ARTICLES

RECOGNIZING GAY AND LESBIAN FAMILIES: MARRIAGE AND PARENTAL RIGHTS

KATHRYN E. KOVACS*

I. INTRODUCTION

Two friends of mine split up after spending fifteen years together. Their three year old daughter stayed with her biological mother, who denied her former partner access to the child. The former partner could do nothing to see the child, or to gain custody. This Article explores this tragedy, whereby a child is separated from a parent by a legal system that refuses to recognize gay and lesbian families.

So long as gay/lesbian families remain together, there may be no need for state intervention. However, when a legal parent dies or a relationship ends, the nonlegal, or second parent may lose any right to continue a relationship with the child.[1] Courts have begun to award

* B.A. Yale University; J.D. Georgetown University Law Center; Law Clerk to the Honorable Robert C. Murphy, Chief Judge, Court of Appeals of Maryland. Special thanks go to Jana B. Singer, Associate Professor, University of Maryland School of Law and to Tracy A. Timmons.

1. SEXUAL ORIENTATION AND THE LAW 145 (Harv. L. Rev. ed. 1990).

custody to stepparents upon divorce from or death of the legal parent; however, gay/lesbian second parents have been deprived of such custody. If the second parent was never married to the legal parent, she is usually denied even the right to see the child, if she gets as far as court.[2]

Much of the writing on gay/lesbian second parents' rights focuses on the relationship between the second parent and the child and recommends expanding existing equitable doctrines to encompass gay and lesbian families.[3] While this approach has been successful for heterosexual second parents, it has not been as successful for gay and lesbian second parents. Although these doctrines do not require consideration of the legality of the parents' union, courts tend to favor legally married families, thus disfavoring gay/lesbian families. This seemingly homophobic preference will likely continue. Therefore, in this Article, I argue that a more effective approach to expanding the rights of gay/lesbian second parents would be to seek legalization of gay marriage.[4] The "defect" in gay/lesbian family cases is not in the relationship between the parent and the child, but in the relationship between the parents.

> The legal system provides boundaries for the rest of society which it does not provide lesbians and gay men—boundaries to limit unconscionable acts, and boundaries to define and support families . . . . [S]traight parents can predict what will happen in future situations. If they die or break-up, they have a legally recognized procedure for determining custody. We do not have the ability to legitimate our families in these ways . . . . Not only are we denied the legal protections and support our families

2. For the purposes of this Article, the legal parent is either a biological parent, an adoptive parent, or an otherwise legally recognized parent. The "second" parent is nonlegal, i.e., not legally recognized, but functions as a parent and is married to, or has a marital-type relationship with, the legal parent.

3. *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

4. Statutes may also be used to gain parental rights in these cases. I choose to concentrate on the equitable and constitutional possibilities because state statutes vary too much for one article and statutes change and are therefore vulnerable to modification by homophobic interests.

> need, we also can't rely on the predictability the law provides.[5]

My purpose in writing is personal: when I have children, I want my partner to have the same rights and responsibilities for our children that any heterosexual parent would have. I want her to be able to make medical decisions for my children and write notes to the teacher when my children are sick. If I should die, I want her to care for my children under the protection of the law. If we should separate, I want the law to protect her from my spite. Mostly, though, I write for my children, so that they may grow up in a family that is legally protected. Hopefully, legal recognition of gay/lesbian marriages will facilitate societal acceptance of families like mine as well.

II. DEFINING PARENTHOOD: A REVIEW OF SUGGESTED SOLUTIONS

A. Current definitions of "parent"

Despite the fact that as many as eight to ten million children have a gay or lesbian parent,[6] current definitions of parenthood do not encompass their families. Parenthood is exclusive;[7] the law requires a child to have only one parent of each sex, and parents have all of the rights and obligations of parenthood, while nonparents have none.[8] Related to the exclusivity of parenthood is the notion of family autonomy, which insulates the family against intervention by outsiders and the state.[9] Katharine Bartlett summarizes parental rights well:

> Parental rights are comprehensive, and they operate against the state, against third parties, and against the child. Parents have the right to custody of their child; to discipline the child; and to make decisions about education, medical treatment, and religious upbringing.

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5. *National Center for Lesbian Rights, Our Day in Court—Against Each Other: Intra-Community Disputes Threaten All Of Our Rights*, *in* LESBIANS, GAY MEN, AND THE LAW 561-62 (William B. Rubenstein ed. 1993).

6. Alison D. v. Virginia M., 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting) (citing Polikoff, *supra* note 3, at 461 n.2).

7. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 879 (1984).

8. Polikoff, *supra* note 3, at 468, 471.

9. Bartlett, *supra* note 7, at 879-80; Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J. LAW & POL. 5, 15-16 (1991).

> Parents assign the child a name. They have a right to the child's earnings and services. They decide where the child shall live. Parents have a right to information gathered by others about the child and may exclude others from that information. They may speak for the child and may assert or waive the child's rights. Parents have the right to determine who may visit the child and to place their child in another's care.[10]

Parents have corresponding duties which limit those rights, but parental status is not conditioned on the fulfillment of all of those duties.[11]

Currently, the biological mother and her husband at the time of birth are considered parents due to the presumption of legitimacy.[12] In addition, the biological father is a parent, even if not married to the mother, if he has some relationship with the child,[13] unless the mother is married to another man.[14]

B. Equitable estoppel

Many cases of heterosexual couples involve nonbiological parents using equitable doctrines in seeking to continue their relationship with the child, or biological parents using those doctrines in seeking support after the marriage has ended. Equitable estoppel precludes a person, because of his or her conduct, from asserting rights against someone who has relied on that conduct and who would be injured by repudiation of that conduct.[15] Though primarily used by courts to require nonlegal parents to pay child support,[16] the doctrine of equitable estoppel "would make it possible for non[]legal parents to prevent the legal parent from claiming in court that only the legal relationship between him or her and the child should be recognized."[17]

In *In re Paternity of D.L.H.*, a biological mother brought an action to determine the paternity of a child.[18] Her husband treated the

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10. Bartlett, *supra* note 7, at 884-85.
11. *Id.* at 885.
12. Michael H. v. Gerald D., 491 U.S. 110, 124 (1988); Polikoff, *supra* note 3, at 469-70, 477-82.
13. Lehr v. Robertson, 463 U.S. 248, 262 (1983).
14. *Michael H.*, 491 U.S. at 124.
15. BLACK'S LAW DICTIONARY 538-39 (6th ed. 1990).
16. Cox, *supra* note 9, at 20.
17. *Id.* at 21.
18. 419 N.W.2d 283, 284 (Wis. Ct. App. 1987).

child as his own during the marriage, though he knew he was not the biological father. When the couple divorced, the mother got temporary custody and received child support from the husband. Blood tests determined that the husband was not the father, and the trial court dismissed him from the action. His appeal claimed that the mother was equitably estopped from denying that he was the child's father.[19] The Court of Appeals of Wisconsin held that equitable estoppel was available as a defense to a paternity proceeding if the husband could show: "(1) action or nonaction which induces (2) reliance by another (3) to his detriment."[20] The case was remanded in order to determine whether those elements were met. To prevail on equitable estoppel grounds, the husband must have asserted specifically that the mother's actions, including accepting child support and allowing him to act as a father, induced his reliance in that he did not file for adoption and that severing the parent-child relationship would harm him.[21]

Equitable estoppel was also used in *Klipstein v. Zalewski,* in which an ex-stepfather sued for visitation rights.[22] The stepfather had lived with the child for only one year and had never assumed an obligation to support the child. There were also two other men in this child's life, the biological father and the mother's new boyfriend.[23]

The court ruled that "the obligation to support and the right to visitation are correlative,"[24] so that where "there are facts justifying the imposition of an obligation to support a stepchild after divorce based on a theory of equitable estoppel . . . such facts would similarly equitably estop the natural parents from denying the stepparent visitation rights with their child."[25] In this case, visitation was denied because the stepfather had not proven that the child relied on him financially or emotionally or that he or the child would suffer any detriment by the denial of visitation.[26] Thus, while the court was willing to extend the doctrine of equitable estoppel to stepparent visitation cases, it could not "conceive of a child having three, four or even more stepfathers and there

19. *In re* Paternity of D.L.H., 419 N.W.2d at 284.
20. *Id.* at 287.
21. *Id.*
22. 553 A.2d 1384, 1386 (N.J. Super. Ct. Ch. Div. 1988).
23. *Id.*
24. *Id.* at 1387.
25. *Id.* at 1388.
26. *Id.*

are not enough days in a week for the child to have visitation with all of them."[27]

While the courts have been willing to extend the doctrine of equitable estoppel for heterosexual families,[28] they have not been ready to do so for gay/lesbian families. For example, in *Nancy S. v. Michele G.*, Nancy and Michele lived together for nearly 16 years and had a private marriage ceremony.[29] Nancy was listed on the birth certificates of their daughter and son as the father, and both children were given her family name. The children called her "Mom." For three years following the couple's separation, Nancy and Michele arranged for the daughter to live with Nancy and the son with Michele for five days of the week.[30] At the time of this decision, the daughter was eight and the son was four.

Michele initiated the legal action under the Uniform Parentage Act when Nancy refused to alter their custody arrangement so that each would have custody fifty percent of the time.[31] The appellate court upheld the trial court's determination that Nancy was not a parent under the Act and refused to apply equitable estoppel to expand the definition of parent.[32] The Court distinguished *D.L.H.*,[33] in which the equitable estoppel claim was successful, on the basis of the operation in that case of "[o]ne of the strongest presumptions in law . . . that a child born to a married woman is the legitimate child of her husband."[34] The husband's claim in *D.L.H.* was based not on the presumption of legitimacy, however, but on equitable estoppel.[35] The only differences between these two cases appear to be the sexual orientation of the parties and the legality of their marriages.

In *Nancy S.*, the court classified cases like *Klipstein v. Zalewski*[36] as equitable parenthood cases and refused to apply that doctrine as well.[37]

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27. Klipstein v. Zalewski, 553 A.2d at 1386.

28. *See also* M.H.B. v. H.T.B., 498 A.2d 775 (N.J. 1985); *In re* Adoption of Young, 364 A.2d 1307, 1313-14 (Pa. 1976).

29. 279 Cal. Rptr. 212 (Cal. App. Dep't Super. Ct. 1991).

30. *Id.*

31. *Id.*

32. *Id.* at 215, 219.

33. *In re* Paternity of D.L.H., 419 N.W.2d 283 (Wis. Ct. App. 1987).

34. Nancy S. v. Michele G., 279 Cal. Rptr. at 218 (quoting Brenda J. Runner, Note, *Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115, 116 (1989-90)).

35. 419 N.W.2d at 284.

36. 553 A.2d 1384 (N.J. Super. Ct. Ch. Div. 1988).

37. Nancy S. v. Michele G., 279 Cal. Rptr. at 218-19.

The court drew the line at marriage, fearful that opening the definition of parent would "expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family."[38] Given the stringent requirements of estoppel, however, the court's concern seems misplaced and could be understood as a fear of gay/lesbian families.

In *In re Interest of Z.J.H.*, Sporleder and Hermes lived together for eight years, during which time they tried unsuccessfully to artificially inseminate Sporleder.[39] A child, Z.J.H., then two months old, was placed in their home by an adoption agency pending adoption by Hermes. Sporleder was the primary caretaker. Seven months later, the couple separated and agreed that custody would be determined by mediation and that the noncustodial parent would have liberal visitation rights. Hermes officially adopted Z.J.H. the next month and denied Sporleder access to the child.[40]

The Wisconsin Supreme Court rejected Sporleder's equitable estoppel claim based on her inability to gain custody or visitation under state statutes: "The legal effects and consequences of statutory limitations cannot be avoided by estoppel . . . . Sporleder cannot use the theory of equitable estoppel to create rights to custody or visitation to Z.J.H."[41] The Court distinguished *D.L.H.*[42] saying that "the husband used the equitable estoppel defense as a shield, to protect his right to a relationship with the child."[43] Sporleder was attempting to use the doctrine as a sword to create rights.[44]

Underlying the court's decision is a recognition that the situation would have been different if Sporleder and Hermes had been married, because Sporleder would have standing under the statutes to seek custody,[45] because there would have been an "underlying action affecting the marriage. . ."[46] or because equitable estoppel would have been

38. *Id.* at 219.
39. 471 N.W.2d 202, 204 (Wis. 1991).
40. *Id.*
41. *Id.* at 212 (citations omitted).
42. *In re* Paternity of D.L.H., 419 N.W.2d 283 (Wis. Ct. App. 1987).
43. *Z.J.H.*, 471 N.W.2d at 212.
44. *Id.* The court distinguished another case similar to *D.L.H.* on the basis of the ex-husband's prior status as a natural parent, i.e., before blood tests proved he was not child's biological father. The man's rights in those two cases resulted from the marriage of the parents. *Id.* at 212-13.
45. *Id.* at 205.
46. *Id.* at 211.

available to protect rights resulting from the marriage.[47] Again, the husband's claim in *D.L.H.* was based not on rights resulting from the marriage, but on the biological mother's actions and his reliance thereon. Here again, the court's decision may best be attributed to the sexual orientation of the litigants.

A handful of cases apply equitable estoppel to disputes involving gay/lesbian families. In *Karin T. v. Michael T.*, Karin and Michael were ostensibly married as man and woman. [48] The couple had two children by artificial insemination. When they separated, the county social services agency brought an action against Michael seeking support for the children.[49] Michael defended on the grounds that, as a female, she could not be the father of the children.[50] The court ruled that Michael was estopped from denying that she was a parent because she signed an agreement prior to the inseminations which stated that she waived any right to disclaim the children. Her signing of the agreement "brought forth these offspring as if done biologically."[51] The court assumed Karin would not have had the children without Michael.[52]

While this case seems like a step toward recognizing gay/lesbian families, its facts are unique and other courts have not followed suit.[53] The nonbiological parent in *Karin T.* was ostensibly married and had children on the pretense of being a man.[54] The court implied that by pretending to be a man, Michael accepted the responsibilities of her assumed identity. The court wrote that not requiring Michael to support the children "would allow [her] to completely abrogate her responsibilities for the support of the children involved and would allow

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47. *In re* Interest of Z.J.H., 471 N.W.2d 202, 212-13 (Wis. 1991). *But see*, *contra*, Custody of H.S.H.-K., 533 N.W.2d 419, 434 (Wis. 1995) (overruling *Z.J.H.* and holding that "public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation [apart from statute] on basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest").

48. 484 N.Y.S.2d 780, 781 (N.Y. Fam. Ct. 1985).

49. *Id.*

50. *Id.* at 781-82.

51. *Id.* at 784.

52. *Id.*

53. Karin T. v. Michael T., 484 N.Y.S.2d at 784. This case may also be limited in application because it was brought by the county for support, rather than by the nonbiological parent for custody or visitation rights. *Id.* at 781. See Polikoff, *supra* note 3, at 533-37 (discussing cases that have not followed suit).

54. 484 N.Y.S.2d at 781-82.

her to benefit from her own fraudulent acts which induced their birth no more so than if she were indeed the natural father of these children."[55]

Thus, courts have been willing to apply the doctrine of equitable estoppel both to enforce the responsibilities of and to recognize the rights of the second parent in heterosexual families. While those cases do not depend on the presumption of legitimacy arising from the marriage, courts have not been willing to apply equitable estoppel to similarly situated gay/lesbian families. This disparate treatment on the basis of sexual orientation may be a result of homophobia.

C. Equitable parenthood

The equitable parenthood doctrine holds:

> [A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.[56]

The doctrine of equitable parenthood differs from equitable estoppel in that the latter is "limited to providing specific relief in a specific action," while the former "establishes legal parenthood."[57] Polikoff sees value in the concept of equitable estoppel since it "focuses on the actions and intent of the legally recognized parent."[58] However, she disfavors equitable estoppel because it necessitates additional litigation. Equitable parenthood, on the other hand, decreases the need for further litigation.[59]

The Court of Appeals of Michigan relied on the equitable parenthood doctrine in *Atkinson v. Atkinson* to uphold a husband's

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55. *Id.*
56. Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987).
57. Polikoff, *supra* note 3, at 501.
58. *Id.*
59. *Id.*

parental rights, even though he was not the biological father.[60] At the time of divorce, the couple had been married for twelve years and the child was four.[61] The court in this divorce action thought it was a logical extension of cases holding nonbiological fathers responsible for support to allow them "the reciprocal rights of custody or visitation afforded to a parent."[62] "[W]e recognize that a person who is not the biological father of a child may be considered a 'parent' against his will, and consequently burdened with the responsibility of the support for the child. By the same token, in being treated as a parent, he may also receive the right of custody or visitation."[63] The court's holding was also supported by the doctrine of equitable adoption, whereby an implied contract to adopt is found, which gives the child rights of inheritance.[64]

In *D.L.H.*, the appellate court allowed the trial court to use the considerations of the equitable parenthood doctrine to determine whether the husband relied on the mother's representations or conduct to his detriment.[65] The court did not go so far as to rule that recognition as an equitable parent serves to "elevate the husband in a divorce proceeding from third-party status to a natural parent."[66]

In contrast to their treatment of heterosexual families, courts have generally been unwilling to use the equitable parenthood doctrine to recognize gay/lesbian second parents.[67] In rejecting equitable parenthood in *Nancy S.*, the court said that the doctrine is based on equitable adoption and "may require proof of an express or implied contract to adopt."[68] In *Atkinson*, however, equitable parenthood was upheld as the correlative to holding nonbiological fathers responsible for child support; equitable adoption was cited as additional support for, but not as a necessary component of, the holding.[69] Thus, the court's linkage in *Nancy S.* of equitable parenthood and equitable adoption was an error. The court was also concerned about "expanding the class of persons entitled to assert parental rights. . . ."[70] As noted in the context of the doctrine of equitable

60. Atkinson v. Atkinson, 408 N.W.2d 516, 530 (Mich. Ct. App. 1987).
61. *Id.* at 517.
62. *Id.* at 520.
63. *Id.*
64. *Id.*
65. *In re* Paternity of D.L.H., 419 N.W.2d 283, 287 (Wis. Ct. App. 1987).
66. *Id.*
67. Polikoff, *supra* note 3, at 529-31.
68. 279 Cal. Rptr. 212, 218 (Cal. App. Dep't Super. Ct. 1991).
69. 408 N.W.2d 516, 520 (Mich. Ct. App. 1987).
70. Nancy S. v. Michele G., 279 Cal. Rptr. 212, 218 (Cal. App. Dep't Super. Ct. 1991).

estoppel, in the context of equitable parenthood, this concern seems misplaced and homophobic.

While the equitable parenthood doctrine, as expressed by the *Atkinson* court, is expressly limited to a "husband" and "a child born or conceived during the marriage," it is unlike the presumption of legitimacy, in that the crucial issue is the development of a parent-child relationship.[71] The reasoning could therefore extend to gay/lesbian families where the second parent is held responsible for child support.[72] So far, however, courts have been unwilling to expand the doctrine beyond heterosexual marriage.

D. In loco parentis

Under the doctrine of *in loco parentis*, a person who intentionally provides support or takes custody without adopting may incur the rights and responsibilities of parenthood.[73] At common law, the parental relationship ends with the marriage, so stepparents may discontinue support payments at divorce.[74] Some courts have expanded the *in loco parentis* doctrine to grant parental rights and responsibilities to stepparents after the marriage to the biological parent has ended.[75]

In *Gribble v. Gribble*, a former stepfather sought visitation rights in a divorce action.[76] The child was born two months prior to the marriage, had no contact with his biological father, and lived with his stepfather for four years.[77] The court construed a statute allowing courts to consider whether "parents, grandparents, and other relatives" should be granted visitation to include stepfathers standing *in loco parentis*.[78] According to the court, "one who has [intentionally] assumed the status and obligations of a parent without formal adoption" is *in loco parentis*.[79] The rights and responsibilities of a person *in loco parentis* are the same as a parent, and only the stepparent or the child may terminate the relationship.[80] The court remanded for a hearing to determine whether

71. Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987).
72. *See* Cox, *supra* note 9, at 19-20.
73. Bartlett, *supra* note 7, at 913; Polikoff, *supra* note 3, at 502.
74. Bartlett, *supra* note 7, at 914.
75. *Id.* at 914-15; Cox, *supra* note 9, at 21.
76. 583 P.2d 64, 65 (Utah 1978).
77. *Id.*
78. *Id.* at 66.
79. *Id.*
80. *Id.* at 66-67.

the stepfather stood *in loco parentis* and, if so, whether visitation would be in the child's best interests and whether the stepfather should pay support.[81]

In *Carter v. Broderick*, the Supreme Court of Alaska held that "where a stepparent has assumed the status of *in loco parentis*, a stepchild is a 'child of the marriage'" within the meaning of the state statute granting courts jurisdiction over custody and visitation.[82] In another case, a stepfather was granted partial custody and visitation of his stepdaughter whom he had raised and supported for ten years before divorcing her biological mother.[83]

> It is our belief that a stepfather may not be denied the right to visit his stepchildren merely because of his lack of a blood relationship to them. Clearly, a stepfather and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority.[84]

In sharp contrast to the willingness of courts to use the doctrine of *in loco parentis* to recognize rights of stepparents,[85] the courts refuse to use the doctrine in gay/lesbian family cases. Despite a statute explicitly giving courts discretion to grant visitation rights to stepparents, the court in *Nancy S.* refused to recognize Michele as standing *in loco parentis*.[86] Similarly, in *Z.J.H.* the court denied Sporleder parental status under the doctrine of *in loco parentis* because the doctrine conflicts with the parental preference standard and the rights of legal parents.[87] The court was also concerned that allowing persons standing *in loco parentis* to

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81. *Id.* at 68.

82. 644 P.2d 850, 855 (Alaska 1982).

83. Seger v. Seger, 547 A.2d 424, 428 (Pa. Super. Ct. 1988) (quoting Spells v. Spells, 378 A.2d 879, 881-82 (Pa. Super. Ct. 1977)).

84. *Id.* at 428.

85. Spells v. Spells, 378 A.2d 879, 881 (Pa. Super. Ct. 1977); Bryan v. Bryan, 645 P.2d 1267, 1273 (Ariz. Ct. App. 1982); Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980); *In re* Marriage of Allen, 626 P.2d 16, 23 (Wash. Ct. App. 1981); *see also* Bartlett, *supra* note 7, at 913 n.162, 914-15 n.167-177, and 916 n.182 (citing cases).

86. 279 Cal. Rptr. 212, 217 (Cal. App. Dep't Super. Ct. 1991).

87. *In re* Interest of Z.J.H., 471 N.W.2d 202, 207 (Wis. 1991).

have parental rights "would open the doors to multiple parties claiming custody of children. . . ."[88]

As with the doctrines of equitable estoppel and equitable parenthood, *in loco parentis* need not rely on marriage to determine the status of the second parent. The bond between a gay/lesbian second parent and child may be just as deep and lasting as that between a stepparent and child. The courts' reliance on legal marriage and unwillingness to extend *in loco parentis* to gay/lesbian families may be a function of homophobia.

E. De facto parenthood

The court in *In re B.G.* granted standing to foster parents in a custody proceeding based on the *de facto* parenthood doctrine.[89] The children's father had taken them to California from Czechoslovakia without the mother's knowledge or consent.[90] Shortly after their arrival, he died, and in his will asked that the children stay with neighbors who had been caring for them while he worked.[91] The juvenile court placed the children with the neighbors as foster parents without notifying the mother.[92] After several years, when the mother finally appeared via counsel and the lower court ordered the children to be returned to her in Czechoslovakia, the foster parents disappeared with the children.[93] The court gave the foster parents custody and the mother appealed.[94]

In affirming the foster parents' standing, the court defined the term "*de facto* parent" as a "psychological" parent.[95] The court followed Goldstein, Freud, and Solnit, who define a psychological parent as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."[96] The court recognized that "a person who assumes the role of parent, raising the child in his own home, may in time acquire an interest in the

88. *Id.* at 208.
89. 523 P.2d 244, 246 (Cal. 1974).
90. *Id.*
91. *Id.* at n.3.
92. *Id.*
93. *Id.* at 248.
94. *Id.* at 249.
95. *Id.* at 253, n.18.
96. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 98 (1979).

'companionship, care, custody and management' of that child. The interest of the '*de facto* parent' is a substantial one . . . deserving of legal protection."[97] The court did not go so far as to recognize *de facto* parents as parents within the meaning of state statutes[98] and still required a finding that remaining with the biological parent would be detrimental to the child before awarding custody to a *de facto* parent.[99] The court did not anticipate there would be much difficulty in determining who qualifies as a *de facto* parent: "The simple fact that a person cares enough to seek and undertake to participate goes far to suggest that the court would profit by hearing his views as to the child's best interests. . . ."[100]

Numerous opinions have granted custody to stepparents over fit biological parents where extraordinary circumstances rebutted the presumption that being with a biological parent was in the child's best interests.[101] In contrast to *In re B.G.*, these decisions did not require a finding of detriment to the child before granting custody to the stepparent.[102]

The court in *Nancy S.* followed *In re B.G.* by requiring a finding of detriment and by refusing to determine whether Michele was a *de facto* parent.[103] Two years later, however, another California court of appeal granted standing to a lesbian second parent seeking visitation without even citing *Nancy S.*[104] The facts of *In re Hirenia C.* were unusual. The child was placed in Emanuelle's home as a foster child, and Emanuelle was her primary caretaker for her first five months of life. When the couple decided to adopt, they were advised only to use one name, and Emanuelle's partner, Angela, eventually adopted the child.[105] Emanuelle moved out, but continued to have frequent contact with the child until

97. *In re* B.G., 523 P.2d 244, 253 (Cal. 1974)(citations omitted).

98. *Id.* at 254 n.21.

99. *Id.* at 257.

100. *Id.* at 253, n.18.

101. *See*, *e.g.*, Cebrzynski v. Cebrzynski, 379 N.E.2d 713 (Ill. App. Ct. 1978); Commonwealth *ex rel*. Husack v. Husack, 417 A.2d 233 (Pa. Super. Ct. 1979); Gorman v. Gorman, 400 So. 2d 75 (Fla. Dist. Ct. App. 1981); Bailes v. Sours, 340 S.E.2d 824 (Va. 1986).

102. 523 P.2d 244 (Cal. 1974).

103. 279 Cal. Rptr. 212, 216-17 (Cal. App. Dep't Super. Ct. 1991).

104. *In re* Hirenia C., 22 Cal. Rptr. 2d 443 (Cal. App. Dep't Super. Ct. 1993).

105. *Id.* at 446.

Angela refused to allow such visitation.[106] Emanuelle sought only visitation, not custody, and the child's counsel supported her petition.[107]

Thus, courts have used the *de facto* parenthood doctrine to recognize the rights of heterosexual second parents. By limiting the doctrine to stepparents, however, the courts have unnecessarily focused on the marital relationship between the parents, a focus which may be explained by homophobia.

F. Academic alternatives

Katharine Bartlett advocates a theory of "nonexclusive parenthood" under which psychological or *de facto* parents would be granted party status in custody proceedings if they meet three criteria: (1) the petitioner "must have had physical custody of the child for at least six months . . .;" (2) the petitioner's motive must be "genuine care and concern for the child," and the child must perceive the petitioner as a parent; and (3) the relationship with the child must have begun with the consent of a legal parent or under court order.[108] Once a second parent is granted standing, the court should consider all parents equally for custody or visitation.[109]

If the court in *Nancy S.* had used Bartlett's theory, Michele would have been granted standing because she lived with the children for at least six months, she was motivated by her concern for the children, the children called her "Mom" and considered her a parent, and the relationship began with Nancy's consent.[110] The court would then consider Nancy and Michele equally as parents.

Nancy Polikoff proposes a new doctrine of "functional parenthood" whereby "parenthood [would] be conferred on anyone in a functional parental relationship created by a legally recognized parent with the intent that such relationship be parental in nature."[111] The intent requirement, more specific than Bartlett's consent requirement, would prevent baby-sitters, boyfriends, girlfriends, or relatives from gaining custody without requiring the petitioner to live in the same household

106. *Id.* at 446-47.
107. *Id.* at 450 n.8.
108. Bartlett, *supra* note 7, at 946-48.
109. *Id.* at 948.
110. 279 Cal. Rptr. 212, 214 (Cal. App. Dep't Super. Ct. 1991).
111. Polikoff, *supra* note 3, at 483 n.114.

with the child for any particular length of time.[112] Such a residency requirement, as promoted by Bartlett, "may exclude some of those who function as parents with the legal parent's consent, but who, because of financial hardship, emotional turmoil, a temporarily satisfactory custody and visitation arrangement, or some other reason, do not petition." for custody within a certain time of moving out of the legal parent's home.[113]

Along with the requirement that the legal parent consider the petitioner a parent, Polikoff also advocates Bartlett's mutuality requirement under which "the child must consider the adult to be a parent."[114] Polikoff would give those considered "parents" under her theory all the rights and responsibilities of parenthood. Parental status would be available to more than two people regardless of gender.[115]

Polikoff's theory also would have changed the outcome in *Nancy S.* Nancy intended Michele's relationship with the children to be parental and the children considered her a parent.[116] However, the functional parenthood doctrine was rejected by the court in *Nancy S.* The court wrote that adopting this theory would lead to "years of unraveling the complex practical, social, and constitutional ramifications of this expansion of the definition of parent."[117]

G. Second parent adoption

Bartlett and Polikoff have enjoyed some success in the area of second parent adoption, in which the legal parent's partner seeks to adopt the child. Citing Polikoff in such a case, the Supreme Court of Vermont wrote:

> [I]t is the courts that are required to define, declare and protect the rights of children raised in [alternative] families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal

112. Cox, *supra* note 9, at 18.
113. Polikoff, *supra* note 3, at 488-89.
114. *Id.* at 490.
115. *Id.* at 473 n.51.
116. 279 Cal. Rptr. 212, 214 (Cal. App. Dep't Super. Ct. 1991).
117. *Id.* at 219.

> strangers" who are de facto parents may be awarded custody or visitation or reached for support.[118]

While the growing success of second parent adoptions is encouraging,[119] it has not been accompanied by success in custody and visitation suits by gay/lesbian second parents. There may be several factors contributing to this difference. First, the facts of the successful second parent adoption cases are particularly compelling. In *Adoption of Tammy,*[120] for example, the legal and second parent were both surgeons on the faculty of Harvard Medical School,[121] and the second parent had a sizable family inheritance.[122] Second, the adoption cases are unchallenged by biological parents, relatives, or the state.[123] Third, there are limited threshold standing issues to overcome because of the flexible wording of adoption statutes. In New York, for example, state statutes allow any "adult unmarried person" to adopt "another person."[124]

Fourth, and perhaps most important in the adoption cases, the court is called on to ratify an existing family-like situation. One court wrote:

> It seems clear that the proposed adoption is in Evan's best interest. He is part of a family unit that has been functioning successfully for the past six years. The adoption would bring no change or trauma to his daily life; it would serve only to provide him with important legal rights which he does not presently possess.[125]

The court sees adoption as a way to avoid future difficulty for the child if the couple should break up and to provide "the additional security conferred by formal recognition in an organized society."[126]

Thus, while Bartlett and Polikoff's theories have met with some success in second parent adoption cases, the number of such cases is

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118. *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

119 The New York Court of Appeals recently upheld a second-parent adoption in Matter of Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).

120. 619 N.E.2d 315 (Mass. 1993).

121. *Id.* at 316.

122. *Id.* at 317.

123. *See*, *e.g.*, *In re* Adoption of Evan, 583 N.Y.S.2d 997 (Sur. 1992).

124. N.Y. DOMESTIC RELATIONS LAW §110 (MCKINNEY 1988) (cited in Adoption of Evan, 583 N.Y.S.2d at 999).

125. Adoption of Evan, 583 N.Y.S.2d at 998.

126. *Id.* at 999.

limited and they have not spurred recognition of gay/lesbian families in other contexts.

III. ALTERNATIVES FOR CHANGE

A. Limitations of suggested alternatives

The equitable doctrines discussed above have been successful in limited circumstances, especially in the area of second parent adoption. Even if this doctrinal approach were more successful, however, there are still drawbacks: gay/lesbian families may hesitate to enter the legal system, judicial intervention is intrusive, and rulings are fact-specific and unpredictable. Also, the discrepancy in the courts' willingness to expand equitable doctrines to encompass heterosexual, as opposed to gay/lesbian families, indicates that the real issue is homophobia—a disease that cannot be cured in court alone. Instead of focusing on the relationship between the parent and child, the law should accept the relationship between the parents in gay/lesbian families.

Even if the courts were willing to apply these doctrines to give second parents rights, those individuals would still be required to go to court to establish their rights, as are second parents in the adoption cases. Aside from the time and money required to use the legal system, many gay/lesbian families may be hesitant to enter the system because they may draw the attention of state agencies or other potential parents who may attempt to break up the family. After the family separates, individuals may be unlikely to seek legal recourse for the same reasons and also because the outcome of these cases is still uncertain and the effort may be in vain.[127]

Court intervention also intrudes on family privacy. Requiring gay/lesbian couples to go to court to seek validation of their relationships with their children undermines their search for autonomy and the freedom to define their own personal relationships.[128] Requiring gay/lesbian, but not heterosexual, couples to go to court also "symbolically marginalizes them" and "reinforces the notion that traditional families are the norm while other relationships are abnormal or aberrational."[129]

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127. Polikoff, *supra* note 3, at 526-27.

128. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1653 (1991) [hereinafter *Family Resemblance*].

129. *Id.* at 1655.

Finally, the doctrinal approach is case-by-case; outcomes depend on the specific facts of each case. Courts may respond to only the most sympathetic of facts, such as those in *Karin T.*[130] and *Adoption of Tammy*,[131] where recognizing the second parent was clearly in the child's best interest financially. The case-by-case approach makes the legal system unstable and unpredictable for gay/lesbian second parents.[132] Courts may change their decisions over time, as the California courts did between *Nancy S.* and *In re Hirenia C.*,[133] or come to different conclusions in similar cases, as in *Nancy S.* and *Karin T.*[134]

The biggest problem with the doctrinal approach, though, is that it seeks change only in the judiciary. In the cases discussed previously, courts were willing to use equitable theories to extend parental rights to heterosexual second parents,[135] but not to gay/lesbian second parents in similar circumstances. The courts' disparate treatment of heterosexual and homosexual couples through the misplaced reliance on marriage reveals that homophobia may play a role in the outcomes of the cases.[136] If homophobia is preventing recognition of gay/lesbian families, judicial solutions alone may not be effective.

The legislative approach has its problems too. Polikoff thinks that legislative change is ideal, but unlikely.[137] She blames inaction on the desire of legislatures to leave details, like defining the best interests standard, up to the courts to avoid controversy.[138] Cox also thinks legislative change is preferable, but that gays and lesbians are powerless to influence legislatures.[139] She urges gay and lesbian activists to

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130. 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985); s*ee supra* discussion at Section II.B.

131. 619 N.E.2d 315 (Mass. 1993); *see supra* discussion at Section II.G.

132. *Family Resemblance*, *supra* note 128, at 1653; *see also* William B. Rubenstein*, We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J. LAW & POL. 89, 100 (1991).

133. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. App. Dep't Super. Ct. 1991); *In re* Hirenia C., 22 Cal. Rptr. 2d 443 (Cal. App. Dep't Super. Ct. 1993); *see supra* discussion at Section II.E.

134. *Nancy S.*, 279 Cal. Rptr. at 212; *Karin T.*, 484 N.Y.S.2d at 780; *see supra* discussion at Section II.B.

135. *See also* Tubwon v. Weisberg, 394 N.W.2d 601 (Minn. Ct. App. 1986); *In re* Custody of D.M.M., 404 N.W.2d 530 (Wis. 1987).

136. *See* Rubenstein, *supra* note 132, at 101-02 (discussing different outcomes in *Braschi* and *Alison D.* cases and possibility that homophobia and sexism explain such differences).

137. Polikoff, *supra* note 3, at 573.

138. *Id.* at 573-74.

139. Cox, *supra* note 9, at 8-9, 60-65.

"recognize our limited legislative successes [and] force the courts to wrestle with [these] issues."[140]

At the same time, Cox realizes that only specific legislative change will lend any security to gay/lesbian families.[141] Legislative changes seem more reliable than unstable judicial decisions. In addition, legislative change results from the democratic process and may, therefore, change public attitudes more effectively. Public acceptance, in turn, provides a more secure atmosphere for gay/lesbian families. On the other hand, some judicial decisions, like *Marbury v. Madison*,[142] survive much longer than most statutes, and others, like *Brown v. Board of Education*,[143] force public acceptance in the face of legislative inaction.

Given the benefits and drawbacks of judicial and legislative change, any approach that is limited to one or the other is incomplete. Judicial change may seem like a shortcut because only a limited number of judges need be convinced. Yet, while judges must justify their decisions in neutral terms, "in the end judges . . . share all the biases and limitations of the public itself."[144] Therefore the battle to have gay/lesbian families recognized must be fought not only in the courts, but also in the statehouse.

B. Gay/Lesbian marriage

The courts' reliance on the institution of marriage in applying the equitable doctrines is unnecessary. These doctrines may be easily applied in the gay/lesbian relationship context. The focus on marriage, therefore, discriminates against couples that cannot legally marry. Those who espouse the doctrinal approach ask courts to examine the parent-child relationship directly, apart from the relationship between the parents. An alternative approach would recognize that courts will continue to rely on marriage in assigning parental rights and argue that gay/lesbian marriage should be legalized.

While there is much disagreement within the gay/lesbian community about gay/lesbian marriage,[145] legalization would realize the

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140. *Id.* at 61 n.283.

141. *Id.* at 9-10.

142. 5 U.S. (1 Cranch) 137 (1803).

143. 347 U.S. 483 (1954).

144. Rubenstein, *supra* note 132, at 105.

145. For discussion of this issue, see generally William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Nancy D. Polikoff, *We Will Get What We Ask For:*

benefits and avoid many of the problems of the doctrinal approach to gay/lesbian parenting. Gay/lesbian couples would have the option of legalizing their union, thereby avoiding the necessity of court intrusion to give children born into the marriage the benefits of a second parent. Should the couple break up, they and the children would have the predictability and stability of existing statutes and case law governing custody, visitation, and support. Finally, the effort to legalize gay/lesbian marriage would strike at the heart of homophobia.

Currently, same-sex marriages are not recognized by any state.[146] Courts rejecting same-sex marriage hold that marriage, by definition, involves a man and a woman; two people of the same sex simply cannot marry.[147] The Kentucky Court of Appeals denied a marriage license to two women "because what they propose[d was] not a marriage."[148] Courts also reject same-sex marriage because they say the purpose of marriage is procreation and the preservation of traditional values.[149]

Those who argue in favor of same-sex marriage claim that the Due Process Clause, as interpreted in *Loving v. Virginia*,[150] *Zablocki v. Redhail*,[151] and *Turner v. Safley,*[152] grants gay/lesbian couples a fundamental right to marry.[153] Others argue that classifications on the basis of sexual identity should trigger heightened scrutiny under the Equal Protection Clause, and prohibitions on same-sex marriage impermissibly discriminate on the basis of sexual orientation.[154] Finally, some argue that same-sex marriage prohibitions discriminate on the basis of sex, in

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Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage, 79 VA. L. REV. 1535 (1993); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991).

146. In the well-publicized Hawaii case of Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), the Hawaii Supreme Court remanded the case to a lower court to allow the state to show a compelling interest in prohibiting same-sex marriage.

147. For a list of cases using this reasoning, see Eskridge, *supra* note 145, at 1427 n.17.

148. Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973).

149. Eskridge, *supra* note 145, at 1428-30.

150. 388 U.S. 1 (1967).

151. 434 U.S. 374 (1978).

152. 482 U.S. 78 (1987).

153. Eskridge, *supra* note 145, at 1424, 1424 n.9; Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134 (1987-88) (arguing that denying same-sex couples right to marry is unconstitutional because Constitution protects procreation from unwarranted state interference).

154. Eskridge, *supra* note 145, at 1425-26.

violation of the federal Equal Protection Clause or state equal rights amendments.[155]

Courts are more likely to recognize gay/lesbian second parents' relationships with their children if the relationship with the legal parent is formally recognized because courts prefer that children be raised in marriage-based families. The primary difference between the successful and unsuccessful cases discussed above is the presence or lack of a legally-recognized marital relationship between the parents. The *Karin T.*[156] case, for example, involved a marriage held out by the couple as legal and was successful, while the *Nancy S.*[157] case did not involve a marriage and was unsuccessful.[158]

The United States Supreme Court has also emphasized the link between marriage and parental rights in cases denying the rights of unmarried fathers, where such rights conflict with a marital family. In *Stanley v. Illinois*, Joan and Peter lived together for eighteen years without marrying and had three children.[159] When Joan died, the state took the children without a hearing under a statute that presumed unwed fathers were unfit to raise children.[160] The Court held that the Due Process and Equal Protection Clauses afforded Peter a right to a hearing on his fitness as a parent.[161] In its decision, the Court emphasized that a man's interest in his biological children "undeniably warrants deference . . . and protection."[162] However, the Court predicated that protection on the absence of a "powerful countervailing interest."[163]

In later cases, the presence of a marital family to care for the child proved to be an interest that would justify denying a biological father his parental rights. In *Quilloin v. Walcott*, for example, the Supreme Court denied a biological father the right to block the adoption of his child by the mother's husband.[164] Ardell and Leon, the natural parents, never

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155. *See id.* at 1425; Hunter, *supra* note 145; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 221-33 (1988); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783, 1785-88 (1988); *see also* Baehr v. Lewin, 852 P.2d 44, 63-67 (Haw. 1993).

156. Karin T. v. Michael T., 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985).

157. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. App. Dep't Super. Ct. 1991).

158. *See supra* discussion at Section II.B.

159. 405 U.S. 645, 646 (1972).

160. *Id.*

161. *Id.* at 649.

162. *Id.* at 651.

163. *Id.*

164. 434 U.S. 246, 256 (1978).

married and never lived together. When the child was three, the mother married.[165] Leon provided limited support and visited the child, but never petitioned to legitimate the child.[166] When the child was eleven, the mother's husband filed to adopt the child.[167] Leon's attempt to block the adoption and gain visitation rights failed.[168] The Court wrote that a state's "attempt to force the breakup of a natural family" would violate the Due Process Clause, but "the result of the adoption in this case is to give full recognition to a family unit already in existence."[169] The presence of a marital family overrode the biological father's interests.

Lehr v. Robertson also preferred marriage over biology in distributing parental rights.[170] The biological father lived with the mother prior to, but not after, the child's birth.[171] Eight months after Jessica was born, the mother married, and when Jessica was two years old, the mother's husband filed to adopt her.[172] In those two years, the biological father failed to file with the state's "putative father registry" and had no "significant custodial, personal, or financial relationship with Jessica. . . ."[173]

The Court upheld Jessica's adoption by her stepfather over her biological father's objections.[174] A mere biological relationship, the Court held, does not warrant constitutional protection:[175]

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause . . . . But the mere existence of a biological link does not merit equivalent constitutional protection.[176]

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165. *Id.* at 247.
166. *Id.* at 249, 251.
167. *Id.* at 247.
168. *Id.* at 251.
169. *Id.* at 255 (citation omitted).
170. 463 U.S. 248 (1983).
171. *Id.* at 252.
172. *Id.* at 250.
173. *Id.* at 250-51, 262.
174. *Id.* at 267-68.
175. *Id.* at 261.
176. *Id.* at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)).

In *Michael H. v. Gerald D.*, the Court ruled against a father who had a relationship with his child, as required by *Lehr*, in favor of the mother and her husband.[177] Carole D. had a child, Victoria, as the result of an affair with Michael H. During Victoria's first three years of life, she and Carole lived at times with Michael and Carole's husband, Gerald, both of whom held Victoria out as their own child.[178] After three years, Carole returned to live with her husband permanently and Michael sued for visitation.[179]

The Court held that Michael did not have a liberty interest under the Due Process Clause in continuing his relationship with Victoria because that relationship was not "traditionally protected."[180] The relationship of the husband, in contrast, was protected because it developed within a marital family. Such marriage-based relationships, the Court wrote, have traditionally been accorded respect and even "sanctity."[181] Again, the Supreme Court favored marriage over biology in determining parental rights.[182]

Because courts prefer marital families, legalizing gay/lesbian marriage would facilitate recognition of the relationship between the second parent and the child in a marital gay/lesbian family. Legalizing gay/lesbian marriages would legitimate gay/lesbian families. Some use this argument to oppose legalization of gay/lesbian marriage.[183] The Hawaii Supreme Court recently ruled that a statute denying same-sex couples the right to marry must be given strict scrutiny under the state constitution's Equal Protection Clause because it discriminates on the basis of gender.[184] In opposing legalization of same-sex unions, the state argued, *inter alia*, that "the state's marriage laws 'protect and foster . . . the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons.'"[185] The court also recognized the link between marriage and parental rights by

177. 491 U.S. 110, 121 (1988).

178. *Id.* at 114.

179. *Id.* at 113-15.

180. *Id.* at 121-24.

181. *Id.* at 123.

182. *But see* Caban v. Mohammed, 441 U.S. 380 (1979) (appearing to be an exception to general rule that Supreme Court rules against biological father where mother offers a marital family for child). The facts in *Caban*, however, are distinguishable. The father was also married and filed a cross petition for adoption. *Id.* at 382.

183. Friedman, *supra* note 153, at 160-64, 168-69.

184. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

185. *Id.* at 52 (quoting Lewin's memorandum).

including in a list of the benefits of marital status the "award of child custody and support payments in divorce proceedings."[186]

Cases allowing the second parent in a gay/lesbian family to adopt their partner's child indicate why courts prefer marital families, and why those families need not be heterosexual. Courts prefer that a child receive economic support and inheritance, social security benefits, and medical and educational benefits from two parents instead of one. In the event that a couple separates, courts prefer that children maintain relationships with both of their parents. "[C]ommitted, time-tested life partnership[s]" give children these benefits and provide them with a secure and stable environment in which to grow.[187] Gay/lesbian families also provide economic and emotional security and stability for children,[188] as a growing number of courts have recognized in second parent adoption cases.

Consistent with those opinions, scholars such as Bartlett and Polikoff advocate recognition of relationships that are the functional equivalent of marriage.[189] The functional approach to marriage, however, shares the shortcomings of the functional approach to parenting: it is unpredictable, fact specific, and intrusive. Additionally, the functional approach asks courts to look for relationships that mimic traditional marital relationships.[190] As in the second parent adoption cases and *Karin T. v. Michael T.*,[191] those most likely to be successful are those that most closely resemble heterosexual marriage. Since courts force families to conform to a marital-family model, legalizing gay/lesbian marriage would accomplish the same goal and avoid the problems of the functional approach. In addition, legalizing gay/lesbian marriage might reduce the need for gay/lesbian couples to mimic heterosexual marriage in order to gain recognition.

Legalizing gay/lesbian marriage would enable less intrusive and more predictable resolution of family disputes. "If states licensed same-sex marriage, the courts could use precedents from marriage and family

186. *Id.* at 59.

187. *See In re* Adoption of Evan, 583 N.Y.S.2d 997, 999 (Sur. 1992); *see also* Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993); William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1518-19 (1994).

188. *See* Friedman, *supra* note 153, at 161-69.

189. *See supra* discussion at Section II.F.

190. *Family Resemblance*, *supra* note 128, at 1654.

191. 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985).

law to determine the legal rights of members of same-sex families."[192] Marriage opens up legal presumptions and statutory remedies. While marriage does not currently solve all problems for heterosexual couples,[193] it would certainly be an improvement for gay/lesbian couples.

The story with which I opened this paper may have ended differently had the union between my friends been legally recognized. If the couple had been married, the child would have been a child of the marriage and both of the adults would have been presumed to be parents. The family would not have had to go to court for the child to receive benefits from both parents. Likewise if one parent had died, the survivor would not have had to go to court to retain custody. Thus, legalizing gay/lesbian marriage would reduce court intrusion into existing families.

Marriage would also have increased predictability and reduced court intrusion after the couple broke up. State statutes and case law governing custody, visitation, and support would have applied to the two parents equally. While these laws do not always yield predictable results, they may develop precedential trends. For example, their state may have generally favored joint custody, in which case a court dispute would be more likely to result in such an arrangement. Such precedents might have also informed the couples' expectations, and the natural mother, knowing that a court would be likely to impose joint custody, might never have denied her former partner visitation and forced her to go to court for relief.

IV. CONCLUSIONS

The symbolic importance of allowing gays and lesbians to participate in one of our society's most fundamental institutions cannot be underestimated. "Through a legal disability created by the state's denial of a legal framework for committed same-sex relationships, the state produces gay men and women as a peculiar class of second-class citizens."[194] As the legal system treats straight and gay/lesbian couples alike, they will be perceived as "normal."[195] In other words, the traditional notion of "family" as a heterosexual unit would expand to

192. Friedman, *supra* note 153, at 160.

193. Cox, *supra* note 9, at 65.

194. Hohengarten, *supra* note 187, at 1530.

195. *Family Resemblance*, *supra* note 128, at 1655. This note advocates a registry system, similar to domestic partnership. *Id.* at 1657. Anything less than marriage, however, is unacceptable because it treats gays and lesbians differently, again perpetuating homophobia.

include alternative forms like the gay/lesbian family. Ultimately, it is the children in gay/lesbian families who will benefit from decreased prejudice and greater recognition.[196]

The current approach for gay/lesbian second parents seeking recognition of their relationships with their children is to ask courts to expand the notion of parenthood using any of a number of equitable doctrines. So far, this approach has met with limited success and causes problems for the litigants. It is intrusive and unpredictable. Perhaps its greatest failing, though, is that it perpetuates homophobia by allowing gay/lesbian families to be treated differently.

Legalizing gay/lesbian marriage is likely to gain greater recognition of gay/lesbian second parents' rights because the courts have traditionally preferred marriage-based families. The marriage approach would be less intrusive and more predictable. The greatest benefit of legalizing gay/lesbian marriage is that it strikes at the heart of homophobia by instructing society that gay/lesbian families are entitled to the protection and recognition of the legal system and the respect of us all.

196. Friedman, *supra* note 153, at 163.