From *Fretté* to *E.B.*: The European Court of Human Rights on Gay and Lesbian Adoption

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INTRODUCTION

European nations, while progressive in many areas pertaining to gay and lesbian family law, have been slow to recognize the rights of gay individuals or same-sex couples to adopt children. In January of 2008, however, the European Court of Human Rights (ECHR) held in *E.B. v.*

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France that France violated the Convention for the Protection of Human Rights and Fundamental Freedoms when it denied a lesbian woman permission to adopt a child.[1] Only six years earlier, the Court decided *Fretté v. France*, holding on virtually identical facts that France's denial of a gay man's application to adopt did not violate the Convention.[2] The implications of *E.B. v. France* remain unclear, but this sea change in the ECHR's jurisprudence warrants consideration.

Part I of this Article will provide background on the applicable provisions of the Convention and the jurisprudence of the ECHR. Part II will explore the holding of *E.B. v. France*, and whether it overruled prior precedent. Part III will consider what happened between the decisions that shaped the outcome of *E.B.*, and Part IV will discuss the potential effect the ECHR's decision may have on the legislation of other European States in relation to gay, lesbian, bisexual and transgender (LGBT) people.

I. BACKGROUND

A. The Council of Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the European Court of Human Rights

In the wake of the Second World War, largely "in response to the threat to fundamental human rights and to political freedom which had all but overwhelmed the European continent," ten countries founded the Council of Europe in 1949.[3] The Council's first project was drafting the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention on Human Rights"), which was signed in Rome on November 4, 1950, and entered into force in September of 1953.[4] Human rights were in the hearts and minds of the members of the Council of Europe, and continue to be so today, as "[n]ew members . . . are expected to accede to the European Convention."[5] There are currently forty-seven member countries to the Council that are bound by the Convention.[6]

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1. E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. § 96 (2008), *available at* http://www.echr.coe.int/echr/.

2. Fretté v. France, 2002-I Eur. Ct. H.R. 345, 370.

3. CLARE OVEY & ROBIN WHITE, JACOBS AND WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 102 (3d ed. 2002).

4. Council of Europe, "Greater" and "Smaller" Europe, http://www.coe.int/T/E/Com/About_Coe/greater_and_smaller_europe.asp (last visited Jan. 2, 2009).

5. OVEY & WHITE, *supra* note 3, at 4.

6. Council of Europe, About the Council of Europe, http://www.coe.int/T/e/Com/about_coe/ (last visited Dec. 30, 2008).

The Convention on Human Rights contains broad protections in a variety of areas, since it was patterned after the United Nations' 1948 Universal Declaration of Human Rights.[7] The aspects of the Convention that are generally invoked to protect LGBT people are articles 8 and 14. Article 8, section 1, states: "Everyone has the right to respect for his private and family life, his home and his correspondence."[8] Article 14 prohibits discrimination based "on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[9] This Article only prohibits "discrimination in relation to the rights guaranteed by the Convention and Protocols."[10] It has "no independent existence."[11] That is, "there can never be a violation of Article 14 considered in isolation, [but] there may be a violation of Article 14, considered together with another Article of the Convention, in cases where there would be no violation of that other Article taken alone."[12] While neither article expressly references sexual orientation, articles 8 and 14 have been used in conjunction to protect the rights of LGBT Europeans.[13]

The European Court of Human Rights was established by the Convention on Human Rights to enforce its guarantees.[14] The court is competent to hear both inter-state cases and individual applications, as long as domestic remedies have been exhausted.[15] The court has the power to issue both advisory opinions and binding judgments, to which all Contracting Parties agree to abide.[16] The ECHR also has the power to award "just satisfaction"[17] if the court finds that the domestic law of a Contracting Party "allows only partial reparation to be made."[18] Thus, the

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7. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention on Human Rights].

8. *Id.*

9. *Id.* art. 14.

10. OVEY & WHITE, *supra* note 3, at 347.

11. Fretté v. France, 2002-I Eur. Ct. H.R., § 27.

12. OVEY & WHITE, *supra* note 3, at 348-49.

13. *See, e.g.*, Human Rights Educ. Assocs., Sexual Orientation and Human Rights, http://www.hrea.org (last visited Dec. 29, 2008).

14. Convention on Human Rights, *supra* note 7, art. 19.

15. *Id.* arts. 33-35.

16. *Id.* arts. 44-47.

17. There is no formal definition of "just satisfaction" under the Convention on Human Rights; the jurisprudence of the ECHR indicates that a mere finding of an infringement of a Convention right can, in some circumstances, constitute "just satisfaction." R. on the Application of K.B. v. South London and South West Region Mental Health Review Tribunal (Damages), [2003] 3 W.L.R. 185, para. 16 (Q.B.).

18. Convention on Human Rights, *supra* note 7, art. 41.

ECHR is vested with significant power to ensure compliance with the European Convention of Human Rights.

B. The European Court of Human Rights' Protection of LGBT People and Families

The jurisprudence of the ECHR as it relates to LGBT people began in 1981 with the landmark ruling that laws criminalizing homosexual conduct violated article 8 of the Convention and the notion of respect for private life.[19] The ECHR also repeatedly found that laws that required higher ages of consent for homosexual sexual relations than heterosexual ones impermissibly discriminated on the basis of sexual orientation.[20] In a subsequent line of cases, the ECHR decided that gender identification, name, sexual orientation, and sexual life are all protected under the Convention as aspects of the private life, "which is a broad term 'not susceptible to exhaustive definition.'"[21] Later, the ECHR ruled that the United Kingdom's exclusion of gays and lesbians from military service violated article 8.[22] In sum, over the course of approximately twenty years, the ECHR overturned a variety of laws that directly targeted gays and lesbians for discriminatory treatment.

C. Lesbian and Gay Families and Adoption

The ECHR has yet to hear a case that squarely addresses gay and lesbian relationship-recognition. With respect to adoption, the ECHR has heard three cases to date: *Salgueiro da Silva Mouta v. Portugal*, *Fretté v. France*, and *E.B. v. France*.[23]

In *Salgueiro da Silva Mouta v. Portugal*, the ECHR considered a custody dispute between Salgueiro da Silva Mouta, a gay man, and his ex-wife.[24] Upon their divorce, the mother was granted parental responsibility, and the father received visitation rights.[25] The mother did

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19. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) § 63 (1981).

20. *See* L. & V. v. Austria, 2003-I Eur. Ct. H.R. 71; SL v. Austria, 2003-I (extracts) Eur. Ct. H.R. 29; B.B. v. United Kingdom, App. No. 53760/00, Eur. Ct. H.R. § 25 (2004), *available at* http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database.

21. OVEY & WHITE, *supra* note 3, at 221 (quoting Bensaid v. United Kingdom, 2001-I Eur. Ct. H.R. 303, 320-21); *see also* B. v. France, Judgment of 25 Mar. 1992, App. No. 13343/87, Eur. Ct. H.R. (ser. A no. 232-C) at 53-54, § 63; Burghartz v. Switzerland, Judgment of 22 Feb. 1994, App. No. 16213/90, Eur. Ct. H.R. (ser. A no. 280-B) at 28, § 24; Brown v. United Kingdom, Judgment of 19 Feb. 1997, 1997-I Eur. Ct. H.R. 131, § 36.

22. Smith & Grady v. United Kingdom, 1999-VI Eur. Ct. H.R. 45, 89.

23. Salguiero da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309; Fretté v. France, 2002-I Eur. Ct. H.R. 345; E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. (2008).

24. *Salgueiro*, 1999-IX Eur. Ct. H.R. at 309.

25. *Id.* at 314.

not comply with the agreement, and the father filed suit with the Portuguese courts requesting that parental responsibility be vested in him.[26] The Lisbon Family Affairs Court granted his petition.[27]

The mother appealed the Family Court's judgment to the Lisbon Court of Appeal.[28] The Court of Appeal reversed the Family Court judgment, awarding parental responsibility to the mother, reasoning that "[t]he child should live in a family environment, a traditionally Portuguese family, which is certainly not the set-up the father has decided to enter into."[29] While the court granted the father visitation rights, it essentially forbade him "to act in any way that would make his daughter realize that her father is living with another man in conditions resembling those of man and wife."[30] The father filed an application with the ECHR.[31]

The ECHR considered the applicant's complaint that "the Lisbon Court of Appeal had based its decision . . . exclusively on the ground of his sexual orientation," thereby violating article 8 alone and in conjunction with article 14.[32] The ECHR found that there was a difference in treatment between the mother and father, and considered whether the difference was justified.[33] A difference in treatment under article 14 of the Convention is discriminatory "if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[34] The ECHR found that protecting children was an acceptable legitimate aim.[35] However, it held that the introduction of the applicant's homosexuality into the court's analysis was not proportional because it was "far from being merely clumsy . . . the applicant's homosexuality was a factor which was decisive in the final decision."[36] Consequently, in child custody cases, Contracting States may no longer discriminate on the basis of sexual orientation.

With respect to a lesbian or gay individual's right to adopt an unrelated child, the ECHR first considered the issue in *Fretté v. France*.[37]

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26. *Id.* at 315.
27. *Id.*
28. *Id.* at 315-23.
29. *Id.*
30. *Id.*
31. *Id.* at 313.
32. *Id.* at 324.
33. *Id.* at 327.
34. *Id.*
35. *Id.*
36. *Id.* at 328-29.
37. Fretté v. France, 2002-I Eur. Ct. H.R. 345.

French domestic law allows both married and unmarried people to adopt children.[38] In order to become eligible to adopt either a foreign child or a child in the custody of the State, France requires that couples or individuals apply for authorization to adopt from the Children's Welfare Service.[39] The process includes "conduct[ing] all the investigations required to ascertain what kind of home the applicant is likely to offer the child[] from a psychological, child-rearing and family perspective."[40] It is impermissible to deny an application solely on the basis of the applicant's age, marital status, or whether children are already present in the home.[41]

Mr. Philippe Fretté, a single gay man, applied for authorization to adopt in 1991.[42] He disclosed that he was homosexual in an application interview.[43] The written statements of the interviewing psychologists reveal that Fretté had some degree of experience with children and that "[h]is ideas about bringing up children are well thought out and imbued with a spirit of tolerance."[44] They mentioned, however, that "[h]is desire for a child is genuine but he has difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child."[45] In their view, "Mr. Fretté has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him. The question is whether his particular circumstances as a single homosexual man allow him to be entrusted with a child."[46] The Paris Social Services Department consequently denied Fretté's application, concluding that his "'choice of lifestyle' did not appear to be such as to provide sufficient guarantees that he would offer a child a suitable home."[47] Fretté's request for reconsideration was denied, and he appealed the judgment to the Paris Administrative Court.[48]

The Administrative Court reversed the Social Services Department's judgment, finding that the major reasons Mr. Fretté's applications were denied—including a lack of maternal role model for the child and his failure "to envisage the practical consequences of the upheaval occasioned by the arrival of a child"—were inappropriate.[49]

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38. *Id.* at 358.
39. *Id.* at 358-59.
40. *Id.* at 359.
41. *Id.*
42. *Id.* at 352.
43. *Id.*
44. *Id.* at 353.
45. *Id.*
46. *Id.*
47. *Id.* at 352-54.
48. *Id.* at 354.
49. *Id.* (internal quotes omitted).

The first, the court said, "could only have meant to refer to Mr. Fretté's unmarried status, which . . . could not lawfully constitute the sole reason for the decision."[50] The court found the second reason unsubstantiated based on the facts in the record.[51] The Administrative Court also decided that homosexuality could only be considered in combination "with conduct that was prejudicial to the child's upbringing," but that such conduct was clearly lacking under the circumstances.[52] The Paris Social Services appealed to the Conseil d'État.[53]

The High Court reversed the Administrative Court and ruled on the merits, denying Mr. Fretté's application to adopt.[54] The court stated that "the child's interests cannot always be reconciled with current developments"; therefore, it is not for the courts to speak on the issue of whether gays and lesbians should be permitted to adopt, but rather for Parliament.[55] Mr. Fretté subsequently brought his case before the ECHR.[56]

Fretté alleged violations of article 8 and article 14 because the decision to reject his application was due to his sexual orientation.[57] The court, while noting that "the Convention does not guarantee a right to adopt as such," found that articles 8 and 14 were implicated because "the applicant's homosexuality [was] the decisive factor" in rejecting his application.[58] As in *Salgueiro*, the ECHR engaged in its classic article 8 and 14 analysis, first asking if the decision served a legitimate aim, and then asking whether a "reasonable relationship of proportionality [existed] between the means employed and the aim sought to be realised."[59] The ECHR also emphasized that "the Convention is a living instrument, to be interpreted in light of present-day conditions."[60]

The ECHR found that there could be "no doubt" that protecting the health and rights of children were legitimate state aims.[61] Turning to the issue of proportionality, the ECHR held that a reasonable relationship

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50. *Id.* (internal quotes omitted).
51. *Id.*
52. *Id.* (internal quotes omitted).
53. *Id.* at 355. Le Conseil d'État is the Supreme Court of Administrative Law in France. *See* Le Conseil d'État, Le Conseil d'État en bref, http://www.conseil-etat.fr/ce/missio/index_mi_ce01.shtml (last visited Jan. 2, 2009).
54. *Fretté*, 2002-I Eur. Ct. H.R. at 357-58.
55. *Id.* at 355-57.
56. *Id.* at 351.
57. *Id.* at 360-61.
58. *Id.* at 364.
59. *Id.* at 365 (internal quotes omitted); Salgueiro da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309.
60. *Fretté*, 2002-I Eur. Ct. H.R. at 365.
61. *Id.* at 368.

existed for two reasons.[62] First, the court accepted the argument that the scientific community "is divided over the possible consequences of a child being adopted by one or more homosexual parents," particularly in light of the sparse research on the topic.[63] Second, it found that "there are wide differences in national and international opinion" on the question of whether gays and lesbians should be permitted to adopt.[64] These factors led the ECHR to conclude, in a four-to-three decision, that "[i]f account is taken of the broad margin of appreciation to be left to States in this area and the need to protect children's best interests to achieve the desired balance, the refusal to authorise adoption did not infringe the principle of proportionality."[65] Thus, after *Fretté v. France*, Contracting Parties to the Convention were free to decide whether gays and lesbians should be allowed to adopt.

Fretté v. France was a split decision.[66] Three concurring judges expressed the view that article 14 was not implicated at all.[67] Bearing in mind that "there is no right to [adopt] children . . . there was . . . no interference by the State in Mr. Fretté's private or family life"; therefore, article 14 could not be applied to the case.[68] Judge Costa wrote, "[I]t would have been easier to justify the rejection of the complaint on the legal basis of the inapplicability of Article 14 than to declare Article 14 applicable and then find no breach of it."[69] Judge Costa thus pointed out the difficulty of the majority's reasoning that later influenced the ECHR in *E.B. v. France*.[70]

Finally, Judges Bratza, Fuhrmann, and Tulkens dissented.[71] They wrote that although adoption is not a right guaranteed by the Convention, "Article 14 covers not only the enjoyment of the rights that States are obliged to safeguard . . . but also those rights and freedoms that fall within the ambit of a substantive provision of the Convention and that a State has chosen to guarantee."[72] Thus, because France chose to open adoption to both married and single persons, going beyond the

62. *Id.* at 369-70.
63. *Id.* at 369.
64. *Id.*
65. *Id.*
66. *See id.*
67. *See id.*
68. *Id.* (Costa, J., concurring).
69. *Id.*
70. *See* E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. (2008).
71. *Fretté*, 2002-I Eur. Ct. H.R. (Bratza, J. et al., dissenting).
72. *Id.*

requirements of article 8, it is nevertheless bound by article 14 in the provision of that right.[73]

The dissenters also found that there was no legitimate reason to consider the sexual orientation of the applicant because there was no reference in the case file "to any specific circumstance that might pose a threat to the child's interests."[74] This shifted the analysis out of the abstract question of whether the best interests of a child might be harmed by placing them with *any* gay or lesbian parent, and to the specific applicant in the case. Therefore, the steps France took could not be proportionate, and the dissenters warned that "when couched in such general terms," the majority was "liable to take the protection of fundamental rights backwards."[75] The dissenting opinions in *Fretté v. France* contained an analysis that would be closely mirrored in the ECHR's subsequent decision in *E.B. v. France*.[76]

II. *E.B. V. FRANCE*: A SEA CHANGE

Against this background, in January of 2008, the ECHR spoke again on the issue of lesbian and gay adoptions in the French context.[77] In *E.B. v. France*, the ECHR held, in a ten-to-seven vote, that France violated articles 8 and 14 by denying a lesbian the right to adopt.[78] This holding, despite an attempt by the majority to distinguish *Fretté v. France*, may be seen as overruling the case. This was possible for a number of factual and legal reasons.

The applicant in the case, Ms. E.B., had been a nursery school teacher for thirteen years when she applied for authorization to adopt.[79] Although she was a lesbian involved in a stable eight-year relationship, she filed her application as a single individual because she and her partner could not legally marry in France.[80] Her application was considered by a wide range of individuals, including psychologists, educational specialists, pediatric nurses, and numerous representatives from the Children's Welfare Service and the Adoption Board.[81] They described her as "a good listener . . . broad-minded and cultured," as well

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73. *Id.*
74. *Id.* (internal quotes omitted).
75. *Id.*
76. *See* E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. (2008).
77. *See id.*
78. *Id.* §§ 96-98.
79. *Id.* §§ 8-9.
80. *Id.*
81. *Id.* §§ 10-17.

as "enthusiastic and warm-hearted."[82] They noted that "[h]er ideas about child-rearing appear very positive."[83] Many indicated that the applicant was firm that the child would find a "father figure in the persons of her own father and her brother-in-law," and that the child could additionally "choose a surrogate father in his or her environment" such as "a friend's relative, a teacher, or a male friend."[84] Despite these positive impressions, each individual reviewing her application recommended that it be denied.[85]

Every denial was based on two factors: first, "the lack of a paternal role model . . . capable of fostering the well-adjusted development of an adopted child," and second, "the place that [the applicant's] partner would occupy in the child's life [was] not sufficiently clear."[86] These particular criticisms were couched in a variety of ways. One made reference to her "current lifestyle" as likely prohibiting the formation of a child's "family image revolving around a parental couple."[87] Another wrote: "[w]e do not wish to . . . insinuate that [the applicant] would be harmful to a child; what we are saying is that all the studies on parenthood show that a child needs both its parents."[88] One simply commented that the applicant had an "[u]nusual attitude towards men in that men are rejected."[89] Finally, another remarked that "Ms. [E.B.] lives with a female partner who does not appear to be a party to the plan. The role this partner would play in the adopted child's life is not clearly defined."[90] As a result of these statements, Ms. E.B.'s application was formally denied.[91] She requested reconsideration of the decision, but she was again denied permission to adopt.[92]

Ms. E.B. appealed to the Besançon Administrative Court.[93] The court reversed, finding that the reasons cited by the agency for denying Ms. E.B.'s application were "not in themselves capable of justifying a refusal to grant authorisation to adopt," and went on to highlight the applicant's positive qualities.[94] The Department sought review in the

82. *Id.* §§ 10-11.
83. *Id.* § 11.
84. *Id.* § 10.
85. *Id.* §§ 10-17.
86. *Id.* § 17.
87. *Id.* § 10.
88. *Id.* § 11.
89. *Id.* § 13 (internal quotes omitted).
90. *Id.* § 16.
91. *Id.* § 17.
92. *Id.* §§ 18-20.
93. *Id.* § 21.
94. *Id.* § 22.

Nancy Administrative Court of Appeal.[95] The Nancy Court reversed, holding that Ms. E.B.'s application was not refused "on the basis of a position of principle regarding her choice of lifestyle," and that she is therefore "not justified in alleging a breach . . . of the requirements of Articles 8 and 14 of the Convention."[96] The applicant disagreed and brought her case to the ECHR in December of 2002.[97]

A. The ECHR Overrules Fretté v. France

The ECHR took the E.B. case and compared it to *Fretté v. France*.[98] The court found that although the French courts had denied both applications for similar reasons, in particular the absence of a referent, or role model, of the opposite sex for the child, the cases presented different factual situations for three reasons.[99] First, unlike with Mr. Fretté, "the domestic administrative authorities did not—expressly at least—refer to E.B.'s 'choice of lifestyle.'"[100] Second, Ms. E.B's "qualities and her child-raising and emotional capacities" were emphasized in the decisions, "unlike in *Fretté* where the applicant was deemed to have had difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child."[101] Finally, in Ms. E.B.'s case, "the domestic authorities had regard to the attitude of E.B.'s partner, with whom she had stated that she was in a stable and permanent relationship, which was a factor that had not featured in the application lodged by Mr. Fretté."[102]

These factual distinctions are unconvincing. With respect to the first distinction, the domestic authorities expressly referred to Ms. E.B.'s lifestyle. For example, the written report by the nurse noted specifically that her decision was made with "regard being had to her current lifestyle: unmarried and cohabiting with a female partner."[103] While this is not an express reference to the applicant's *choice* of lifestyle, surely there is no meaningful distinction to be drawn between the phrases "choice of lifestyle" and "current lifestyle." While "current lifestyle" implies that Ms. E.B.'s relationship was temporary, the record clearly indicates that Ms. E.B. disclosed her sexual orientation and that the

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95. *Id.* § 23.
96. *Id.* § 24 (internal quotes omitted).
97. *Id.* § 1.
98. *See id.*
99. *Id.* § 71.
100. *Id.* (quoting Fretté v. France, 2002-I Eur. Ct. H.R. 345).
101. *Id.*
102. *Id.*
103. *Id.* § 10.

relationship with her partner was "stable" and "permanent."[104] Thus, while phrased as "current lifestyle," the French administrators clearly considered Ms. E.B.'s "choice of lifestyle."

Neither do the second and third factors listed by the ECHR distinguish the two situations. Although Ms. E.B. clearly had more experience with young children, child-rearing abilities were emphasized by the reviewing authorities in both *E.B. v. France* and *Fretté v. France*.[105] In addition, both applications had one negative indicator. In Mr. Fretté's petition, it was a psychologist's opinion that he had trouble imagining the specific changes a child might cause in his life, while in Ms. E.B.'s case, it was similarly an opinion of a psychologist that her partner was not sufficiently committed to the plan to have a child.[106] While the criticism of Mr. Fretté goes to his ability to parent and that of Ms. E.B. goes to that of her partner, both are equally negative strikes against each application. For these reasons, the ECHR's opinion in *E.B. v. France* did not successfully distinguish the case from *Fretté v. France*.

B. The ECHR's Analysis

Turning to the conclusion of the ECHR in *E.B. v. France*, the court found a violation of articles 14 and 8.[107] It did so after considering the two grounds of denial of Ms. E.B.'s application (the lack of a male referent in the child's proposed home and the attitude of Ms. E.B.'s partner) collectively.[108] Under this approach, "the illegitimacy of one of the grounds has the effect of contaminating the entire decision."[109] Consequently, the ECHR found that the French authorities had relied too heavily on the applicant's sexual orientation in reaching their decisions.[110] The court looked carefully at the written opinions of those reviewing Ms. E.B.'s application, finding that "the manner in which certain opinions were expressed was indeed revealing in that the applicant's homosexuality was a determining factor."[111] Not only were direct statements to this effect made, but the overwhelming reliance on "her status as a single person" and the "lack of a paternal referent"—when adoption by individuals is specifically permitted by French law—further supported

104. *Id.* §§ 9, 71.
105. *See id.*; *Fretté*, 2002-I Eur. Ct. H.R. at 345.
106. *Fretté*, 2002-I Eur. Ct. H.R. at 345; *E.B.*, App. No. 43546/02, Eur. Ct. H.R. § 10.
107. *Id.* § 98.
108. *Id.* §§ 73-78.
109. *Id.* § 80 (conceding that had the court looked at each individually, a violation would likely not have been found).
110. *Id.* §§ 84-85.
111. *Id.* § 85.

the conclusion that sexual-orientation discrimination was at work.[112] In light of the entirety of the record, the ECHR found that "the reference to the applicant's homosexuality was . . . at least implicit . . . [and that] [t]he applicant therefore suffered a difference in treatment."[113]

Rather than focus on the legitimacy of the aim as the ECHR did in *Fretté*, the ECHR in *E.B. v. France* turned to its article 14 test, assumed that the aim was legitimate, and jumped straight into the issue of proportionality.[114] Like the dissent in *Fretté*, the ECHR in *E.B. v. France* focused on the specific facts of the case when evaluating proportionality.[115] The court found that the applicant, with her "undoubted personal qualities and an aptitude for bringing up children," would not present a problem under the best interest of the child standard.[116]

The ECHR expressly rejected France's arguments that there was no European consensus on the topic of homosexual adoption, and that the scientific community was still divided as to the consequences of raising a child in a gay or lesbian household.[117] In doing so, the ECHR overruled the legal underpinnings of its decision in *Fretté*. The court firmly stated that "the domestic authorities made a distinction based on . . . [E.B.'s] sexual orientation, a distinction which is not acceptable under the Convention."[118] Consequently, all Member States of the Convention on Human Rights are prohibited from discriminating against gays and lesbians in adoption proceedings.

III. WHAT HAPPENED?

After considering these cases, the striking question remains: What happened in the six years between *Fretté* and *E.B. v. France* that would cause such a dramatic shift in the ECHR? Because the court has repeatedly observed that "the Convention is a living instrument, to be interpreted in light of present-day conditions,"[119] consideration of the legal and social shifts in the six years between the cases is warranted.

As a legal matter, the Convention itself underwent changes, particularly with respect to its provisions on discrimination in the years between Fretté and E.B. v. France. Although Protocol 12 had been opened for signature two years before the final decision in Fretté, it

112. *Id.* §§ 86-87.
113. *Id.* §§ 89-90.
114. *See id.* §§ 91-98.
115. *See id.*; Fretté v. France, 2002-I Eur. Ct. H.R. 345 (Bratza, J. et al., dissenting).
116. *Id.* § 95 (internal quotes omitted).
117. *See id.* §§ 64-69, 98.
118. *Id.* § 96.
119. *Id.* § 92.

entered into force in 2005.[120] Protocol 12 contains a general prohibition of discrimination:

> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.[121]

Protocol 12 thus goes further than article 14, which by its text forbids discrimination only insofar as it is within the context of a right provided by the Convention.[122] Protocol 12 prohibits discrimination in the provision of any right provided by the law of any Member State that has acceded to the Protocol, and "moves from a prohibition of discrimination to a recognition of a right of equality."[123] While Protocol 12 was not relied upon in either case, it was likely excluded from the analysis because to date, France is not a signatory.[124] However, the Protocol's entry into force between the cases illuminates a growing European consensus that all forms of discrimination are impermissible, and not just in cases that directly implicate rights enumerated by the Convention. This perhaps made it easier for the court to reject the logic of the concurring Judges in *Fretté* that article 14 was not applicable because adoption is a privilege, not a right guaranteed by the Convention on Human Rights.[125]

In addition, in 2003 the Council of Europe formed the Working Group on Adoption, which was charged with revising the European Convention on the Adoption of Children.[126] The revised Convention has not opened for signature, but as of April 2007 was before the Parliamentary Assembly for comment.[127] The draft Convention in article

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120. Council of Europe, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, http://conventions.coe.int/Treaty/en/Treaties/html/177.htm (last visited Dec. 30, 2008) [hereinafter Protocol No. 12].

121. *Id.*

122. Convention on Human Rights, *supra* note 7, art. 14.

123. OVEY & WHITE, *supra* note 3, at 359.

124. Protocol No. 12, *supra* note 120.

125. *See* Fretté v. France, 2002-I Eur. Ct. H.R. 345; E.B. v. France, App. No. 43546/02, Eur. Ct. H.R. (2008). Judge Costa, the only member of the court to hear both cases, wrote the relevant concurrence in *Fretté v. France* and dissented in *E.B. v. France*.

126. Eur. Consultative Ass'n, *Draft European Convention on the Adoption of Children (Revised)—Invitation to the Parliamentary Assembly To Give an Opinion*, Mtg. 993, intro., Apr. 11, 2007, https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2007)44&Language=lanEnglish&Ver=corr.

127. *Id.*

7 provides for the conditions of adoption.[128] Section 48 of article 7 reads: "States are also free to extend the scope of the convention to different or same-sex couples who . . . are living together in a stable relationship."[129] Article 7, section 1, also provides that individual persons should be permitted to adopt.[130]

The draft Convention is cited by the ECHR in *E.B. v. France* as relevant legal authority, though the court does not expressly rely on it at any point in its judgment.[131] However, the draft Convention illustrates a change in European *opinio juris* that gays and lesbians are suitable to adopt children. This point certainly made it easier for the court to reject France's argument that there was little tolerance—let alone a consensus—among member States regarding the suitability of gays and lesbians to adopt.[132]

Outside of such international legal changes, the laws of the various European countries and the attitudes of the European scientific community with respect to gay parenting changed during the time between *Fretté* and *E.B.* Such changes are succinctly described in a brief filed jointly by the Fédération Internationale des Ligues des Droits de l'Homme, the European Region of the International Lesbian and Gay Association, the British Agencies for Adoption and Fostering, and the Association des Parents et Futurs Parents Gays et Lesbiens in the *E.B. v. France* case.[133]

Professor of Law Robert Wintemute wrote the brief.[134] He encouraged the court to consider that, since the decision in *Fretté*, a "gradual trend towards full equality for same-sex couples with regard to second-parent adoption and joint adoption has begun."[135] Wintemute points to a number of European states, including Denmark, Germany, Iceland, the Netherlands, Norway, Spain, Sweden, and the UK (England and Wales) that, between 2004 and 2005, began permitting second-parent or joint adoption to gay couples.[136] This increase in the number of States that specifically approved of gay and lesbian parenting could not have been lost on the court.

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128. *Id.* art. 7.
129. *Id.*
130. *Id.* art. 7(43).
131. E.B. v. France, App. No. 43546/02, Eur. Ct. H.R., § 29 (2008).
132. *Id.* at 94.
133. *See id.* (Written Comments of FIDH, ILGA-Europe, BAAF & APGL, submitted June 3, 2005).
134. *Id.* ¶ 1.
135. *Id.* ¶ 12.
136. *Id.*

Furthermore, after *Fretté*, the scientific community began publicizing its approval of gay and lesbian parenting. For example, a 2004 study in the Netherlands "compared children in 100 two-mother families with children in 100 mother-father families and found 'no differences between the psychological adjustment of children in lesbian and those in heterosexual families.'"[137] Additionally, a 2005 statement by the Colegio Oficial de Psicólogos de Madrid (Official School of Psychologists of Madrid) announced that "[a]ccording to existing scientific studies . . . it cannot be claimed that children raised by lesbian or gay families suffer harm in their psychological development."[138] Going further, in 2002, the British Agencies for Adoption and Fostering "stated its strong support for an amendment to adoption legislation that would extend joint adoption to unmarried different-sex or same-sex couples."[139] Such studies and statements demonstrate that the visibility of scientific research and state agencies accepting gay and lesbian parents increased dramatically after *Fretté*.[140] But even so, Professor Wintemute rightly points out that the burden of proving the inability of gays and lesbians to parent should fall on the State imposing the restriction, "not on lesbian and gay individuals to produce methodologically ideal studies that 'prove absence of harm.'" [141] The court, in dismissing the government's arguments to the contrary, must have taken these developments—and perhaps the proper burden of proof—into consideration.

IV. WHAT NEXT?

While the legal and social changes in accepting gay and lesbian parenting may have factored into the ECHR's thinking, it is clear that *E.B. v. France* is a seminal case from the perspectives of gay and lesbian activists.[142] However, the decision seems out of step with the general European system of recognition of LGBT rights; the consequences may be both positive and negative.

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137. *Id.* ¶ 27.

138. *Id.* ¶ 30 (internal quotes omitted).

139. *Id.* ¶ 29. This announcement came after the *Fretté* judgment in 2002.

140. The problem articulated in *Fretté* was not just the absence of scientific evidence, but additionally concerns raised by skeptics as to the reliability of the studies themselves. The state agencies' approval of such studies was deeply important because it improved the visibility—and credibility—of such research in Europe.

141. *Id.* ¶ 31.

142. *See, e.g.*, Human Rights Watch, Europe: Gay Adoption Ruling Advances Family Equality (Jan. 24, 2008), http://hrw.org/english/docs/2008/01/23/france17856.htm.

A. The European Legislative Model for Recognition of LGBT Rights

The European mode of granting civil rights to gays and lesbians is unique. Noted scholar Kees Waaldijk posits that legal recognition of LGBT people and families in Europe begins with "symbolic preparation" followed by "steady progress" taking the form of "small change" in a "standard sequence."[143] This process, Waaldijk argues, is "governed by a 'law of symbolic preparation'"—that is, for the process to start at all, a State must first pass "some symbolic legislation reducing the condemnation of homosexuality (e.g. by advancing its acceptance)."[144] Any further steps toward equality are tempered by what he calls the "law of small change."[145] This concept recognizes that "legislative change on homosexuality is seldom big; . . . [legislation] only gets enacted if it is perceived as a small change to the law."[146] Finally, he observes that such legislation occurs in the following order: decriminalization of homosexual sex, creating an equal age of consent, antidiscrimination legislation, relationship recognition, and, lastly, parenting.[147] The system, he observes, has been effective and most Member States to the Convention have moved fairly significantly through the sequence, stalling only at the relationship recognition or parenting stages.[148]

B. The Current State of LGBT Relationship Recognition and Access to Parenting

Waaldijk's model appears to correctly chart the legislative development of LGBT civil rights in Europe. This process of legislative acceptance of LGBT people began in Europe as early as 1787, when Austria became the first European nation "to repeal its death penalty for

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143. Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 635 (Robert Wintemute & Mads Andenaes eds., 2001).

144. *Id.* at 638 (citations omitted).

145. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 637.

148. *See* ROBERT WINTEMUTE, INT'L LESBIAN AND GAY ASS'N—EUR., SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION: THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE § I (2006), http://www.ilga-europe.org/europe/litigation_in_the_european_courts/sexual_orientation_and_gender_identity_discrimination_the_case_law_of_the_european_court_of_human_rights_and_the_european_court_of_justice.

some forms of consensual same-sex sexual activity."[149] All of the first fifteen member states of the Council of Europe and Russia followed suit.[150] They have all also equalized their ages of consent for heterosexual and homosexual sex.[151] Except for Russia, each State went on to enact legislation prohibiting discrimination in the employment context.[152]

With respect to relationship recognition, European Legislation is all over the map. Of the forty-seven Member States of the Council of Europe, four States allow marriage, twelve have some system of registered domestic partnerships, two recognize registered co-habitation, nine allow for unregistered co-habitation, and twenty-six provide no legal recognition for gay and lesbian relationships at all.[153] There are bills in progress to recognize some legal status in two of the States that currently provide no protections (Ireland and Lichtenstein), and a marriage law is soon to be proposed in one registered domestic-partnership State (Sweden).[154] There is clearly a huge range of approaches in the legislative step of LGBT relationship-recognition in Europe.

With respect to gay parenting, the national laws are even more varied. In the States with some form of legal recognition of LGBT relationships, there are major disparities on the acceptance of gay child-rearing.[155] Four nations do not provide for any adoptive or reproductive rights.[156] The Czech Republic and France do not allow for lesbian or gay second-parent adoptions.[157] Finland, Germany and Iceland allow a couple

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149. *Id.*

150. The first fifteen Council of Europe States include: Spain, Belgium, the Netherlands, Sweden, the United Kingdom, Denmark, Finland, Germany, France, Luxembourg, Portugal, Ireland, Italy, Austria, and Greece. *Id.*

151. Wintemute, *supra* note 148.

152. *Id.*

153. Int'l Lesbian and Gay Ass'n—Eur., Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country, http://www.ilga-europe.org/europe/issues/marriage_and_partnership/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Dec. 30, 2008). Those countries providing marriage are Belgium, the Netherlands and Spain. *Id.* Norway recently passed a gender-neutral marriage law that took effect January 1, 2009. *Id.* The states with a registered domestic partnership system are the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Sweden, Switzerland, and the United Kingdom. *Id.* The registered cohabitation states are Italy (on a regional level only) and Andova. *Id.* The states recognizing only unregistered cohabitation rights are Austria, Portugal, and Croatia. *Id.* Finally, the states providing no legal status are Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Greece, Ireland, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Monaco, Poland, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, the Former Yugoslav Republic of Macedonia, Turkey, and the Ukraine. *Id.*

154. *See id.*

155. *See id.*

156. *Id.* (including Austria, Croatia, Italy, and Slovenia).

157. *Id.*

to have joint custody over a child.[158] In two States, second-parent adoptions are permissible, including in Denmark (only when the child is biologically related to one partner) and Germany.[159] Nine States specifically prohibit joint adoption, including the Czech Republic, Denmark, Finland, France, Germany, Hungary, Luxembourg, Poland, and Switzerland.[160] Only six States expressly permit joint adoption by LGBT people: Iceland, Sweden, the United Kingdom, and those that provide for full marriage—Belgium, the Netherlands, Spain, and Norway.[161] With respect to reproductive technology that would allow lesbian couples to bear a child, two States, Hungary and Switzerland, specifically prohibit lesbian women from accessing fertility treatments, while three States—Iceland, Sweden and Norway—expressly allow access.[162]

C. The Court's Move: Outside the Box

There is a problem applying Waaldijk's framework of analysis for the development of LGBT rights to the jurisprudence of the ECHR because "[a]ll of the changes charted by Professor Waaldijk occurred in the legislatures, guided by large-scale policy and political considerations."[163] Even so, while the ECHR at first blush appears to be following Waaldijk's observed path of LGBT rights in Europe, by ruling first in favor of decriminalization of same-sex sexual relations, which served as the "symbolic preparation" necessary to start the process of a series of holdings causing "small changes" in the law, its decision to take up lesbian and gay adoption before relationship recognition clearly breaks from Waaldijk's "standard sequence." After the ECHR's holding in *E.B. v. France*, the European LGBT rights landscape closely resembles its American counterpart in that legislative policy and judicial decision-making are sometimes moving in different directions.[164]

The analogy to U.S. jurisprudence vis-a-vis lawmaking brings to light the fear that there will be a legislative backlash in the Council of Europe Member States, as there has often been in state legislatures in the

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*; Int'l Lesbian and Gay Ass'n—Eur., ILGA-Europe Campaigns for Equal Parenting Rights to Same-Sex Partners, http://www.ilga-europe.org/Europe/Issues/Parenting (last visited Jan. 2, 2009).

162. *Id.*

163. Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 714 (2000).

164. *Id.*

United States when the courts have moved ahead of the legislative process.[165] This could manifest in a variety of ways. For example, some of the many European states that either do not yet allow for single-parent adoption or second-parent adoption may choose not to liberalize those laws. Additionally, *E.B. v. France* may require States that provide some form of registered partnership to gays and lesbians to permit those couples to adopt if married couples enjoy that right. If this is the case, those States that have not yet provided for relationship recognition may refrain from doing so. However, in the nine months since the ECHR's *E.B. v. France* decision, there is no indication that such a backlash is underway.

It is likely that *E.B. v. France* will have a positive effect for gays and lesbians seeking to adopt in Europe. Many States currently discriminate specifically on the basis of sexual orientation in the adoption process. For example, the 2002 Finnish Act of Registered Partnerships provides: "The provisions of the Adoption Act . . . on the right of a spouse to adopt do not apply in a registered partnership."[166] Finland, as a nation that has both signed and ratified Protocol 12, cannot grant a right to some of its citizens and preclude others from sharing that right on a discriminatory basis.[167] With or without the holding of *E.B. v. France*, the ECHR would likely find such discrimination impermissible because of Protocol 12's applicability. Thus, *E.B. v. France* will have its greatest effect on States, like France, that have not ratified Protocol 12 but maintain discriminatory adoption laws. At present, those States include the Czech Republic, Denmark, France, Germany, Hungary, Poland, and Switzerland.[168] These States must either change their laws regarding LGBT adoption and (potentially) access to assisted reproductive technology, or face challenges by their citizens in the ECHR that will likely be successful. Furthermore, the Council of Europe States that are

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165. The experience within the United States on this topic is instructive. For example, when the Supreme Court of Hawai'i ruled that gay marriages were constitutionally required, the legislature responded by amending the State Constitution to prohibit such unions. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that legislation prohibiting gay marriage was unconstitutional under the Hawai'i state constitution's equal protection clause); Baehr v. Miike, 1999 Haw. LEXIS 391 (Haw. 1999) (holding that in light of an amendment to Hawai'i's constitution investing in the legislature the power to reserve marriage to opposite-sex couples, which took the anti-gay-marriage legislation outside the ambit of Hawai'i's equal protection clause, legislation prohibiting gay marriage was constitutional).

166. Act on Registered Partnerships ch. 3, § 9(2) (2001) (Finland), http://www.ilga-europe.org/europe/issues/marriage_and_partnership/marriage_and_partnership_rights_for_same_sex_partners_country_by_country/finland_registered_partnership_english.

167. *See* Protocol No. 12, *supra* note 120, art. 1.

168. *Id.*

silent on the issue must be careful not to apply their adoption laws in a discriminatory way.

V. CONCLUSION

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