkansas neither allows for nor recognizes same-sex marriage,<sup>123</sup> this seems to preclude same-sex, second-parent adoptions. No other statutes or case law address this issue.

### *California*

California law does not put any restrictions on adoption by single people according to sexual orientation,<sup>124</sup> and the California Supreme Court has allowed same-sex, second-parent adoptions.<sup>125</sup> Also, California’s domestic partnership laws, which give same-sex domestic partners the same rights as “spouses,” would also allow same-sex couples to get a second-parent adoption, as well as a joint adoption, if they were registered.<sup>126</sup>

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<sup>118</sup> ARK. CODE ANN. § 9-9-204(2)–(3) (LEXIS through 2012 Fiscal Sess.).

<sup>119</sup> Catherine L. Hartz, *Arkansas’s Unmarried Couple Adoption Ban: Depriving Children of Families*, 63 AR. L. REV. 113 (2010); § 9-8-304(a) (repealed 2013); see also Ark. Dep’t of Human Servs. v. Cole, 380 S.W.3d 429, 431 (Ark. 2011).

<sup>120</sup> *Cole*, 380 S.W.3d at 431.

<sup>121</sup> § 9-9-204(1) (LEXIS).

<sup>122</sup> *Id.* § 9-9-204(4)(i) (LEXIS).

<sup>123</sup> *Id.* § 9-11-208(a)(1)(B) (LEXIS).

<sup>124</sup> See CAL. FAM. CODE § 8802(a)(1) (Westlaw through Ch. 130, 2013 Reg. Sess.).

<sup>125</sup> Sharon S. v. Superior Court, 73 P.3d 554, 572 (Cal. 2003).

<sup>126</sup> § 297.5(a) (Westlaw).

### Colorado

The Colorado Code provides that anyone over the age of twenty-one can petition for adoption.<sup>127</sup> There is no preclusion of homosexual singles, and it is safe to infer that this group can adopt. Also, Colorado allows for second-parent adoptions even when the couple is not married,<sup>128</sup> and this includes same-sex couples.<sup>129</sup> As of May 2013, Colorado allows civil unions, giving partners in a civil union substantially similar rights enjoyed by married couples.<sup>130</sup> This law allows joint adoption by same-sex couples registered in a civil union.<sup>131</sup>

### Connecticut

The Connecticut Code provides that “any adult person” may adopt, which implicitly allows for homosexual singles to petition for adoption.<sup>132</sup> The Code also allows for second-parent adoption:

[A]ny parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated.<sup>133</sup>

The gender and marriage-neutral language in this section arguably allows for same-sex, second-parent adoption.<sup>134</sup> Connecticut law also allows “any parent” to “join in the adoption of the child,” which suggests that same-sex couples could probably petition for a joint adoption, though there is no case law on point.<sup>135</sup>

<sup>127</sup> COLO. REV. STAT. § 19-5-202(1) (LEXIS through 2013 Reg. Sess.).

<sup>128</sup> *Id.* § 19-5-203(1)(d.5)(I) (LEXIS).

<sup>129</sup> *Id.* § 14-15-107(5)(g) (LEXIS).

<sup>130</sup> *Id.* § 14-15-107(1) (LEXIS).

<sup>131</sup> *Id.* § 14-15-107(5)(g) (LEXIS).

<sup>132</sup> CONN. GEN. STAT. § 45a-724(a)(1) (Westlaw through Pub. Acts of 2013 Reg. Sess.).

<sup>133</sup> *Id.* § 45a-724(a)(3) (Westlaw).

<sup>134</sup> *See id.*; Oleski v. Hynes, No. KNLFA084008415, 2008 WL 2930518, at \*1, \*12 (Conn. Super. Ct. July 10, 2008) (allowing same-sex partner of child’s biological parent to petition for adoption of child through Connecticut’s statute); *see also* Jason C. Beekman, *Same-Sex Marriage: Strengthening the Legal Shield or Sharpening the Sword? The Impact of Legalizing Marriage on Child Custody/Visitation and Child Support for Same-Sex Couples*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 225 n.40 (2012); Susanna Birdsong, *Voiding Motherhood: North Carolina’s Shortsighted Treatment of Subject Matter Jurisdiction in Boseman v. Jarrell*, 21 AM. U. J. GENDER SOC. POL’Y & L. 109, 112–13 (2012); Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 471 n.15 (2012).

<sup>135</sup> § 45a-724(a)(3) (Westlaw); *see also* Raftopol v. Ramey, 12 A.3d 783, 787, 793 (Conn. 2011) (allowing same-sex partner of biological parent to assume custody of child conceived through artificial insemination pursuant to gestational agreement without going

### *Delaware*

The Delaware Code authorizes “[a]n unmarried person or a husband and wife jointly” to petition for adoption.<sup>136</sup> Because the Code does not specifically exclude homosexual singles from adopting, it can be inferred that this group may petition for adoption. Delaware’s recently-enacted civil union provision provides that parties to a civil union “shall have the same rights . . . as . . . married spouses;”<sup>137</sup> thus, same-sex couples who have entered into a civil union can adopt a child.<sup>138</sup> The same provision would allow a same-sex, second-parent adoption as well.<sup>139</sup>

### *District of Columbia*

District of Columbia law allows “any person” to petition for adoption.<sup>140</sup> The District of Columbia Court of Appeals held that unmarried couples, including homosexual couples, can petition the court for adoption.<sup>141</sup> The Court also stated that the D.C. Code’s provision that allows for stepparent adoptions without terminating the rights of the natural parent,<sup>142</sup> applies equally to homosexual couples.<sup>143</sup>

### *Florida*

Florida law states that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”<sup>144</sup> The statute was upheld by the 11th Circuit in 2004,<sup>145</sup> but a Florida District Court of Appeal has recently held that the statute was unconstitutional in *Florida Department of Children and Families v. Adoption of X.X.G.*<sup>146</sup> However, the Florida law banning homosexuals from adopting is still currently in the Florida state code. It is unclear how *X.X.G.* affects second-parent and joint same-sex couple adoption. However, it is

through adoption proceedings); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (holding that same-sex couples have a constitutional right to marry in Connecticut).

<sup>136</sup> DEL. CODE ANN. tit. 13, § 903 (LEXIS through 79 Del. Laws, Ch. 172).

<sup>137</sup> *Id.* § 212 (LEXIS).

<sup>138</sup> *See id.* §§ 212, 903 (LEXIS); *see also id.* § 204 (LEXIS).

<sup>139</sup> *Id.* § 904(a)(1) (LEXIS).

<sup>140</sup> D.C. CODE § 16-302 (Westlaw through July 14, 2013).

<sup>141</sup> *In re M.M.D.*, 662 A.2d 837, 840 (D.C. 1995).

<sup>142</sup> §16-302 (Westlaw).

<sup>143</sup> *In re M.M.D.*, 662 A.2d at 859–60.

<sup>144</sup> FLA. STAT. ANN. § 63.042(3) (Westlaw through 2013, 1st Reg. Sess.).

<sup>145</sup> *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 806, 823, 827 (11th Cir. 2004).

<sup>146</sup> 45 So. 3d 79, 86, 92 (Fla. Dist. Ct. App. 2010) (allowing a homosexual foster father to adopt his foster children).



unlikely that these forms of adoption are recognized in Florida from its statutory language. The only couples who are authorized to jointly adopt in Florida are “a husband and wife jointly.”<sup>147</sup> Furthermore, the statutes do not allow for second-parent adoption but do allow for stepparent adoption when the petitioner is “married.”<sup>148</sup> Since Florida does not allow same-sex marriage,<sup>149</sup> it is unlikely that Florida would allow homosexual couples to take advantage of the stepparent provision.

### *Georgia*

The Georgia Code states that “any adult person” can petition for adoption, with no specific ban on homosexual singles.<sup>150</sup> The Code is silent on joint petitions for adoption by same-sex couples, and there is no case law on point. The Code is also silent on second-parent adoptions but does allow for stepparent adoptions when the second-parent is a “spouse” of the other parent.<sup>151</sup> Since Georgia does not allow for, nor recognize, same-sex marriage,<sup>152</sup> it can be inferred that second-parent and joint adoptions by same-sex couples are prohibited, but there is no other law on point.

### *Hawaii*

The Hawaii Code allows “any proper adult person [who is] not married” to petition for adoption, with no explicit preclusion of homosexual singles.<sup>153</sup> The Code further allows only for a “husband and wife” to jointly adopt.<sup>154</sup> Hawaii enacted a civil union statute in 2011 that gave registered parties to a civil union the same protections as those who are married.<sup>155</sup> The Code is silent about second-parent adoptions but does allow for stepparent adoption (“a person married to [the] legal parent” of the child to be adopted).<sup>156</sup> Same-sex couples in civil unions can take advantage of the stepparent provisions,<sup>157</sup> but it is unclear whether unmarried same-sex couples can adopt each other’s children as there is no case law or statute on point. In November 2013, the Hawaii

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<sup>147</sup> § 63.042(2)(a) (Westlaw).

<sup>148</sup> *Id.* § 63.042(2)(c)(1) (Westlaw).

<sup>149</sup> *Id.* § 741.212(1) (Westlaw).

<sup>150</sup> GA. CODE ANN. § 19-8-3(a)(1) (LEXIS through 2013 Reg. Sess.).

<sup>151</sup> *Id.* § 19-8-3 (LEXIS).

<sup>152</sup> *Id.* § 19-3-3.1 (LEXIS).

<sup>153</sup> HAW. REV. STAT. ANN. § 578-1 (LEXIS through Act 110, 2013 Reg. Sess.).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* § 572B-9 (LEXIS).

<sup>156</sup> *Id.* § 578-16(d) (LEXIS).

<sup>157</sup> *Id.* § 578-1 (LEXIS); see also Dean A. Soma, *Civil Unions in Hawai‘i—A One-Year Retrospective*, 17 HAW. B.J. 4, 11–12 (2013).

legislature and governor enacted a law legalizing same-sex marriage (to take effect in December 2013)<sup>158</sup> that would seem to allow such couples to adopt as a married couple, which could make it less likely that unmarried same-sex or heterosexual couples would be deemed eligible to adopt.

### *Idaho*

The Idaho Code allows “any adult person” to petition for adoption, with no specific preclusion of homosexual singles.<sup>159</sup> The Code is silent on same-sex joint adoption, and no cases are on point. The Code does not specifically recognize second-parent adoption but implicitly recognizes stepparent adoption: “*Unless the decree of adoption otherwise provides*, the natural parents of an adopted child are, from the time of the adoption, relieved of all parental duties toward, and all responsibilities for, the child so adopted.”<sup>160</sup> Although there is no case law on same-sex adoption per se, the Supreme Court of Idaho said the following on custody matters: “Sexual orientation, in and of itself, cannot be the basis for awarding or removing custody; only when the parent’s sexual orientation is shown to cause harm to the child, such that the child’s best interests are not served, should sexual orientation be a factor in determining custody.”<sup>161</sup> Idaho only recognizes marriage between a man and a woman,<sup>162</sup> but no other law is on point for whether the state recognizes same-sex, second-parent, or joint adoptions.

### *Illinois*

In *In re Petition of K.M.*, one appellate court in Illinois permitted homosexual persons to petition for adoption, as well as same-sex couples to petition both jointly and through second-parent adoptions.<sup>163</sup> The Illinois Compiled Statutes provide that “[a] reputable person of legal age and of either sex” may petition for adoption, with no explicit preclusion of homosexual singles.<sup>164</sup> Other than *K.M.*, no case law addresses joint or

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<sup>158</sup> S. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013) (redefining marriage as “permitted between two individuals without regard to gender”); see also *Hawaii Senate Sends Marriage Equality Bill to Governor*, BUZZFEED (Nov. 12, 2013, 5:56 PM), <http://www.buzzfeed.com/tonymerevick/hawaii-senate-sends-marriage-equality-bill-to-governor>.

<sup>159</sup> IDAHO CODE ANN. § 16-1501 (LEXIS through 2013 Sess.).

<sup>160</sup> *Id.* § 16-1509 (LEXIS) (emphasis added).

<sup>161</sup> *McGriff v. McGriff*, 99 P.3d 111, 117 (Idaho 2004).

<sup>162</sup> § 32-201(1) (LEXIS).

<sup>163</sup> *In re Petition of K.M.*, 653 N.E.2d 888, 892, 895, 898–99 (Ill. App. Ct. 1995).

<sup>164</sup> 750 ILL. COMP. STAT. 50/2(A)(a) (Westlaw through P.A. 98-194, except P.A. 98-122, 98-176, 98-192, 2013 Reg. Sess.).

second-parent adoptions by same-sex couples. Under Illinois's recent same-sex marriage law, however, joint and second-parent adoptions by same-sex couples will be allowed.<sup>165</sup>

#### *Indiana*

The Indiana Code allows for “[a] resident of Indiana” to petition for adoption, with no preclusion of homosexual singles.<sup>166</sup> The Indiana Court of Appeals ruled that the state’s adoption act did not prevent a same-sex couple from jointly petitioning to adopt a child.<sup>167</sup> The same court has held that the common law allows for same-sex, second-parent adoptions.<sup>168</sup>

#### *Iowa*

The Iowa Code allows “an unmarried adult” to petition for adoption, with no preclusion of homosexual singles.<sup>169</sup> There is no statute that deals directly with joint adoption by same-sex couples, but the Supreme Court of Iowa has ruled that same-sex marriage is legal, which means that same-sex couples can jointly adopt.<sup>170</sup> There is no statute or case law that deals with same-sex second-parent adoption, but married same-sex couples should be able to take advantage of Iowa’s stepparent adoption provision.<sup>171</sup>

#### *Kansas*

The Kansas Code allows “any adult” to petition for adoption, with no preclusion of homosexual singles.<sup>172</sup> There is no case law or statute that explicitly addresses joint, same-sex adoptions. The Kansas Code, however, specifies that only a “husband and wife” can adopt jointly, which implies that same-sex couples are precluded.<sup>173</sup> There is also no statute or case law that specifically addresses same-sex, second-parent

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<sup>165</sup> S. 10, 98th Gen. Assemb. (Ill. 2013).

<sup>166</sup> IND. CODE ANN. § 31-19-2-2(a) (Westlaw through 2013 Legis.).

<sup>167</sup> R.K.H. v. Morgan Cnty. Office of Family & Children (*In re* Infant Girl W.), 845 N.E.2d 229, 233, 243–44 (Ind. Ct. App. 2006) (finding the Indiana Code did not preclude unmarried and same-sex couples from petitioning for adoption).

<sup>168</sup> See *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004) (allowing for same-sex, second parent adoption when the first parent was the biological parent of the child to be adopted); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 268, 270–71 (Ind. Ct. App. 2003) (allowing for same-sex, second parent adoptions when the first parent was the legal adoptive parent of the child to be adopted).

<sup>169</sup> IOWA CODE ANN. § 600.4(1) (Westlaw through 2013 Reg. Sess.).

<sup>170</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 872–73, 884, 906–07 (Iowa 2009).

<sup>171</sup> See § 600.13(4) (Westlaw).

<sup>172</sup> KAN. STAT. ANN. § 59-2113 (Westlaw through 2012 Reg. Sess.).

<sup>173</sup> *Id.*

adoptions. Kansas requires that, before a child can be adopted, the child's biological parent's rights must be terminated, unless the petitioner for adoption is the spouse of the biological parent.<sup>174</sup> Kansas law thus seems to preclude any second-parent adoptions, whether by same-sex or heterosexual couples.

### *Kentucky*

The Kentucky Code states that any resident of the state over eighteen years old can petition for adoption, with no preclusion of homosexual singles.<sup>175</sup> The Kentucky Court of Appeals has explicitly denied same-sex second-parent adoption.<sup>176</sup> Kentucky's Code and case law are silent on joint, same-sex adoptions, but given the Court of Appeals' ruling on second-parent adoption for same-sex couples, it is unlikely that the same-sex couples can petition to jointly adopt.

### *Louisiana*

The Louisiana Code allows for "[a] single person, eighteen years or older" to petition for adoption, with no preclusion of homosexual singles.<sup>177</sup> There is no statute or case law on same-sex, second-parent adoptions, and it is unclear whether same-sex couples may take advantage of the stepparent provision.<sup>178</sup> There is no case law or statute that deals directly with joint petitions for adoption by same-sex couples, but Louisiana law provides that a couple has to be "married" in order to jointly adopt.<sup>179</sup> Since same-sex marriage is neither allowed nor recognized in Louisiana, it is doubtful that same-sex couples can petition jointly to adopt.<sup>180</sup> The Louisiana Attorney General has stated, "[b]y refusing to accept an out-of-state judgment obtained by two unmarried individuals who jointly adopted a child (in another jurisdiction), Louisiana does not violate the Full Faith and Credit Clause of the United States Constitution."<sup>181</sup> The Fifth Circuit held that it did not

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<sup>174</sup> *Id.* § 59-2118(b) (Westlaw).

<sup>175</sup> KY. REV. STAT. ANN. § 199.470(1) (Westlaw through 2013 Reg. Sess.).

<sup>176</sup> S.J.L.S. v. T.L.S., 265 S.W.3d 804, 809, 822 (Ky. Ct. App. 2008) (holding that since Kentucky law required a legal marriage for step-parent adoption, § 99.520(2) (Westlaw), and because Kentucky prohibited same-sex marriage, same-sex, second parent adoption was not allowed in Kentucky).

<sup>177</sup> LA. CHILD. CODE ANN. art. 1198 (Westlaw through 2012 Reg. Sess.).

<sup>178</sup> *See id.* arts. 1243(A)–(B), 1256(A), (C) (Westlaw through 2012 Reg. Sess.).

<sup>179</sup> *Id.* art. 1198 (Westlaw).

<sup>180</sup> LA. CIV. CODE ANN. arts. 89, 3520 (Westlaw through 2012 Reg. Sess.). *See also* Adoption of Meaux, 417 So.2d 522, 523 (La. Ct. App. 1982) (holding that an unmarried couple was not eligible to adopt their own natural child).

<sup>181</sup> La. Att'y Gen. Op., No. 06-0325, at 1 (Apr. 18, 2007), available at <http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=4&Doc=18900>.

violate the Full Faith and Credit clause to deny a same-sex couple a revised birth certificate for their Louisiana-born child whom they adopted in New York.<sup>182</sup>

### *Maine*

The Maine Code provides that any “unmarried person” can petition for adoption, with no preclusion of homosexual singles.<sup>183</sup> Although the Code states that a “husband and wife” may jointly petition for adoption,<sup>184</sup> same-sex couples can legally marry in Maine,<sup>185</sup> and, as a result, these couples are able to jointly adopt. Furthermore, the Supreme Judicial Court of Maine ruled in *Adoption of M.A.* that this provision also allows unmarried, same-sex couples to jointly petition the court for adoption.<sup>186</sup> Some sources say the court’s decision in *M.A.* also recognizes same-sex, second-parent adoptions,<sup>187</sup> but the court’s opinion does not explicitly mention same-sex, second-parent adoption, though it is strongly implied by its holding.<sup>188</sup>

### *Maryland*

Maryland’s Code permits “any adult” to petition for adoption, with no preclusion of homosexual singles.<sup>189</sup> These same provisions require a married petitioner to have his or her spouse join in the adoption unless the couple is separated or the other spouse is incompetent.<sup>190</sup> Further, a Maryland court found that petitioners for adoption do not have to be married.<sup>191</sup> As of January 1, 2013, same-sex couples can legally marry in

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<sup>182</sup> *Adar v. Smith*, 639 F.3d 146, 161 (5th Cir. 2011).

<sup>183</sup> ME. REV. STAT. tit. 18-A, § 9-301 (Westlaw through Ch. 367, 369–427, 2013 Reg. Sess.).

<sup>184</sup> *Id.*

<sup>185</sup> ME. REV. STAT. tit. 19-A, § 650-A (Westlaw through Ch. 367, 369–427, 2013 Reg. Sess.).

<sup>186</sup> *Adoption of M.A.*, 930 A.2d 1088, 1090 (Me. 2007).

<sup>187</sup> See, e.g., Karel Raba, Note, *Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates*, 15 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 293, 313, 314 n.116, 315 n.120 (2013) (discussing same-sex parenting and second-parent adoption, observing that *Adoption of M.A.* recognizes second-parent adoptions).

<sup>188</sup> See *Adoption of M.A.*, 930 A.2d at 1090, 1098.

<sup>189</sup> MD. CODE ANN., FAM. LAW §§ 5-331(b)(1), 5-345(b)(1) (LEXIS through 2013 Reg. Sess.).

<sup>190</sup> *Id.* §§ 5-331(b)(2), 5-345(b)(2) (LEXIS).

<sup>191</sup> *In re Adoption No. 90072022/CAD*, 590 A.2d 1094, 1096 (Md. Ct. Spec. App. 1991).

Maryland,<sup>192</sup> which should affirmatively allow same-sex couples to jointly petition for adoption. The Code and case law are silent regarding same-sex, second-parent adoptions, but in light of the recognition of same-sex marriage, the existing provisions for stepparent adoptions should allow married same-sex couples to have a second-parent adoption.<sup>193</sup> It is questionable whether unmarried same-sex couples may have a second-parent adoption.

#### *Massachusetts*

The Massachusetts General Laws provide that “[a] person of full age may petition” for adoption.<sup>194</sup> The Supreme Judicial Court of Massachusetts in *Adoption of Tammy* declared that “there is nothing in the statute that prohibits adoption based on gender or sexual orientation.”<sup>195</sup> This same case allowed a lesbian to adopt her partner’s natural born child.<sup>196</sup> Concerning joint petitions for adoption by same-sex couples, the Court in *Tammy* said, “[t]here is nothing on the face of the statute which precludes the joint adoption of a child by two unmarried cohabitants such as the petitioners.”<sup>197</sup>

#### *Michigan*

Michigan law states that “a person” can petition for adoption, with no preclusion of homosexual singles.<sup>198</sup> Michigan’s prohibition for same-sex marriage<sup>199</sup> makes it unlikely that it will recognize either joint or second-parent, same-sex petitions for adoption. The only joint petitions for adoption allowed in Michigan are those where the petitioner jointly

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<sup>192</sup> See Civil Marriage Protection Act, 2012 Md. Laws 9–14 (codified at MD. CODE ANN., FAM. LAW §§ 2-201, 2-202); see also Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1753 (2013) (noting that the pattern of statewide votes against same-sex marriage changed in 2012 with votes in Maine, Maryland, Minnesota, and Washington).

<sup>193</sup> See MD. CODE ANN., EST. & TRUSTS § 1-207(a) (LEXIS through 2013 Reg. Sess.) (allowing second-parent adoptions if the petitioner is married to the natural parent of the child).

<sup>194</sup> MASS. GEN. LAWS ANN. ch. 210, § 1 (Westlaw through Ch. 59, except Ch. 38, 46, 2013 Ann. Sess.).

<sup>195</sup> *Adoption of Tammy*, 619 N.E.2d 315, 318 n.2 (Mass. 1993).

<sup>196</sup> *Id.* at 315–16, 321.

<sup>197</sup> *Id.* at 318.

<sup>198</sup> MICH. COMP. LAWS ANN. § 710.24(1) (Westlaw through P.A. 2013, No. 106, 2013 Reg. Sess.); see also Mich. Att’y. Gen. Op., No. 7160, at 3 (Sept. 14, 2004), available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10236.htm> (“[A same-sex individual] may adopt a child as a single person.”).

<sup>199</sup> MICH. CONST. art. I, § 25; MICH. COMP. LAWS ANN. § 551.1 (Westlaw through P.A. 2013, No. 106, 2013 Reg. Sess.).

files with a “wife or . . . husband, if married.”<sup>200</sup> Michigan does not allow for second-parent adoption and allows stepparent adoption only if the petitioner is married to the legal parent of the child to be adopted.<sup>201</sup> Thus, it is unlikely that a court would view a same-sex couple as “married,” which would preclude both joint and second-parent, same-sex adoptions. There is no other law on point.

#### *Minnesota*

The Minnesota Statutes say that “any person” can petition for adoption, with no preclusion of homosexuals.<sup>202</sup> There is no statute or case law on point that deals with same-sex couples petitioning to adopt. No statute or case law directly addresses same-sex, second-parent adoption, but Minnesota law does allow for stepparent adoption when the adoptive parent is the “spouse” of the legal parent.<sup>203</sup> A recent Minnesota Court of Appeals decision declined to address the legality of same-sex, second-parent adoptions because the holding of that case was based on other grounds, but the lower court said in dictum that such adoptions were legal.<sup>204</sup> The court of appeals observed: “[W]e have no occasion to address the district court’s dictum that second-parent, same-sex adoption is lawful in Minnesota.”<sup>205</sup> The district court case was unpublished, and there is no other case law on point.

#### *Mississippi*

The Mississippi Code provides that an “unmarried” adult may petition for adoption.<sup>206</sup> The Code also explicitly states that “[a]doption by couples of the same gender is prohibited.”<sup>207</sup> Although Mississippi law does not specifically mention second-parent adoption by same-sex couples, the Code strongly implies that such adoptions are prohibited as well.<sup>208</sup> There is no case law dealing with any of these issues.

#### *Missouri*

The Missouri Statutes say that “[a]ny person desiring to adopt another person” can petition for adoption, with no preclusion of

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<sup>200</sup> § 710.24(1) (Westlaw).

<sup>201</sup> *Id.* § 710.51(5) (Westlaw).

<sup>202</sup> MINN. STAT. ANN. § 259.22(1) (Westlaw through 2013 Spec. Sess.).

<sup>203</sup> *Id.* §§ 259.21(7), 259.22(1) (Westlaw).

<sup>204</sup> *J.M.J. v. L.A.M. (In re Adoption of T.A.M.)*, 791 N.W.2d 573, 578 (Minn. Ct. App. 2010).

<sup>205</sup> *Id.*

<sup>206</sup> MISS. CODE ANN. § 93-17-3(4) (LEXIS through 2012 Reg. Sess.).

<sup>207</sup> *Id.* § 93-17-3(5) (LEXIS).

<sup>208</sup> *See id.*

homosexual singles.<sup>209</sup> There is no case law or statute on point regarding same-sex joint petitions for adoption; neither is there any case law or statute regarding same-sex, second-parent adoptions.

### *Montana*

Montana law permits “an unmarried individual who is at least 18 years of age” to petition for adoption, with no preclusion of homosexual singles.<sup>210</sup> There is no case law or statute that deals directly with same-sex joint adoptions, but the Code only makes joint adoption available to a “husband and wife.”<sup>211</sup> Since Montana prohibits same-sex marriage,<sup>212</sup> it probably does not allow same-sex joint adoptions. The Code and case law are also silent on same-sex, second-parent adoption. But the Code allows stepparent adoption when the second parent is “the husband or wife if the other spouse is a parent of the child.”<sup>213</sup> In light of Montana’s proscription of same-sex marriage, and given the lack of other statutory or case law guidance, Montana probably will not allow same-sex, second-parent adoptions under the stepparent provision. The Montana Supreme Court has, however, allowed a woman to have a “parental interest” in her former lesbian partner’s adoptive children after the couple split.<sup>214</sup>

### *Nebraska*

Nebraska law provides that “any minor child may be adopted by any adult person or persons,” with no preclusion of homosexual singles.<sup>215</sup> The Supreme Court of Nebraska has specifically ruled against second-parent adoption by unmarried persons, but that was more than a decade ago.<sup>216</sup> Regarding joint, same-sex adoptions, the Code provides that any adult person “or persons” may petition the court for adoption,<sup>217</sup> which seems to imply that two unmarried “persons” could petition for adoption, but no court has taken up the issue so far.

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<sup>209</sup> MO. ANN. STAT. § 453.010(1) (Westlaw through 2013, 1st Reg. Sess.).

<sup>210</sup> MONT. CODE ANN. § 42-1-106(2) (Westlaw through July 1, 2013).

<sup>211</sup> *Id.* § 42-1-106(1) (Westlaw).

<sup>212</sup> *Id.* § 40-1-401(1)(d) (Westlaw).

<sup>213</sup> *Id.* § 42-1-106(1) (Westlaw).

<sup>214</sup> *Kulstad v. Maniaci*, 220 P.3d 595, 597, 609–10 (Mont. 2009).

<sup>215</sup> NEB. REV. STAT. ANN. § 43-101(1) (LEXIS through 2012 Sess.).

<sup>216</sup> *B.P. v. State (In re Adoption of Luke)*, 640 N.W.2d 374, 379 (Neb. 2002) (quoting § 43-101(1) (LEXIS)) (“[W]e conclude that with the exception of the stepparent adoption, the parent or parents possessing existing parental rights must relinquish the child before any minor child may be adopted by any adult person or persons.”).

<sup>217</sup> § 43-101(1) (LEXIS).



*Nevada*

Nevada law provides that “[a]ny adult person or any two persons married to each other” can petition for adoption, with no preclusion of homosexual singles.<sup>218</sup> Nevada grants joint, same-sex adoption through its domestic partnership law: “Domestic partners have the same rights, protections and benefits . . . as are granted to . . . spouses.”<sup>219</sup> Nevada allows for domestic partners to take advantage of their stepparent procedures: “[T]he adoption of a child by his or her stepparent shall not in any way change the status of the relationship between the child and his or her natural parent who is the spouse of the petitioning stepparent.”<sup>220</sup> Although the domestic partnership laws make it possible for same-sex couples to petition for joint and stepparent adoptions, it is uncertain whether unregistered same-sex couples could do so as there is no case law or statute on point.

*New Hampshire*

New Hampshire law allows “[a]n unmarried adult” to petition for adoption with no preclusion of homosexual singles.<sup>221</sup> Underscoring joint and second-parent adoptions for same-sex couples is New Hampshire’s 2010 law that allows same-sex marriage.<sup>222</sup> Although there is no case law on point, this would presumably allow petitions for adoptions by at least married same-sex couples jointly, as well as same-sex married couples under the stepparent adoption provision.<sup>223</sup>

*New Jersey*

New Jersey law provides that “[a]ny person may institute an action for adoption,” with no specific preclusion of homosexual singles.<sup>224</sup> Also, in *In re Adoption of Two Children by H.N.R.*, a New Jersey court said that homosexual singles can apply for adoption.<sup>225</sup> New Jersey’s Code is

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<sup>218</sup> NEV. REV. STAT. ANN. § 127.030 (LEXIS through 2011 Sess.).

<sup>219</sup> *Id.* § 122A.200(1)(a) (LEXIS).

<sup>220</sup> *See id.*; § 127.160 (LEXIS).

<sup>221</sup> N.H. REV. STAT. ANN. § 170-B:4(II) (Westlaw through Ch. 279, 2013 Reg. Sess.).

<sup>222</sup> H.R. 436 F.N. Local, 2009 Session (N.H. 2009) (effective Jan. 1, 2010); *see* § 457:1-a (Westlaw).

<sup>223</sup> § 170-B:4(IV) (Westlaw) (allowing “[a] married person without that person’s spouse joining as a petitioner, if the adoptee is not the petitioner’s spouse” to petition for adoption).

<sup>224</sup> N.J. STAT. ANN. § 9:3-43(a) (Westlaw through L. 2013, c. 84, J.R. No. 9).

<sup>225</sup> 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) (“[A]n unmarried person, either heterosexual or homosexual, qualifies” under § 9:3-43(a) to petition for adoption).

silent on second-parent adoption, but allows for stepparent adoption.<sup>226</sup> However, *H.N.R.*'s holding established that an unmarried, same-sex partner could petition to adopt her partner's biological children under the stepparent exception.<sup>227</sup> Furthermore, in New Jersey, same-sex couples can enter into marriages<sup>228</sup> or civil unions where they are entitled to the same "legal benefits[] and protections" as spouses in matters of "adoption law and procedures."<sup>229</sup> Thus, this statute appears to authorize joint, same-sex petitions for adoption. And given *H.N.R.*'s holding, it is likely that even unregistered same-sex couples can jointly adopt.

#### *New Mexico*

The New Mexico Code provides that "any individual" can petition for adoption, with no preclusion of homosexual singles.<sup>230</sup> There is no case law or statute on point regarding same-sex joint adoption. New Mexico's statutes and case law are also silent on second-parent adoption, but allow for stepparent adoption for "married" individuals.<sup>231</sup> New Mexico's laws do not address whether in some circumstances a same-sex couple could be considered "married," and thus it is uncertain whether a same-sex couple could use New Mexico's stepparent provision to adopt a child.

#### *New York*

New York Law states that: "An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person."<sup>232</sup> The plain language of the statute allows for both homosexual single adoption, and joint, same-sex petitions for adoption. The language of this statute was changed in 2010 from "husband and wife" to "married couple" in order to unambiguously allow

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<sup>226</sup> § 9:3-50(c)(1) (Westlaw) (stating that adoptions will "terminate all parental rights and responsibilities of the parent towards the adoptive child except for a parent who is the spouse of the petitioner and except those rights that have vested prior to entry of the judgment of adoption").

<sup>227</sup> *H.N.R.*, 666 A.2d at 538.

<sup>228</sup> *Garden State Equality v. Dow*, No. L-1729-11, 2013 WL 5397372, at \*25 (N.J. Super. Ct. Law Div. Sept. 27, 2013).

<sup>229</sup> § 37:1-32(d) (Westlaw).

<sup>230</sup> N.M. STAT. ANN. § 32A-5-11(B)(1) (Westlaw through 2013, 1st Reg. Sess.).

<sup>231</sup> *Id.* § 32A-5-11(B)(2) (Westlaw).

<sup>232</sup> N.Y. DOM. REL. LAW § 110 (Westlaw through L. 2013, Ch. 1-340).

for joint same-sex couple adoptions.<sup>233</sup> The New York Court of Appeals has allowed same-sex, second-parent adoptions as well.<sup>234</sup>

#### *North Carolina*

The North Carolina General Statutes provide that “[a]ny adult may adopt another individual,” with no preclusion of homosexual singles.<sup>235</sup> North Carolina law only allows couples who are married to jointly adopt: “If the individual who files the petition is unmarried, no other individual may join in the petition . . . .”<sup>236</sup> Given this provision, and since North Carolina does not allow or recognize same-sex unions,<sup>237</sup> the state explicitly bars joint same-sex petitions for adoption through its state law. Although in years past some North Carolina courts allowed for second-parent adoption,<sup>238</sup> recently the North Carolina Supreme Court ruled that second-parent adoptions are not consistent with North Carolina’s stepparent adoption scheme, which requires the termination of the biological or previous parent’s parental rights unless the stepparent is married to the existing parent.<sup>239</sup>

#### *North Dakota*

North Dakota allows an “unmarried adult” to petition the court for adoption, with no preclusion of homosexual singles.<sup>240</sup> The only people who can jointly adopt a child under the North Dakota statutes are a “husband and wife together.”<sup>241</sup> Since North Dakota does not allow or recognize same-sex marriage,<sup>242</sup> it is unlikely the state would allow same-sex couples to adopt. This same line of reasoning makes it unlikely that North Dakota allows same-sex, second-parent adoptions. Only stepparents who are “married” can adopt their husband or wife’s biological child.<sup>243</sup>

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<sup>233</sup> 2010 N.Y. Sess. Laws 1364–65 (McKinney).

<sup>234</sup> *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995).

<sup>235</sup> N.C. GEN. STAT. § 48-1-103 (LEXIS through 2012 Reg. Sess.).

<sup>236</sup> *Id.* § 48-2-301(c) (LEXIS).

<sup>237</sup> *Id.* § 51-1.2 (LEXIS).

<sup>238</sup> *See, e.g.*, *Boseman v. Jarrell*, 704 S.E.2d 494, 497 (N.C. 2010); *Same-Sex Couple Adoption Voided*, NEWSOBSERVER.COM (Dec. 21, 2010), <http://www.newsobserver.com/2010/12/21/873846/same-sex-couple-adoption-voided.html>.

<sup>239</sup> *Boseman*, 704 S.E.2d at 496, 498–99, 501, 503. For the step-parent adoption statutes in North Carolina, see §§ 48-4-101, 48-1-106(d) (LEXIS).

<sup>240</sup> N.D. CENT. CODE § 14-15-03(2) (LEXIS through 2011 Reg. Sess.).

<sup>241</sup> *Id.* § 14-15-03(1) (LEXIS).

<sup>242</sup> N.D. CONST. art. XI, § 28.

<sup>243</sup> § 14-15-03(4) (LEXIS).

*Ohio*

Ohio allows an “unmarried adult” to petition for adoption with no exclusion of gay or lesbian singles.<sup>244</sup> Ohio allows stepparent adoption, but requires the petitioner to be the “spouse” of the adoptive child’s parent.<sup>245</sup> An Ohio Court of Appeals case specifically prohibited a lesbian second-parent adoption because the couple was not married.<sup>246</sup> There is no case law or statute on point as to whether same-sex couples can jointly adopt. But since Ohio only allows a “husband and wife” to jointly adopt,<sup>247</sup> and since Ohio does not allow or recognize same-sex marriage,<sup>248</sup> it can easily be inferred that there is no joint, same-sex couple adoption in Ohio.

*Oklahoma*

Oklahoma allows “[a]n unmarried person who is at least twenty-one (21) years of age” to petition for adoption, with no preclusion of homosexual singles.<sup>249</sup> Although Oklahoma statutory law allows homosexual single persons to adopt, it allows only “a husband and wife” to jointly adopt.<sup>250</sup> Because Oklahoma does not allow or recognize same-sex marriage,<sup>251</sup> it is unlikely that same-sex couples can petition for joint adoption. In *In re Adoption of M.C.D.*, an Oklahoma appeals court ruled that unmarried persons cannot petition the court for adoption when the adoptive child would not have a “stable, permanent loving famil[y]” as a result.<sup>252</sup> Oklahoma does not otherwise give the possibility for same-sex, second-parent adoptions because the biological parent’s parental rights are automatically terminated by an adoption decree unless the adoptive parent is the “spouse” of the biological parent.<sup>253</sup> Again, because Oklahoma does not allow or recognize same-sex marriage, it is unlikely that same-sex couples can use the stepparent provision to adopt a child.

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<sup>244</sup> OHIO REV. CODE ANN. § 3107.03(B) (LEXIS through File 24, 26–37, 2013 Sess.); see also *In re Adoption of Charles B.*, 552 N.E.2d 884, 885–86, (Ohio 1990) (allowing a homosexual man to adopt a child).

<sup>245</sup> § 3107.03(D)(1) (LEXIS).

<sup>246</sup> *In re Adoption of Doe*, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998).

<sup>247</sup> § 3107.03(A) (LEXIS).

<sup>248</sup> OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. § 3101.01(C) (LEXIS through File 24, 26–37, 2013 Sess.).

<sup>249</sup> OKLA. STAT. tit. 10, § 7503-1.1(3) (Westlaw through 2013, 1st Reg. Sess.).

<sup>250</sup> *Id.* § 7503-1.1(1) (Westlaw).

<sup>251</sup> OKLA. CONST. art. II, § 35.

<sup>252</sup> *Depew v. Depew (In re Adoption of M.C.D.)*, 42 P.3d 873, 881 (Okla. Civ. App. 2001).

<sup>253</sup> See § 7505-6.5(B) (Westlaw).

*Oregon*

Oregon law allows “[a]ny person” to petition for adoption, with no preclusion of homosexual singles.<sup>254</sup> Oregon’s statutes do not provide for second-parent adoption specifically, but they do have a stepparent statute. This statute requires the stepparent to be “the spouse” of the first parent.<sup>255</sup> Oregon has a domestic partnership law that states any rights given by statute to married persons are also given to a couple in a domestic partnership.<sup>256</sup> Thus, same-sex couples registered as domestic partnerships, should be able to have a second-parent adoption through the stepparent provision; if the couple is not registered as a domestic partnership, they probably would not be able to use the stepparent provision. There is no case law on un-registered same-sex couples trying to adopt. This holds true for same-sex joint adoptions as well—it can be assumed that registered partners could jointly petition for adoption, while it is uncertain if non-registered same-sex couples could jointly petition.

*Pennsylvania*

Pennsylvania law provides that “[a]ny individual may become an adopting parent,” with no exclusion of homosexual singles.<sup>257</sup> There is no case law or statute that addresses joint same-sex petitions for adoption. Pennsylvania law provides that in a stepparent adoption, the existing parental rights will not be disturbed if the adopting party is the “spouse” of the first parent.<sup>258</sup> The commonwealth has a “strong and longstanding public policy” against same-sex marriage.<sup>259</sup> However, the Pennsylvania Supreme Court ruled that trial courts have discretion to grant same-sex, second-parent adoptions when the petitioners show “cause.”<sup>260</sup>

*Rhode Island*

Rhode Island allows “[a]ny person” to petition for adoption, with no preclusion of homosexual singles.<sup>261</sup> Rhode Island allows same-sex couples to enter civil unions, which give these couples the same rights as

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<sup>254</sup> OR. REV. STAT. ANN. § 109.309(1) (Westlaw through Ch. 676, 2013 Reg. Sess.).

<sup>255</sup> *Id.* § 109.041(2) (Westlaw).

<sup>256</sup> *Id.* § 106.340(1) (Westlaw).

<sup>257</sup> 23 PA. CONS. STAT. ANN. § 2312 (Westlaw through Act 2013-11, Reg. Sess.).

<sup>258</sup> *See id.* § 2903 (Westlaw).

<sup>259</sup> *Id.* § 1704 (Westlaw). However, the Pennsylvania legislature has recently discussed changing the state’s longstanding policy. *See* H.R. 1647, 2013 Gen. Assemb. (Pa. 2013); S. 719, 2013 Gen. Assemb. (Pa. 2013).

<sup>260</sup> *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002).

<sup>261</sup> R.I. GEN. LAWS § 15-7-4(a) (LEXIS through 2012 Sess.).

those who have contracted for civil marriage.<sup>262</sup> This allows same-sex couples to jointly petition for adoption if they have registered in a civil union.<sup>263</sup> This statute also allows registered same-sex couples to take advantage of the stepparent provision, which requires the petitioner to be “married” to the adoptive child’s parent.<sup>264</sup> But there is no statute or case law on point regarding whether unregistered same-sex partners can petition for joint or second-parent adoptions.

#### *South Carolina*

South Carolina law provides that: “Any South Carolina resident may petition the court to adopt a child,” with no preclusion of homosexual singles.<sup>265</sup> South Carolina allows stepparent adoptions when the petitioner is the “spouse” of the adoptive child’s parent.<sup>266</sup> Since South Carolina does not recognize same-sex marriages or civil unions,<sup>267</sup> it is unlikely that the state recognizes same-sex, second-parent adoptions. In the absence of any case law or statutes on same-sex joint petitions for adoption, South Carolina’s constitutional ban on same-sex unions makes it unlikely that it recognizes joint petitions for adoption.

#### *South Dakota*

South Dakota law allows “any adult person” to petition for adoption, with no exception of LGBT singles.<sup>268</sup> South Dakota does not explicitly recognize second-parent adoptions, but allows stepparent adoptions when the petitioner “is the present spouse of the natural parent.”<sup>269</sup> There is no case law or statute that deals specifically with same-sex, second-parent adoptions. Since South Dakota does not allow or recognize same-sex marriage,<sup>270</sup> it is unlikely that the state will recognize a homosexual couple as “spouse[s]” for purposes of the stepparent provision. South Dakota statutes and case law are silent on who can jointly petition for adoption, and thus do not necessarily limit it to “married” couples, thus making it uncertain whether same-sex couples could petition jointly for adoption.

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<sup>262</sup> *Id.* § 15-3.1-6 (LEXIS).

<sup>263</sup> *See id.* §§ 15-3.1-6, 15-7-4(a) (LEXIS).

<sup>264</sup> *Id.* § 15-7-17 (LEXIS).

<sup>265</sup> S.C. CODE ANN. § 63-9-60(A)(1) (Westlaw through 2012 Reg. Sess.).

<sup>266</sup> *Id.* § 63-9-1110 (Westlaw).

<sup>267</sup> S.C. CONST. art. XVII, § 15.

<sup>268</sup> S.D. CODIFIED LAWS § 25-6-2 (Westlaw through 2013 Reg. Sess.).

<sup>269</sup> *Id.* § 25-6-17 (Westlaw).

<sup>270</sup> S.D. CONST. art. XXI, § 9.

*Tennessee*

Tennessee law provides that “[a]ny person over eighteen (18) years of age may petition” for adoption, with no preclusion of homosexual singles.<sup>271</sup> Tennessee’s stepparent adoption provision only mentions such adoptions in the context of the petitioner being the “spouse” of the legal or biological parent.<sup>272</sup> Since Tennessee does not allow or recognize same-sex marriage,<sup>273</sup> it is unlikely that a same-sex couple could use the stepparent provision of Tennessee law to accomplish a second-parent adoption through the stepparent provision. There is no case law or other statute on point for second-parent adoptions. There is also no case law or other statutes that deal directly with joint adoption by same-sex couples, though some sources speak favorably of same-sex couples adopting.<sup>274</sup>

*Texas*

Texas law states “an adult may petition to adopt a child” and makes no preclusion of homosexual singles.<sup>275</sup> Although there is no case law or statute on point regarding joint same-sex petitions for adoption, the Court of Appeals of Texas in *Goodson v. Castellanos* said in dictum that “there is no direct statement of public policy found in the family code or the constitution prohibiting the adoption of a child by two individuals of the same sex.”<sup>276</sup> *Goodson* declined to declare void a joint same-sex adoption that a district court had granted because the petitioner waited too long to attack the validity of the adoption.<sup>277</sup> Additionally, this case shows that lower courts in Texas have granted such adoptions.<sup>278</sup>

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<sup>271</sup> TENN. CODE ANN. § 36-1-115(a) (LEXIS through 2012 Reg. Sess.).

<sup>272</sup> *Id.* § 36-1-115(c) (LEXIS).

<sup>273</sup> TENN. CONST. art. XI, § 18.

<sup>274</sup> See *Adoptions by Same Sex Couples*, Tenn. Att’y Gen. Op., No. 07-140, at 1 (Oct. 10, 2007), available at <http://www.tn.gov/attorneygeneral/op/2007/op/op140.pdf> (“Assuming the adoption is found to be in the best interest of the child, there is no prohibition in Tennessee adoption statutes against adoption by a same sex couple,” though an opinion of the Attorney General does not carry the force of law); see also *In re Adoption of M.J.S.*, 44 S.W.3d 41, 56–57 (Tenn. Ct. App. 2000) (citations omitted) (in affirming the adoption petition of a lesbian, the court said, “the lifestyle of a proposed adoptive parent is certainly a factor that the trial court should consider in determining whether a proposed adoption is in a child’s best interests. By itself, however, this factor does not control the outcome of custody or adoption decisions, particularly absent evidence of its effects on the child.”).

<sup>275</sup> TEX. FAM. CODE ANN. § 162.001(a) (Westlaw through Ch. 65, 2013 Reg. Sess.).

<sup>276</sup> 214 S.W.3d 741, 751 (Tex. App. 2007).

<sup>277</sup> *Id.* at 748.

<sup>278</sup> *Id.* at 745, see also *Hobbs v. Van Stavern*, 249 S.W.3d 1, 3 (Tex. App. 2006) (noting that the trial court appointed two women as joint managing conservators for a child following their breakup). At least one lower court has also granted same-sex, second parent adoptions. See *In re S.D.S.-C.*, No. 04-08-00593-CV, 2009 WL 702777, at \*1 (Tex. App. Mar.

However, no appellate court has actually ruled on the issue of whether joint or second-parent same-sex adoptions are legal in Texas. While joint same-sex adoptions are probable, same-sex, second-parent adoptions are unlikely to be recognized in Texas. This is because the stepparent provision requires the petitioner to be the “spouse” of the legal or biological parent.<sup>279</sup> Same-sex couples will probably not qualify as “spouses” because Texas does not allow or recognize same-sex marriage.<sup>280</sup> Thus, in the absence of any statute or case law regarding second-parent adoptions, it is unlikely that same-sex couples could get such an adoption through the stepparent provision.

#### *Utah*

Utah law allows any “adult” to petition for adoption, unless that person is “cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”<sup>281</sup> Therefore, single homosexuals could adopt as long as they are not cohabiting in a relationship not recognized as a legal marriage. In light of this provision, and since Utah does not recognize or allow same-sex marriage,<sup>282</sup> joint and second-parent, same-sex adoptions are disallowed.

#### *Vermont*

Vermont’s law allows “any person” to petition for adoption and does not preclude homosexual singles.<sup>283</sup> The same statute also allows second-parent adoptions, with no exclusion of same-sex couples: “If a family unit consists of a parent and the parent’s partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent’s parental rights is unnecessary in an adoption under this subsection.”<sup>284</sup> Same-sex couples can jointly adopt because Vermont allows for same-sex marriage,<sup>285</sup> as well as civil unions (parties to civil unions have same rights as married people, including adoption).<sup>286</sup> Since Vermont allows for same-sex marriage,<sup>287</sup> married,

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18, 2009) (reviewing a same-sex, second parent adoption granted by a lower court for different issues).

<sup>279</sup> § 162.001(b)(2) (Westlaw).

<sup>280</sup> *Id.* § 6.204(b) (Westlaw).

<sup>281</sup> UTAH CODE ANN. § 78B-6-117(2)(b), (3) (LEXIS through 2013, 1st. Spec. Sess.).

<sup>282</sup> *Id.* § 30-1-2(5) (LEXIS), § 78B-6-117(2)(b), (3) (LEXIS).

<sup>283</sup> VT. STAT. ANN. tit. 15A, § 1-102(a) (LEXIS through 2011 Adjourned Sess.).

<sup>284</sup> *Id.* § 1-102(b) (LEXIS).

<sup>285</sup> *Id.* tit. 15, § 8 (LEXIS).

<sup>286</sup> *Id.* § 1204(a), (e)(4) (LEXIS); *see also* Titchenal v. Dexter, 693 A.2d 682, 686–87 (Vt. 1997) (saying, in dictum, that “[t]hrough marriage or adoption, heterosexual couples may assure that nonbiological partners will be able to petition the court regarding parental



same-sex couples can petition for joint adoptions. It is unclear, however, whether unmarried, same-sex couples can do the same as there is no case law or statutes on point.

### *Virginia*

The Code of Virginia allows “any natural person” to petition for adoption with no exclusion of LGBT singles.<sup>288</sup> Virginia statutes and case law are silent on joint, same-sex adoptions. Virginia law does not explicitly address second-parent adoptions, but does allow for stepparent adoptions when the petitioner is the “husband or wife” of the child’s legal parent.<sup>289</sup> Because Virginia does not recognize same-sex marriage,<sup>290</sup> it is unlikely that an individual in a same-sex relationship can be a “husband or wife” for purposes of this provision. Such an individual will, therefore, most likely not be able to utilize the stepparent provision to accomplish a second-parent adoption.

### *Washington*

Washington law states, “[a]ny person who is legally competent and who is eighteen years of age or older may be an adoptive parent.”<sup>291</sup> The law also provides that “[i]f the petitioner is married, the petitioner’s spouse shall join in the petition.”<sup>292</sup> Since Washington formally recognizes same-sex marriage as of December 2012,<sup>293</sup> it is now even clearer that married, same-sex couples can jointly petition for adoption.<sup>294</sup> Washington does not explicitly allow for second-parent adoptions, but allows stepparent adoptions when the petitioner is

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rights and responsibilities or parent-child contact in the event a relationship ends. Nonbiological partners in same-sex relationships can gain similar assurances through adoption[,]” and “same-sex couples may participate in child-rearing and have recourse to the courts in the event a custody or visitation dispute results from the breakup of a relationship.”).

<sup>287</sup> Tit. 15, § 8).

<sup>288</sup> VA. CODE ANN. § 63.2-1201 (LEXIS through 2013 Spec. Sess. I).

<sup>289</sup> *Id.* § 63.2-1215 (LEXIS).

<sup>290</sup> VA. CONST. art. I, § 15-A; VA. CODE ANN. § 20-45.2 (LEXIS through 2013 Spec. Sess. I).

<sup>291</sup> WASH. REV. CODE ANN. § 26.33.140(2) (Westlaw through 2013 Legis.).

<sup>292</sup> *Id.* § 26.33.150(4) (Westlaw).

<sup>293</sup> 2012 Wash. Sess. Laws 199.

<sup>294</sup> *See* § 26.33.140(2) (Westlaw); *see also* Andersen v. King County, 138 P.3d 963, 982 (Wash. 2006) (stating, in dictum, that adoption in Washington is not limited to couples that are legally married); State *ex rel.* D.R.M., 34 P.3d 887, 891 (Wash. Ct. App. 2001) (discussing that common law recognizes only biological parents and that adoption is purely statutory); Lucas v. Dep’t of Soc. & Health Servs. (*In re* Dependency of G.C.B.), 870 P.2d 1037, 1044 (Wash. Ct. App. 1994) (“Adoption is not a public forum open to any and every person who may wish to adopt.”).

“married” to the other parent.<sup>295</sup> Washington’s legalization of same-sex marriage should also make second-parent adoptions affirmatively available to married, same-sex couples. Washington also allows same-sex couples that register as a domestic partnership to take advantage of the joint adoption and stepparent adoption provisions.<sup>296</sup> However, it is uncertain whether unmarried same-sex couples can petition for joint or second-parent adoptions because there is no statute or case law on point.

#### *West Virginia*

West Virginia allows “[a]ny person not married or any person, with his or her spouse’s consent, or any husband and wife jointly” to adopt with no preclusion of homosexual singles.<sup>297</sup> West Virginia is unlikely to recognize either same-sex joint or second-parent adoptions, though there is no case law on the subject. The state allows stepparent adoption if the petitioner is the “husband or wife” of the adoptive child’s legal parent.<sup>298</sup> Since West Virginia does not allow or recognize same-sex marriage,<sup>299</sup> it is unlikely that an individual in a same-sex relationship will be considered a “husband or wife” under the stepparent provision. Similarly, a same-sex couple will most likely not be considered a “husband or wife” for joint adoptions. The state’s case law and statutes are otherwise silent on joint or second-parent same-sex adoptions.

#### *Wisconsin*

Wisconsin law allows “[a]n unmarried adult” to petition for adoption, with no indication that LGBT singles are excluded from eligibility.<sup>300</sup> The law also allows for stepparent adoption by “the husband or wife if the other spouse is a parent of the minor.”<sup>301</sup> However, the Supreme Court of Wisconsin specifically ruled that since a same-sex lesbian couple was not married, the petitioner could not adopt her partner’s child without terminating the partner’s existing parental

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<sup>295</sup> See § 26.33.260(1) (Westlaw).

<sup>296</sup> *Id.* § 26.33.902 (Westlaw) (“For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons . . .”).

<sup>297</sup> W. VA. CODE ANN. § 48-22-201 (LEXIS through 2013, 1st Extraordinary Sess.).

<sup>298</sup> *Id.* § 48-22-703(a) (LEXIS).

<sup>299</sup> *Id.* §§ 48-2-104(c), 48-2-603 (LEXIS).

<sup>300</sup> WIS. STAT. ANN. § 48.82(1)(b) (Westlaw through 2013 Wis. Act 19).

<sup>301</sup> *Id.* § 48.82(1)(a) (Westlaw).

rights.<sup>302</sup> Since Wisconsin law only allows joint adoptions by “husband and wife,”<sup>303</sup> it is unlikely that same-sex couples can petition jointly for adoption. There is no case law or other statute on point, but a Wisconsin Supreme Court decision intimated that same-sex couples cannot jointly petition for adoption.<sup>304</sup> Although Wisconsin law allows for domestic partnerships, these partnerships are “not substantially similar to that of marriage.”<sup>305</sup> Furthermore, the Wisconsin Constitution states that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state.”<sup>306</sup>

### Wyoming

Wyoming law provides that “[a]ny adult person” can petition for adoption, with no preclusion of homosexual singles.<sup>307</sup> There is no specific statute or case law on second-parent adoptions, but Wyoming does allow for stepparent adoptions by “the husband or wife if the other spouse is a parent of the child.”<sup>308</sup> Since Wyoming does not allow or recognize same-sex marriage,<sup>309</sup> it is unlikely that same-sex couples qualify for second-parent adoption through the stepparent provision. There is no statute or case law directly addressing joint, same-sex adoptions. However, the only people that Wyoming law allows to jointly petition for adoption are a “husband and wife.”<sup>310</sup> And in light of Wyoming’s prohibition of same-sex marriage, it is unlikely that the state would allow a joint petition for adoption by a same-sex couple.

As this survey has demonstrated, over the past decade, American states have become more receptive toward adoption of children by gay and lesbian singles, partners, and couples. That trend continues. While less than half of the American states today allow same-sex partners or couples to adopt, if the trend continues, a majority of states will allow such adoptions within a few years. The trend of allowing adoption by

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<sup>302</sup> *Georgina G. v. Terry M. (In re Angel Lace M.)*, 516 N.W.2d 678, 680, 683 (Wis. 1994) (holding that, absent the provision for step-parents, “a minor is not eligible for adoption unless the rights of both of her parents have been terminated.”).

<sup>303</sup> § 48.82(1)(a) (Westlaw).

<sup>304</sup> *See Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 437 n.41 (Wis. 1995) (noting in dictum that joint same-sex adoptions are “a remedy not permitted in Wisconsin”).

<sup>305</sup> § 770.001 (Westlaw).

<sup>306</sup> WIS. CONST. art. XIII, § 13.

<sup>307</sup> WYO. STAT. ANN. § 1-22-103 (LEXIS through 2013 Reg. Sess.).

<sup>308</sup> *Id.* § 1-22-104(b) (LEXIS).

<sup>309</sup> *Id.* § 20-1-101 (LEXIS).

<sup>310</sup> *Id.* § 1-22-104(b) (LEXIS).

LGBT partners and couples seems generally to correlate with the trend toward reduction in the number of intercountry adoptions.<sup>311</sup>

*B. Reciprocal Implications of Adoption by Same-Sex Partners and Same-Sex Marriage*

While not directly on point, the recent decisions of the Supreme Court in *United States v. Windsor*, invalidating the “vertical” Section Three of the federal Defense of Marriage Act (“DOMA”) which barred recognition in federal law of same-sex marriages,<sup>312</sup> and *Hollingsworth v. Perry*, refusing to review and leaving intact a dubious district court opinion invalidating California’s Proposition 8, which prohibited same-sex marriage in the state,<sup>313</sup> are not irrelevant for adoption by same-sex partners. In Part IV of the *Windsor* opinion, the Court enthusiastically emphasized the perception that the enactment of Section Three of DOMA was motivated by animus, a “desire to harm a politically unpopular group,”<sup>314</sup> to “impose a disadvantage, a separate status, and so a stigma” upon same-sex couples who married.<sup>315</sup> The majority opinion specifically mentioned that refusal to allow same-sex marriage “demeans” persons in same-sex relationships, and “humiliates” their children.<sup>316</sup>

The *Windsor* decision gives a boost to advocates of same-sex marriage and equal treatment of same-sex family relationships, including parent-child relations. If five Justices think that denial of same-sex marriage humiliates children being raised by such couples, it is not unlikely that many courts will conclude that denial of same-sex partner adoption also humiliates children being raised by such couples.

Moreover, there is a logical and practical connection between legalizing adoption by LGBT couples and partners and legalizing same-sex marriage. All states that have legalized same-sex marriage, except Minnesota, allow or probably allow same-sex partners and couples to adopt.<sup>317</sup> Most states that have legalized adoption by same-sex partners

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<sup>311</sup> Compare *supra* Figure 1, with *infra* Table 4 and Christy M. Glass et al., *Toward a ‘European Model’ of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 BERKELEY J. INT’L L. 132, 140–42 (2011).

<sup>312</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013); see also Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 956 (2010).

<sup>313</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659, 2663 (2013).

<sup>314</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 2694.

<sup>317</sup> Compare *infra* Table 4, with *infra* Table 6. For more information, also see Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital*

and couples have legalized same-sex marriage.<sup>318</sup> Numerous commentators have noted the connection between legalizing adoption by LGBT couples and partners and legalizing same-sex marriage.<sup>319</sup> Even in the Supreme Court oral arguments in *Hollingsworth v. Perry* about whether the Constitution of the United States requires legalization of same-sex marriage, the lawyer for the respondents insisted that one reason California could not constitutionally deny LGBT couples same-sex marriage was because the state had legalized adoption, custody, and visitation by same-sex partners and couples.<sup>320</sup>

Globally, the correlation between same-sex marriage and adoption by same-sex partners is notable. Out of 193 U.N. Member States in the world, only sixteen nations (counting Brazil, whose inclusion is very debatable) allow same-sex marriage, and another eighteen nations allow

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*Couples and Partners*, 63 ARK. L. REV. 31, 61–62 (2010) [hereinafter Wardle, *Comparative Perspectives*].

<sup>318</sup> Compare *infra* Table 6, with *infra* Table 4. See generally Jennifer B. Mertus, *Barriers, Hurdles, and Discrimination: The Current Status of LGBT Intercountry Adoption and why Changes Must Be Made to Effectuate the Best Interests of the Child*, 39 CAP. U. L. REV. 271, 288 (2011) (noting the same trend internationally).

<sup>319</sup> See, e.g., Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671, 672 (2012); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 216–17, 243 (2012); Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913, 978 (2011); Susanna Birdsong, Comment, *Voiding Motherhood: North Carolina's Shortsighted Treatment of Subject Matter Jurisdiction in Boseman v. Jarrell*, 21 AM U. J. GENDER SOC. POL'Y & L. 109, 113 (2012). Compare William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1969 (2012) (explaining that almost two-thirds of same-sex couples live in nonrecognition jurisdictions where the default rule is that only the biological parent may be a legal parent), with Lisa Shultz, *No Faith, No Credit, No Union*, 56 ADVOCATE 20, 21 (2013) (discussing the argument that “adoption by a same-sex partner is a ‘gateway’ to same-sex marriage,” and the “harsh consequence” that children of same-sex parents suffer due to jurisdictions forbidding non-biological parents to adopt their same-sex partner’s child).

<sup>320</sup> Mr. Olson, attorney for the Respondents:

California’s already made a decision that gay and lesbian individuals are perfectly suitable as parents, they’re perfectly suitable to adopt, they’re raising 37,000 children in California, and the expert on the other side specifically said and testified that they would be better off when their parents were allowed to get married.

.....  
 . . . But the fact is that California can’t make the arguments about adoption or child-rearing or people living together, because they have already made policy decisions. So that doesn’t make them inconsistent.

Transcript of Oral Argument at 43–44, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

same-sex civil unions.<sup>321</sup> However, out of the thirty-four nations that allow some form of civil union, only fifteen of 193 U.N. Member States allow adoption by same-sex partners.<sup>322</sup> However, even some nations that allow some form of same-sex unions forbid some or all adoption by same-sex partners and couples.<sup>323</sup>

Table 3: Legal Allowance of Same-Sex Unions Globally (of 193 Nations)<sup>324</sup>

<b>Jurisdictions Permitting Same-Sex Marriage</b> (Sixteen Nations)	Argentina, Belgium, Brazil, Britain (England & Wales) (effective 2014), Canada, Denmark, France, Iceland, The Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Uruguay
<b>Jurisdictions Allowing Same-Sex Unions Equivalent to Marriage</b> (Eighteen Nations)	Andorra, Australia, Austria, Colombia, Croatia, the Czech Republic, Ecuador, Finland, Germany, Greenland, Hungary, Ireland, Liechtenstein, Luxembourg, Scotland, Slovenia, Sweden, Switzerland

Similarly, the status of same-sex marriage in the United States has changed from no recognition just a decade ago to sixteen states that permit same-sex marriage today.<sup>325</sup>

<sup>321</sup> Compare *infra* Table 3, with *UN at Glance*, THE UNITED NATIONS, <http://www.un.org/en/aboutun/index.shtml> (last visited Oct. 30, 2013).

<sup>322</sup> Fifteen nations allow adoption in some form by same-sex couples, though as of 2011 some only allow it indirectly through single parent adoption. See *infra* Table 5.

<sup>323</sup> Compare Bowen, *supra* note 97, at 6 & n.17, with *infra* Table 3.

<sup>324</sup> *The Freedom to Marry Internationally*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/landscape/entry/c/international> (last updated Aug. 2013) (stating that Andorra, Croatia, Czech Republic, Liechtenstein, Luxembourg, Slovenia, and Switzerland only “offer some spousal rights to same-sex couples, which are far from full marriage”). Brazil has not passed any laws legalizing same-sex marriage nationally, but the Brazilian Supreme Court recently ruled that defining the family narrowly violates the Brazilian Constitution. See Daniel De La Cruz, Comment, *Explaining the Progression of the Rights of Same-Sex Couples in South America*, 14 SAN DIEGO INT’L L.J. 323, 330 (2013). Same-sex “civil unions” or equivalent relationships are also allowed in some sub-jurisdictions in other nations such as the United States and Mexico. See, e.g., David Agren, *Mexican States Ordered to Honor Gay Marriages*, N.Y. TIMES (Aug. 10, 2010), [http://www.nytimes.com/2010/08/11/world/americas/11mexico.html?\\_r=2&](http://www.nytimes.com/2010/08/11/world/americas/11mexico.html?_r=2&); *Mexico City Passes Gay Union Law*, BBC NEWS (Nov. 20, 2006, 9:39 AM), <http://news.bbc.co.uk/2/hi/6134730.stm>; *Mexico City Recognizes Gay Civil Unions*, CBSNEWS.COM (Dec. 21, 2009, 7:14 PM), [http://www.cbsnews.com/2100-202\\_162-2169987.html](http://www.cbsnews.com/2100-202_162-2169987.html); *infra* Table 4.

<sup>325</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting) (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)) (“In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.”); *Massachusetts Court Strikes Down Ban on Same-Sex Marriage*,

Table 4: Legal Allowance of Same-Sex Unions in the United States

<b>Jurisdictions Allowing Same-Sex Marriage</b> (Sixteen States and the District of Columbia) <sup>326</sup>	California (2010), Connecticut (2008), Delaware (2013), District of Columbia (2010), Hawaii (2013), Illinois (2013), Iowa (2009), Maine (2009), Maryland (2012), Massachusetts (2003), Minnesota (2013), New Hampshire (2009), New Jersey (2013), New York (2011), Rhode Island (2013), Vermont (2009), Washington (2012)
<b>Jurisdictions Granting Same-Sex Couples Rights Similar to Marriage</b> (Six States and the District of Columbia) <sup>327</sup>	Colorado (2013), District of Columbia (2002), Hawaii (2011), Illinois (2011), Nevada (2009), New Jersey (2006), Oregon (2007)

One legal commentator sympathetic to same-sex partner adoptions recently reported:

Many countries have outright bans on homosexual adoption. Other countries have regulations that appear neutral on their face but in practice exclude LGBT adoption by banning single individuals from adopting. Thus, the only countries from which LGBT individuals or couples may adopt are those countries that either expressly allow

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CNN.COM (Nov. 18, 2003, 10:16 AM), <http://www.cnn.com/2003/LAW/11/18/gay.marriage.reut/>. For the current number of states that allow same-sex marriage, see *infra* Table 4.

<sup>326</sup> Sixteen states plus the District of Columbia allow same-sex marriage. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008); H.R. 75, 147th Gen. Assemb. (Del. 2013); Council 18-482, Council Period 18 (D.C. 2010); S. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013); S. 10, 98th Gen. Assemb. (Ill. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009); LD 1020, 124th Leg., First Reg. Sess. (Me. 2009); H.D. 438, 2012 Leg., 430th Sess. (Md. 2013); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003); H.R. 1054, 2013 Leg., 88th Sess. (Minn. 2013); H.R. 436, 2009 Sess. (N.H. 2009); *Garden State Equality v. Dow*, No. L-1729-11, 2013 WL 5397372, at \*25 (N.J. Super. Ct. Law Div. Sept. 27, 2013); Assemb. 8354, 2011–2012 Reg. Sess. (N.Y. 2011); H.R. 5015B, 2013 Reg. Sess. (R.I. 2013); S. 115, 2009-2010 Legis. Sess. (Vt. 2009); S. 6239, 62d Leg., 2012 Reg. Sess. (Wash. 2012).

<sup>327</sup> Six states plus the District of Columbia allow same-sex unions that are not equivalent to marriage but that grant rights similar to marriage. S. 13-011, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); Council 14-459, Council Period 14 (D.C. 2002) (implementing the Health Care Benefits Expansion Act of 1992, Council 9-188, Council Period 9 (D.C. 1992)); S. 232, 26th Leg., Reg. Sess. (Haw. 2011); S. 1716, 96th Gen. Assemb., Reg. Sess. (Ill. 2011); S. 283, 75th Legis. Sess., Reg. Sess. (Nev. 2009); Assemb. 3787, 212th Leg. (N.J. 2006); H.R. 2007, 74th Legis. Assemb., 2007 Reg. Sess. (Or. 2007).

homosexual adoption, those that do not specify, or those that allow singles to adopt.<sup>328</sup>

In fact, “very few countries allow same-sex married couples to adopt jointly.”<sup>329</sup> The same commentator noted that approximately eighty nations allow single individuals to adopt, about a half-dozen nations allow same-sex partners or couples to adopt in some cases, and at least seventeen nations have explicit prohibitions against LGBT joint adoptions.<sup>330</sup> None of the top five sending nations in 2009, for children being adopted in the United States, allow placement of children for adoption with LGBT individuals or couples.<sup>331</sup>

Many jurisdictions today distinguish between adoption by individuals and by gay or lesbian couples, allowing the former but not the latter. A distinction was drawn recently in 2008 by the European Court of Human Rights (“ECHR”) in *E.B. v. France*, interpreting provisions of the European Convention on Human Rights.<sup>332</sup> The case involved a woman who had been in a lesbian relationship for about eight years, but she and her partner technically did not regard themselves as a couple.<sup>333</sup> The woman applied to the French Jura Social Service Department for authorization to adopt a child, but her application was

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<sup>328</sup> Mertus, *supra* note 318, at 281–82; *see also id.* at 292–93 (“[M]any countries allow single individuals to adopt,” but some exclude single males, and “very few countries allow joint adoption [by] same-sex, or even heterosexual, unmarried couples.”).

<sup>329</sup> *Id.* at 293 & n.149.

<sup>330</sup> *Id.* at 281–82 & nn.59–63. This produces a potential irony:

LGBT couples, specifically married couples, have the most difficulty adopting internationally. The group that experiences the second most difficulty is unmarried same-sex couples. In other words, those members of the LGBT community that are in stable, committed, and sometimes legally recognized relationships may actually be at a disadvantage when it comes to adopting internationally.

*Id.* at 304 (footnotes omitted).

<sup>331</sup> *Id.* at 283–88. China and Ethiopia explicitly bar adoption by same-sex individuals or couples, and while Russia, South Korea, and the Ukraine do not explicitly ban such adoptions, a de facto ban exists that is enforced through other requirements. *Id.*

<sup>332</sup> *See E.B. v. France*, App. No. 43546/02, Eur. Ct. H.R. ¶ 49 (2008).

<sup>333</sup> *Id.* ¶¶ 8–10. This may have been a tactical rather than factual statement, as the applying partner wished to adopt a child from, *inter alia*, Asia, *id.* ¶ 9, where adoption by same-sex couples is usually expressly forbidden, *see* Luo & Smolin, *supra* note 9, at 607. Many lesbians have dissembled and have applied as single women to adopt Asian children, even though they are living in same-sex relationships, in order to circumvent the Asian nations’ laws barring placement of children for adoption with same-sex couples. *See id.* at 607–08; Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China’s One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT’L L. REV. 283, 288 n.31 (1998); Glenn Schloss, *Americans Queue for Chinese Babies*, S. CHINA MORNING POST (Aug. 10, 1997, 12:00 AM), <http://www.scmp.com/article/207030/americans-queue-chinese-babies>.



denied and that decision was upheld by the French Court.<sup>334</sup> The ECHR ruled that the French decision to bar the adoption by the lesbian as a single person violated the European Convention on Human Rights since the ECHR concluded that she had been discriminated against due to her sexual orientation.<sup>335</sup> However, the ECHR decision left intact the French adoption policy by which *joint* adoption is reserved only for dual-gender, married couples.<sup>336</sup> This policy is reflected in a French National Assembly report, emphasizing that “a child has a right to grow up within a family,” which should be “organized in accordance with the best interests of the child during his or her minority.”<sup>337</sup> The report further acknowledged that “the form or organization of the couple constituted by the parents is not in fact neutral in its consequences for the child.”<sup>338</sup>

That conclusion was reaffirmed just last year, in March 2012, when the ECHR held in *Gas v. France* that the refusal of France to allow a woman to adopt her same-sex partner’s child did not violate the European Convention on Human Rights.<sup>339</sup>

A 2006 survey by Eurobarometer for the European Commission revealed that a majority of the population in only two European nations favored allowing legalized adoption by gay or lesbian couples, and support for gay adoption in eighteen of the nations was only thirty-three percent or less, with only single-digit support in four nations.<sup>340</sup> Likewise, a 2010 poll in the progressive South American nation of Brazil reported that fifty-one percent of Brazilians surveyed opposed allowing same-sex couples to adopt children while thirty-nine percent did not

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<sup>334</sup> *E.B.*, App. No. 43546/02, ¶¶ 9–10, 24–25.

<sup>335</sup> *Id.* ¶¶ 49, 95–98.

<sup>336</sup> *Id.* ¶ 49; see Assemblée Nationale [National Assembly], 1 RAPPORT FAIT AU NOM DE LA MISSION D’INFORMATION SUR LA FAMILLE ET LES DROITS DES ENFANTS [1 REPORT SUBMITTED ON BEHALF OF THE MISSION OF INQUIRY ON THE FAMILY AND THE RIGHTS OF CHILDREN], No. 2832, at 83 (2006) [hereinafter NATIONAL ASSEMBLY REPORT].

<sup>337</sup> NATIONAL ASSEMBLY REPORT, *supra* note 333, at 18.

<sup>338</sup> *Id.* at 50.

<sup>339</sup> *Gas v. France*, App. No. 25951/07, Eur. Ct. H.R. ¶ 69, 73 (2012); see also Donna Bowater, *Gay Marriage Is Not a Human Right, According to European Ruling*, TELEGRAPH (UK) (Mar. 21, 2102, 6:29 AM), <http://www.telegraph.co.uk/news/religion/9157029/Gay-marriage-is-not-a-human-right-according-to-European-ruling.html>.

<sup>340</sup> EUROPEAN COMM’N, EUROBAROMETER 66: PUBLIC OPINION IN THE EUROPEAN UNION 42 (2006), available at [http://ec.europa.eu/public\\_opinion/archives/eb/eb66/eb66\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.pdf).

oppose.<sup>341</sup> However, more recent polls suggest public opinion has changed.<sup>342</sup>

V. HOW THE PLACEMENT OF CHILDREN WITH LGBT INDIVIDUALS,  
PARTNERS, AND COUPLES REDUCES BOTH INTERCOUNTRY AND DOMESTIC  
ADOPTION

*A. Changing Policies Regarding Legalization of Same-Sex Partner Adoption*

Reasonable persons may disagree about the merit of allowing LGBT individuals, partners, and couples to adopt children, especially children unrelated to either partner, and there is a lot of discussion about allowing or forbidding such adoptions.<sup>343</sup> In this Part, this Article considers the correlation between the adoption of the Hague Convention, the rise of the gay rights movement, and the decrease in intercountry adoptions.

During the drafting of the Hague Convention and as late as 1993, when the Hague Convention was approved,<sup>344</sup> adoptions by homosexual couples were generally prohibited worldwide and were allowed in only one American state.<sup>345</sup> Accordingly, the Hague Convention does not prohibit or require nations to place children for adoption with or approve

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<sup>341</sup> *Half of Brazilians Reject Adoption by Gay Couples*, ANGUS REID GLOBAL (July 22, 2010), [http://www.angusreidglobal.com/polls/39318/half\\_of\\_brazilians\\_reject\\_adoption\\_by\\_gay\\_couples/](http://www.angusreidglobal.com/polls/39318/half_of_brazilians_reject_adoption_by_gay_couples/).

<sup>342</sup> Compare sources cited *supra* notes 340–38, with Patricia Reaney, *Support for Gay Marriage High in Developed Nations: Poll*, REUTERS (Jun. 18, 2013), <http://www.reuters.com/article/2013/06/18/us-gaymarriage-poll-idUSBRE95H09T20130618>, and *Strong International Support (73%) Among Developed Nations for Legal Recognition of Same-Sex Couples: Majorities in All 16 Countries Support Recognition*, IPSOS (June 18, 2013), <http://www.ipsos-na.com/news-polls/pressrelease.aspx?id=6151>.

<sup>343</sup> The lead author of this Article has participated in this academic dialogue (generally opposed to placing children with same-sex partners and couples but not necessarily with LGBT individuals who otherwise qualify). See, e.g., Wardle, *Comparative Perspectives*, *supra* note 317, at 32–33; Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 AVE MARIA L. REV. 1, 34 (2011); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 204–05 (2006); Wardle, *HCIA Implementing Law*, *supra* note 51, at 114; Lynn D. Wardle, *The "Inner Lives" of Children in Lesbian Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 512 (2005) [hereinafter Wardle, *Inner Lives*]; Wardle, *Protecting Adoption*, *supra* note 51, at 323.

<sup>344</sup> See Mark T. McDermott, *Intercountry Adoptions: Hague Convention Update*, in ADOPTION LAW INSTITUTE 2006, at 379, 381–82 (2006); Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647, 647 (1997).

<sup>345</sup> See *In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 551–52, 554–55 (N.J. Super. Ct. Ch. Div. 1993) (allowing the adoption of a child by the lesbian partner of the child's mother); see e.g., sources cited *infra* notes 349–53 (noting the dates on which countries began to allow homosexual couples to adopt).

adoptions by LGBT individuals, same-sex partners, or same-sex couples. Rather, it leaves it to each nation to set its own standard for sending and receiving children for adoption.<sup>346</sup> That is governed by the domestic adoption policies of both the sending nation and the receiving nation. The Hague Convention merely requires that those standards be transparent, and out of respect for the sovereignty of each nation, the Hague Convention seeks to see that the policies of the nations are not circumvented or violated but are observed and enforced.<sup>347</sup>

Today, by contrast, adoption by lesbian and gay couples or partners is allowed in at least fifteen nations (mostly in Europe).<sup>348</sup>

Table 5: Nations That Generally Allow Adoption of Children by LGBT Partners and Couples<sup>349</sup>

<b>Americas</b> <sup>350</sup>	Argentina, Brazil, Canada, Uruguay
<b>Europe</b> <sup>351</sup>	Belgium, Denmark, France, Iceland, Netherlands, Norway, Spain, Sweden, United Kingdom

<sup>346</sup> See Wardle, *HCIA Implementing Law*, *supra* note 51, at 135.

<sup>347</sup> See Convention on Intercountry Adoption, *supra* note 15, arts. 4–5, 7, 9–12, 17–20, 23. See generally Wardle, *HCIA Implementing Law*, *supra* note 51, app. 1.

<sup>348</sup> See *infra* Table 5.

<sup>349</sup> Same-sex partner and couple adoptions are allowed in some non-sovereign, subordinate jurisdictions (such as particular cities or provinces), including jurisdictions within Australia and Mexico. See, e.g., *Tasmanian Upper House Passes Gay Adoption Bill*, NEWS AUSTRALIA (June 27, 2013), <http://www.news-australia.com/news/tasmanian-upper-house-passes-gay-adoption-bill-201306271840.html> (noting that some, but not all, jurisdictions in Australia allow adoption by same-sex couples); Ignacio Pinto-Leon, *Mexico's Supreme Court Orders States to Recognize Same-Sex Marriages and Adoptions of Minors by Such Couples*, LAW TRENDS & NEWS, Fall 2010, available at [http://www.americanbar.org/content/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/fl\\_feat1.html](http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/fl_feat1.html) (noting that while not all jurisdictions in Mexico allow gay marriage or adoption, marriages and adoptions by same-sex couples must be honored throughout the country).

<sup>350</sup> See *Argentine Senate Backs Bill Legalising Gay Marriage*, BBC NEWS, <http://www.bbc.co.uk/news/10630683> (last updated July 15, 2010) (noting that Argentina became “the first country in Latin America to legalise gay marriage” and that the law “also allows same-sex couples to adopt”); Saeed Kamali Dehghan, *Brazilian Gay Man Granted ‘Maternity’ Leave for Adopted Child*, GUARDIAN (Aug. 31, 2012, 11:58 AM), <http://www.theguardian.com/world/2012/aug/31/brazilian-gay-man-maternity-leave> (noting that the Supreme Court of Brazil gave same-sex partners all the legal rights enjoyed by heterosexual couples in May 2011); *Frequently Asked Questions About Adoption*, ADOPTION COUNCIL CAN., <http://www.adoption.ca/faqs> (last visited Oct. 30, 2013) (stating that there is no legal prohibition to same-sex adoption in Canada); *Uruguay Passes Same-Sex Adoption Law*, CNN.COM, <http://www.cnn.com/2009/WORLD/americas/09/10/uruguay.gays/> (last updated Sept. 10, 2009) (“Uruguay became the first Latin American country to allow same-sex couples to adopt children . . .”).

<b>Africa</b> <sup>352</sup>	South Africa
<b>Asia</b>	(None)
<b>Oceania</b> <sup>353</sup>	New Zealand

Likewise, as noted previously, same-sex partner adoptions are permitted or likely to be allowed in at least twenty-one American states (compared to at least twenty-one states that ban or probably prohibit such adoptions).<sup>354</sup>

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<sup>351</sup> See *Belgium Passes Gay Adoption Law*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/4929604.stm> (last updated Apr. 21, 2006); *Gay Adoption on the Lawbooks*, POLITIKEN.DK (May 4, 2010), <http://politiken.dk/newsinenglish/ECE963619/gay-adoption-on-the-lawbooks> (reporting that homosexual couples in Denmark are now able to adopt children); *François Hollande Signs Same-Sex Marriage into Law*, FRANCE 24 (May 18, 2013), <http://www.france24.com/en/20130518-france-gay-marriage-law-adoption> (reporting that France's legalization of same-sex marriage also legalized gay adoption); *Iceland, Intercountry Adoption*, U.S. DEP'T STATE, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=iceland](http://adoption.state.gov/country_information/country_specific_info.php?country-select=iceland) (click "Who Can Adopt" tab) (last updated May, 2009) (reporting that same-sex couples have been able to adopt since 2006); Shane Opatz, *Gay Marriage Goes Dutch*, CBSNEWS.COM (Feb. 11, 2009, 9:27 PM), <http://www.cbsnews.com/stories/2001/04/01/world/main283071.shtml> (noting that homosexual couples were also given the right to adopt); *Norway Passes Law Approving Gay Marriage*, NBCNEWS.COM, <http://www.nbcnews.com/id/25218048/#.Uk6IxyzWqG5> (last updated June 17, 2008, 8:41 PM) (reporting that homosexual couples were given right to marry and adopt children); *Gay Marriage Around the Globe*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/4081999.stm> (last updated Dec. 22, 2005) (discussing, among other countries, Spain and its same-sex marriage law that also allows for the adoption of children); *Sweden Legalises Gay Adoption*, BBC NEWS (June 6, 2012), <http://news.bbc.co.uk/2/hi/europe/2028938.stm>; *Gay and Lesbian Adoption: Edwin Poots' Challenge Dismissed*, BBC NEWS, <http://www.bbc.co.uk/news/uk-northern-ireland-23077516> (last updated June 27, 2013, 9:58 AM) (discussing Britain, including Northern Ireland, England, Scotland, and Wales).

<sup>352</sup> *South African Gays Can Adopt Children*, BBC NEWS (Sept. 10, 2002), <http://news.bbc.co.uk/2/hi/africa/2248912.stm>.

<sup>353</sup> Isaac Davison, *Same-Sex Marriage Law Passed*, NEW ZEALAND HERALD (Apr. 17, 2013, 11:00 PM), [http://www.nzherald.co.nz/news/article.cfm?c\\_id=1&objectid=10878200](http://www.nzherald.co.nz/news/article.cfm?c_id=1&objectid=10878200).

<sup>354</sup> See *infra* Table 6.

Table 6: U.S. States That Allow, Probably Allow, Prohibit, Probably Prohibit, and Are Uncertain About Allowing/Prohibiting Adoption by Same-Sex Partners, Couples, and Individuals (November 2013)<sup>355</sup>

<b>U.S. States That Allow Otherwise Qualified LGBT Singles to Adopt (49 + DC)</b>	AL, AK, AZ, AR, CA, CO, CT, DE, DC, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY
<b>U.S. States That Probably Allow Otherwise Qualified LGBT Singles to Adopt (1)</b>	FL
<b>U.S. States That Allow Joint Adoption by Same-Sex Partners and Couples (17 + DC)</b>	CA, CO, DE, DC, HI, IL, IN, IA, ME, MD, MA, NV, NJ, NY, OR, RI, VT, WA
<b>U.S. States That Probably Allow Joint Adoption by Same-Sex Partners and Couples (3)</b>	CT, NH, TX
<b>U.S. States That Are Uncertain About Allowing/Prohibiting Joint Adoption by Same-Sex Partners and Couples (9)</b>	ID, MN, MO, NE, NM, PA, SD, TN, VA
<b>U.S. States That Prohibit Joint Adoption by Same-Sex Partners and Couples (4)</b>	MS, NC, OH, UT
<b>U.S. States That Probably Prohibit Joint Adoption by Same-Sex Partners and Couples (17)</b>	AL, AK, AZ, AR, FL, GA, KS, KY, LA, MI, MT, ND, OK, SC, WV, WI, WY
<b>U.S. States That Allow Second-Parent Adoption by Same-Sex Partners and Couples (14 + DC)</b>	CA, CO, DE, DC, HI, IL, IN, IA, MA, NV, NY, OR, PA, RI, VT
<b>U.S. States That Probably Allow Second-Parent Adoption by Same-Sex Partners and Couples (7)</b>	CT, IA, ME, MD, NH, NJ, WA
<b>U.S. States That Are Uncertain About Allowing/Prohibiting Second-Parent Adoption by Same-Sex Partners and Couples (5)</b>	ID, LA, MN, MO, NM

<sup>355</sup> This table has been compiled from an analysis of the materials in Section IV.A above. *See supra* Part IV.A.

<b>U.S. States That Prohibit Second-Parent Adoption by Same-Sex Partners and Couples (6)</b>	KY, NE, NC, OH, UT, WI
<b>U.S. States That Probably Prohibit Second-Parent Adoption by Same-Sex Partners and Couples (19)</b>	AL, AK, AZ, AR, FL, GA, KS, MI, MS, MT, ND, OK, SC, SD, TN, TX, VA, WV, WY

Thus, even today, adoption by same-sex couples and partners is extremely controversial across the country and around the globe. Even now, only a very small minority of nations—just a handful of countries—allow same-sex partners or couples to adopt children.<sup>356</sup> However, parenting by gay and lesbian adults seems to be on the rise, and adoption by LGBT persons is small but significant. One report by the Urban Institute and the Williams Institute found that in the United States, more than one-third of lesbian women have given birth, about one-sixth of gay men have fathered or adopted a child, more than half of gay men and over forty percent of lesbian women are interested in being parents, and an estimated 65,500 adopted children are living with lesbian or gay parents in the United States.<sup>357</sup>

*B. Why Legalization of Adoptions by Same-Sex Partners of Children Unrelated to Either Partner May Reduce the Number of Adoptions*

One reason homosexual adoption remains a controversial issue of public policy may be because it deviates from the global ideal of children being raised by a mother and a father.<sup>358</sup> Some concerns that have been expressed include children being deprived of a male or female parenting influence due to lack of a father or mother, homosexual adoptions reflecting an adult-centric perspective (as opposed to the best interests of the child), and the premature hyper-sexualization of children.<sup>359</sup> Furthermore, given most religious traditions' moral objections to homosexuality, there remains substantial concerns about the moral and

<sup>356</sup> *Supra* Table 5.

<sup>357</sup> See GARY GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES, Executive Summary (2007), available at [http://www.urban.org/UploadedPDF/411437\\_Adoption\\_Foster\\_Care.pdf](http://www.urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf).

<sup>358</sup> See Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 178, 187 (2005).

<sup>359</sup> *Id.*; see also DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1 (1995) (arguing that separation of children from their fathers is “the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women”); Wardle, *HCIA Implementing Law*, *supra* note 51, at 131; Wardle, *Inner Lives*, *supra* note 343, at 515–16; Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852–57 (1997).

religious implications and effects on children raised in homosexual households.<sup>360</sup> Concerns about exploitation of children by sexual predators are also relevant, as periodic, prominent scandals involving sexually-exploited adopted children demonstrate.<sup>361</sup> Moreover, concerns about the impact upon the integrity of the adoption system and of the willingness of parents to relinquish children they cannot care for must be considered.<sup>362</sup>

While legally authorizing same-sex partners to adopt probably will increase the total number of such adoptions, whether it is a good environment for the children being adopted remains controversial.<sup>363</sup> Furthermore, it may result in a net loss of adoptions due to reduction in placement of foreign children for adoption into a jurisdiction that permits same-sex partners to adopt, and as a result of domestic parents refusing to place their children for adoption out of concern that their children will be placed for adoption with homosexual partners or adults whose sexual values deeply offend the natural parents.<sup>364</sup> Thus, legalizing adoption by same-sex partners may have the effect of reducing (rather than increasing) the overall number of adoptions in particular jurisdictions.

Recent research has raised concerns about the “outcomes” for children raised by LGBT parents. For instance, one review of massive data that initially had been interpreted as supportive found that “[c]ompared with traditional married households, . . . children being raised by same-sex couples are 35% less likely to make normal progress through school; this difference is statistically significant at the 1% level.”<sup>365</sup> Sociology Professor Mark Regnerus’s study found that children of mothers who have had same-sex relationships were significantly

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<sup>360</sup> See, e.g., Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2495–502 (1997); Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 463 (2007) (“Most mainstream religions in the United States disapprove of homosexuality, and the Catholic Church, which is the country’s largest single religious institution, has taken a particularly strong stance against homosexual conduct.”).

<sup>361</sup> For an in-depth discussion of this topic, see this author’s previous work, Wardle, *Inner Lives*, *supra* note 343, at 521–22.

<sup>362</sup> See Wardle, *Comparative Perspectives*, *supra* note 317, at 74–76; Wardle, *Inner Lives*, *supra* note 343, at 529.

<sup>363</sup> See Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 766 (2012), available at <http://www.sciencedirect.com/science/article/pii/S0049089X12000610> (reporting study outcomes for children in different family structures).

<sup>364</sup> Wardle, *Comparative Perspectives*, *supra* note 317, at 75.

<sup>365</sup> Douglas W. Allen et al., *Nontraditional Families and Childhood Progress Through School: A Comment on Rosenfeld*, 50 DEMOGRAPHY 955, 955, 960 (2013).

different (less advantaged) as young adults on twenty-five out of forty (or sixty-three percent) outcome measures compared with those who spent their entire childhood with both of their married, biological parents.<sup>366</sup> Likewise, Professor Loren Marks identified substantial methodological errors in the fifty-nine studies relied upon in the American Psychological Association's brief on lesbian and gay parenting, impairing the brief's validity.<sup>367</sup> In light of this data, it could be argued that the transnational adoption of children (especially children unrelated to either partner) by LGBT individuals, partners, and couples raises many serious policy issues.

Likewise, data collected by adoption agencies in America about adoption facilitation in the various states (and the District of Columbia) and compiled by the National Council for Adoption, a national clearinghouse allied with many national adoption agencies,<sup>368</sup> show that the most adoption-friendly states include a disproportionate number of states that forbid adoption by same-sex couples and partners, while states that allow adoption by same-sex couples appear to be disproportionately less adoption-friendly.<sup>369</sup> So the claim that allowing same-sex couples to adopt will expand the pool of eligible adopters and increase the number of adoptions ignores countervailing social influences that will likely result in reducing the overall number of adoptions.<sup>370</sup> Adoption thrives in communities that value dual-gender marriage, marital families, marital family child-rearing, and that prioritize marital family living.<sup>371</sup> Those nations and states are generally hesitant about allowing same-sex partners and couples to adopt.<sup>372</sup>

The purpose for noting those concerns and arguments here is not to justify or refute them (indeed, some or all of them ultimately may be proven false), but to note that they exist in many nations in the world at this time. Thus, nations that allow same-sex partners and couples (and in some cases LGBT individuals) to adopt may be seen as defying the cultural norms in other countries from which potential adoptive children

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<sup>366</sup> Regnerus, *supra* note 363 at 764.

<sup>367</sup> Loren Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 748 (2012), available at <http://www.sciencedirect.com/science/article/pii/S0049089X12000580>.

<sup>368</sup> See *History*, NAT'L COUNCIL FOR ADOPTION, <http://www.adoptioncouncil.org/who-we-are/history.html> (last visited Oct. 30, 2013); see also Wardle, *Comparative Perspectives*, *supra* note 317, at 75–76.

<sup>369</sup> Wardle, *Comparative Perspectives*, *supra* note 317, at 76.

<sup>370</sup> *Id.* at 74–75.

<sup>371</sup> *Id.* at 76.

<sup>372</sup> *Id.*



may come. Consequently, this conflict may reduce the likelihood of those nations with conservative cultural and family values allowing their children to be placed for adoption in other nations that allow same-sex adoption.

VI. CONCERNS ABOUT ABUSE, DECEPTION, AND FRAUD IN SOME INTERNATIONAL ADOPTIONS IN VIOLATION OF SENDING-NATION POLICIES HAVE CONTRIBUTED TO THE DECREASE IN INTERNATIONAL ADOPTIONS

Apart from the debate surrounding the policy of allowing children to be placed for adoption with gays and lesbians, disreputable international adoption practices by some gays and lesbians and their supporters in some adoption agencies and service providers have added to the controversy surrounding international adoptions by gays and lesbians. “Because society discourages gay adoptions, homosexuals often conceal their sexual orientation when attempting to adopt.”<sup>373</sup>

For example, “Chinese regulations explicitly prohibit adoption by homosexual persons.”<sup>374</sup> Yet, as Professors Smolin and Luo write:

A significant number of gay or homosexual individuals reportedly have been adopting Chinese orphans under the form of single parent adoption. It appears that some social workers within the United States are willing to create “home studies” of homosexual individuals and couples that portray the home simply as that of a “single” person, thus permitting gay individuals and couples largely to escape the force of laws or customs in sending nations prohibiting or disfavoring gay adoption. Social workers within the United States may perceive these actions as supported by principles related to equal rights for gay persons, the best interests of children, or simply privacy. The result is that the United States sends over documents key to the intercountry adoption process that could be viewed from a Chinese perspective as fraudulent or at least as uninformative. Under these circumstances, one practical means for China to enforce its limit on gay adoption is to limit adoption by single persons. Thus, it is possible that the Chinese policy on single parent adoption is, at least in part, a means of enforcing its prohibition of gay adoption.<sup>375</sup>

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<sup>373</sup> David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 31 n.2 (1993); see also Ewall, *supra* note 95, at 355 n.46 (noting that some homosexuals conceal homosexuality when adopting); Wendell Ricketts & Roberta Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, in GAY AND LESBIAN PARENTS 89, 92–93 (Frederick W. Bozett ed., 1987) (noting that gay and lesbian potential adoptive and foster parents often decline to disclose their homosexuality).

<sup>374</sup> Luo & Smolin, *supra* note 9, at 607.

<sup>375</sup> *Id.* at 608. China’s policy on single parent, intercountry adoptions provides “that only eight percent . . . of placements may be to such persons.” *Id.* at 607.

This kind of deception and fraud has been going on for at least a decade.<sup>376</sup> There are numerous reports of this dishonesty in the adoption process.<sup>377</sup>

In 2011, a respectable professor writing in a reputable law review noted the need for LGBT couples to engage in “some degree of forum shopping” and careful “selection of the right adoption agency” to adopt children from abroad,<sup>378</sup> and advised:

[I]f the laws of the sending country permit an individual to adopt but do not permit an unmarried couple to adopt, the report would be best received if it described the prospective adoptive parent as a single person with a roommate. Again, this is not meant to be fraudulent or deceitful, but is merely an attempt to eliminate any bias that may exist on the part of the reviewing parties in relation to sexual orientation.<sup>379</sup>

These “practices represent precisely the kind of manipulation, misuse, and exploitation of intercountry adoption that the Hague

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<sup>376</sup> See Singer, *supra* note 333, at 289 (showing that ten years ago China’s adoption policies were flexible); Schloss, *supra* note 333.

<sup>377</sup> See, e.g., William L. Pierce, *In Defense of the Argument That Marriage Should Be a Rebuttable Presumption in Government Adoption Policy*, 5 J.L. & FAM. STUD. 239, 253 (2003) (“It seems, from the experience that China had with single and mostly female adoptive applicants, that there is no practical way to limit single parent adoptions to heterosexuals. A variety of innovative techniques were used by single persons who were GLBT to appear to be heterosexual for purposes of adopting. And even the imposition of the requirement that single persons certify that they are heterosexual is essentially unenforceable if people choose to lie. Although . . . such dishonesty [might be cautioned against], . . . there are no cases the author is aware of when finalized intercountry adoptions have been revoked because a GLBT individual was dishonest.”); Jordan Downing, et al., *Choices, Challenges, and Tensions: Perspectives of Lesbian Prospective Adoptive Parents*, AM. FERTILITY ASS’N, <http://www.theafa.org/article/choices-challenges-and-tensions-perspectives-of-lesbian-prospective-adoptive-parents/> (last visited Oct. 30, 2013) (stating that due to laws barring both partners from adopting jointly, one same-sex partner often “remain[s] hidden through this important life transition”); *Gay and Lesbian Adopters*, FAM. EDUC., <http://life.familyeducation.com/adoption/nontraditional-families/45789.html> (last visited Oct. 30, 2013) (noting many gay and lesbian potential adopters “still don’t reveal their sexual orientation to others, often because they fear that they’ll be turned down by agencies (despite what they say) or because they want to retain their privacy.”); *In 2010, International Adoption Closed to Same-Sex Couples and GLBT Individuals*, GLBT L. BLOG (Jan. 11, 2010), available at <http://glbtlaw.wordpress.com/2010/01/11/in-2010-international-adoption-closed-to-same-sex-couples-and-glbt-individuals/> (“Gay individuals have successfully adopted from foreign countries for years by concealing their sexual orientation, and same-sex couples have been forced to renounce their partnered status and adopt as single individuals.” In recent years, however, new transparency ethics have reduced the opportunity to use such practices. The result is that the “international adoption option is essentially now closed to same-sex couples and GLBT individuals.”).

<sup>378</sup> Mertus, *supra* note 318, at 281, 301.

<sup>379</sup> *Id.* at 303–04.

Convention was intended to eliminate.”<sup>380</sup> The perpetuation of such practices stains the integrity of intercountry adoption and is another likely reason why such transnational adoptions have been falling.

VII. THE POTENTIAL OF “SIDEWAYS” STATUS (ADOPTIVE “UNCLE” OR “AUNT”) TO RECONCILE THE COMPETING INTERESTS

One conceptually possible solution to the conflict in values would be to legalize what can be called “sideways” adoption. That is: to allow a legal process that creates in law the legal status of “uncle-nephew/niece” or “aunt-niece/nephew” between the adult partner of the adopting parent and the child. The adult partner (or the adoptive co-parent) would have legal responsibilities similar to those of an adoptive parent except that they would be secondary to those of the legal adoptive parent. That means the biological or legal adoptive parent would have first priority in parenting decisions and first liability for parenting responsibility. The adoptive co-parent (perhaps called adoptive aunt or uncle) would have secondary priority in parenting decisions and in parenting responsibilities including financial responsibilities, but would move up to first priority in case the legal parent were unavailable, incapacitated, or dead.

This would give the second adult, the partner of the adopting parent, a legal status and legally-protected parental relationship with the child. It would ensure full access to the resources (including insurance) of the adoptive co-parent if those of the legal parent were inadequate. It would ensure full legal responsibility of a second adult co-parent in case the legal parent were unable to fulfill those responsibilities. It would avoid the kinds of litigation that arise between co-parents upon breaking up as the parental priority would already be established in law. This might be less objectionable to nations, agencies, and parents with strong moral, religious, sociological, or cultural objections to sending children to be raised in homes of same-sex couples, just as allowing adoption by qualified LGBT individuals who live alone is more widely accepted than allowing those persons to adopt together if they are living in a same-sex partnership or marriage.<sup>381</sup> The fact that the adopting parent has a relative, like a sibling, who has same-sex orientation might not be of the same concern, for many people know a relative, close family friend, or an “uncle” or “aunt” who also has same-sex orientation. It could lead to more openness and transparency.

Many nations do not permit same-sex marriage but have created an alternative legal relationship (“civil unions” or “domestic partnerships,”

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<sup>380</sup> Wardle, *HCIA Implementing Law*, *supra* note 51, at 132.

<sup>381</sup> See Wardle, *Comparative Perspectives*, *supra* note 317, app. II.

for example) with similar rights and legal effects as marriage for same-sex partners.<sup>382</sup> Those nations consider dual-gendered marriage to be a unique and uniquely valuable social institution deserving unique legal status, but they also allow for same-sex partners to have equivalent or similar legal status and protections.<sup>383</sup> Similarly, recognizing the unique relationship and value of dual-gender parenting while conferring similar or equivalent legal status, rights, and responsibilities upon other couples, including same-sex couples, might resonate in some nations that object to LGBT parental adoption.

#### VIII. TIME TO AMEND AND IMPROVE THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION AND TO MODERATE STATE ADOPTION LAW

Like the Universal Declaration of Human Rights,<sup>384</sup> the Convention on the Rights of the Child (“CRC”) emphasizes that “the family [is] the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”<sup>385</sup> The CRC provides that children deprived of parents are entitled to special protection including “adoption,”<sup>386</sup> specifically including “inter-country adoption” in appropriate cases.<sup>387</sup> The Hague Convention was “intended to facilitate and promote adoptions for children in need of families.”<sup>388</sup> However, “in practice, this does not always occur.”<sup>389</sup> Recent data shows clearly that the well-intentioned Hague Convention is actually depressing intercountry adoption.<sup>390</sup> The current state of the Hague Convention allows our society to continue living at the expense of its children and that immediate reform is required. Dr. Selman’s admonition provides a sound basis to begin the reform of the Hague Convention:

It is critical for governments . . . to recognize and uphold each child’s right to a family. . . . For children who have no home, no family willing or able to care for them, and no realistic in-country permanent care option, intercountry adoption may represent their only chance for

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<sup>382</sup> See Lynn D. Wardle, *Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law*, 27 *BYU J. PUB. L.* 489, 494–95, 498, 525 (2013).

<sup>383</sup> See *id.* at 498–99.

<sup>384</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 16(3) (Dec. 10, 1948).

<sup>385</sup> Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25, pmb. (Nov. 20, 1989).

<sup>386</sup> *Id.* art. 20(3).

<sup>387</sup> *Id.* art. 21(b).

<sup>388</sup> Selman, *Global Trends*, *supra* note 20, at 16.

<sup>389</sup> *Id.*

<sup>390</sup> See *supra* Part III.

a safe, loving, permanent family of their own. Tragically, the decline in intercountry adoption means that too many of these children will never realize their intrinsic right to a family . . .<sup>391</sup>

Some realistic recognition and respect for the traditional-family cultural values of the sending nations is a practical necessity to address the problem of decreasing intercountry adoptions. It also is necessary to increase regulation in order to ensure transparency and to prevent concealment, deception, and misrepresentation regarding adoption of children by same-sex couples and partners in international adoption. The integrity of the international adoption process is at stake, and the whole system of intercountry adoption suffers when abuses occur. Failure to disclose same-sex partner or same-sex couple status facilitates false, fraudulent, and illegal adoption activity.

The first question is not whether adoption by same-sex couples should or should not be allowed as a matter of adoption policy, but whether behavior that conceals, deceives, and misrepresents the facts in order to evade or circumvent national, agency, or parental adoption policies will be permitted. The current, fraudulent situation resembles those that gave rise to the Hague Convention in the first place. It is no more excusable or tolerable than deceptive baby-buying or the well-intentioned mass baby-saving deceptions in Romania after the fall of Ceaușescu.<sup>392</sup> It makes a mockery of the Hague Convention to turn a blind eye to this kind of deception and is hypocrisy to excuse such a double standard. Reasonable persons certainly can disagree about what policy regarding adoption by same-sex couples and partners is in the best interests of children. But as a matter of international comity and systems, there must be respect for differing policies that are properly adopted.

Similarly, one consequence of legalizing unrestricted adoption by gay and lesbian adults and couples seems to be a reduction in the number of children being sent by traditional sending nations to western, morally “liberal,” receiving nations. Ironically, the legalization of adoption by gay and lesbian couples, which has been promoted in part because it will lead to more needy children being adopted, seems to have had the opposite effect. That seems to cause many sending countries, which usually have very traditional notions about sexual morality and childrearing, to be more cautious about sending their orphaned and needy children, who cannot be placed for adoption within the country, into homes in western nations where they may end up being raised by

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<sup>391</sup> Selman, *Global Trends*, *supra* note 20, at 16.

<sup>392</sup> Gail Kligman, Commentary, *Abortion and International Adoption in Post-Ceausescu Romania*, 18 FEMINIST STUD. 405, 411, 413, 416 (1992).

gay and lesbian adults. Thus, the legalization by more and more states of adoption by LGBT partners and couples may be one reason for the dramatic, continuing reduction in intercountry adoptions into the United States in the past decade. States in which the facilitation of adoption of poor, needy, and orphaned or abandoned children from third-world nations is deemed to be a public-policy priority might consider rethinking and redesigning their adoption laws to eliminate the concern that seems to be causing a reduction of intercountry adoptions. That might be accomplished by imposing tighter restrictions on who is eligible to adopt children (or, at least, also controversially, on who is eligible to adopt children from other nations). Alternatively, it might be accomplished by creating “sideways adoption” legal procedures that effect the creation of uncle/aunt-niece/nephew relationships with clear, legal, full-but-secondary-parental status, standing, and authority. Giving a second adult some legal, quasi-parental responsibilities that have succession value but that are not identical to parental authority might provide an openness, candor, and structure that could reduce adoption integrity concerns and reconcile some of the competing interests.

This Article has suggested reforms of the Hague Convention, and/or reform of United States federal regulations for the implementation of the Hague Convention, as well as reforms of American states’ substantive and procedural domestic adoption laws to prevent placement of adoptive children into environments that are offensive to and deemed dangerous by many third-world cultures and societies. Such reforms, or even part of them, could revive dwindling intercountry adoption in the years ahead. That would benefit tens of thousands of parentless children who are living in deplorable conditions and might also enrich the lives and hearts of tens of thousands of American couples who are anxious and willing to adopt into their homes such needy children. Certainly, that is a goal worth pursuing diligently.