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**The Evolution of the
American Family**



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Section of
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Introduction

The American Family A Work in Progress

By Richard J. Podell

There is no single definition of “family” in any dictionary or encyclopedia. Further, the understanding of the history of the family is distorted by myths, misconceptions, and generalizations. For example, many people believe that a century ago times were simpler and the family unit was more stable and secure. The reality was quite different. The American family has been evolving since colonial times.

Colonial families were productive units that performed a wide range of functions, from teaching basic literacy, religion, and occupational skills to caring for their elderly and sick. Colonial families experienced high mortality rates. Many women and children died. Men remarried. Thus, families consisted of step-relatives, many children (to counteract high mortality rates), and the elderly.

In the early nineteenth century, a new pattern of marriage arose based on companionship and affection. Previously, marriage had been primarily an economic affair. The husband/father was the breadwinner. The role of the wife was to care full time for the children and to maintain the home. Children were viewed as needing attention, love, and time to mature.

During the Great Depression, families coped by returning to a cooperative family economy. Many children worked. Many wives supplemented the family income by taking in sewing, or laundry, or even lodgers. Many husbands deserted their families.

World War II similarly created a severe strain on the family. Husbands and wives were separated for prolonged periods. Many women were forced to

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From the Chair . . .

As my first official duty as chair of the Section of Individual Rights and Responsibilities (IRR), I wish to thank Neal Sonnett for his wonderful job as chair this past year. Not only did Neal bring outstanding leadership to the chair’s position, but his insights and understanding of the various issues that we deal with is truly remarkable. Neal is a great leader within the ABA, chairing both the IRR and Criminal Justice Sections during his brilliant career.

Additionally, we have the best staff in the ABA. Our Section flourishes with Tanya Terrell as Section director, along with Patrice McFarlane, Michael Pates, Sarah Turberville, and Jamie Campbell. These people do not receive enough credit for the work they do.

When I became chair-elect of the Section, Tanya told me that I needed to have a theme for my year. I told her that I would like the theme for my year to be one word: “eracism.” What I mean by eracism is the commitment to nullify the effect of and actively oppose prejudice and discrimination. We cannot stand by quietly when prejudice and discrimination manifest themselves. I wish to continue the great work of the Section in being the true conscience of the ABA and to continue the good battle against discrimination and prejudice, whether it applies to race, religion, sex, gender identity, disability, or anything else.

One of my goals is to work with other entities of the ABA that address similar areas of concern. We need to coordinate our efforts with other sections, divisions, committees, and commissions of the ABA.

Two thousand nine has been a year of change, hope, and anticipation. I am looking forward to the coming year.

Richard J. Podell

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The Evolution of the American Family

By Courtney G. Joslin

Justice Sandra Day O'Connor wrote in *Troxel v. Granville*, 530 U.S. 57 (2000), that “[t]he demographic changes of the past century make it difficult to speak of an average American family.” *Id.* at 63. If this is an accurate statement about the current state of affairs, was it once possible to speak of an average American family? If so, why and how has the family changed over time?

The Early American Family

At our nation’s founding, with the exception of blacks who were legally prohibited from marrying in most of the South, a family consisting of a husband, a wife, and their biological children was the dominant family structure. The vast majority of people who legally could marry did so, and most stayed married until the death of their spouse. Divorce was extremely rare. As Professor Lawrence M. Friedman describes in *A History of American Law*, divorce was available in the South only through a special act of a state legislature. While some northern states shifted more quickly to a system that permitted judges to grant divorces, in all states divorce was only available on fault-based grounds and could only be granted to the innocent spouse.

This dominant family structure played a crucial role in the creation and replication of the social and cultural roles for men and women. Marriage was limited to heterosexual couples, and men and women took on very different roles. Wives lost their legal identity upon marriage. As William Blackstone wrote in his *Commentaries on the Law of England*, at common law, “[b]y marriage the husband and wife [we]re one person in law: that is, the very being or legal existence of the woman [wa]s suspended

during the marriage, or at least [wa]s incorporated and consolidated into that of the husband.” The wife’s “condition” during marriage was referred to as coverture. Under the doctrine of coverture, married women could not own property, could not enter into contracts, and could neither sue nor be sued in their own names. Wives had a duty to serve and be obedient to their husbands. The legal role of women in marriage reinforced the notion that women generally were dependent upon and subordinate to men and that their appropriate roles were as caretakers in the private sphere of the home.

By contrast, husbands were the managers of and the providers for the family. “The corollary of the wife’s obedience was the husband’s authority.” HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 150 (2002). The husband—the only party in the union who maintained control over the earnings (of either party)—had a duty to provide his wife with the necessities of life. In “exchange,” the husband had a right to his wife’s “services,” including the right to engage in sex with her, whether she consented or not. At common law, the concept of marital rape was a legal impossibility. As the Louisiana Supreme Court explained: “The husband of a woman cannot himself be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract.” *State v. Haines*, 25 So. 372, 372 (La. 1899). Similarly, because the husband was responsible for his wife’s behavior toward others, he had



Associated Press, AP

According to a 2008 NCHS report, in 2005 69.3 percent of children born to black women were nonmarital.

a right to subject his wife to “chastisement” for disobedience as long as he did not inflict permanent injuries. If another man “alienated” his wife’s affections, the husband could sue that man in tort. The theory was that the other man had trespassed on or taken his property. These rules, roles, rights, and obligations during marriage were largely fixed and rigid. Generally speaking, courts refused to enforce agreements that altered the responsibilities during marriage.

Family law also regulated the boundaries between the races. Before the Civil War, throughout most of the South, blacks were not permitted to marry. Slaves lacked the legal capacity to consent. Moreover, slaves had no right to control their households—where they lived, or with whom they lived. Female slaves belonged to their white masters, not to their husbands. Even when slaves formed family units, white masters could sell and thus separate any member of the family. Thus, marriage laws served to reinforce the distinction between the races by reaffirming the premise that slaves had no rights. Even after emancipation, many states retained, and some even strengthened, their miscegenation laws, which prohibited

marriage between blacks and whites. In other words, even after blacks throughout the country gained the right to marry, marriage laws continued to reinforce the distinction between and separation of the races.

The law also channeled people into marriage by other means. Until the mid-twentieth century, marriage was the only place in which one could legally have sex. State laws generally criminalized sex outside of marriage (fornication), living together outside marriage (cohabitation), and having children outside of marriage (bastardy). Moreover, children born outside of marriage were subjected to harsh legal disabilities. At common law, a nonmarital child was considered *filius nullius*—the child of no one. Neither parent had an obligation to support a nonmarital child, and the child had no right to inherit through either parent. The mother of a nonmarital child generally was required to support the child, but the “majority of the courts. . . held that without legislation on the subject, the father of a [nonmarital] child [could] not be required to provide for its support.” *G. v. F.O.P.*, 466 S.W.2d 41, 41–42 (Tex. Civ. App. 1971), *rev’d*, *Gomez v. Perez*, 409 U.S. 535 (1973). Similarly, while most states permitted a nonmarital child to inherit through his or her mother, they did not permit the child to inherit through his or her father unless the child had been “legitimated.” Some states prohibited intestate inheritance through nonmarital fathers in all situations.

The law also affirmatively channeled people into marriage through the doctrine of common-law marriage, which most states recognized by the end of the nineteenth century. Under this doctrine, even relationships that did not comply with the institution’s formal requirements were treated as legal marriages if they looked sufficiently like a marriage.

Gradual Changes to the Marital Relationship

The nineteenth century brought about a number of important developments. Starting in the first half of the century,

states gradually began to extend more rights to married women through the Married Women’s Property Acts.

Early versions of these acts enabled women to inherit property free of their husbands’ debts and to maintain ownership and control over their separate estates. States were slower, however, to protect married women’s rights to ownership and control over their own wages earned in the labor market.

NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 168 (2002). By the early twentieth century, almost all states permitted a married woman to own property, to sue and be sued, to enter into contracts, and to control the disposition of her property upon her death.

Despite the formal expansion of the rights of married women, many vestiges of coverture persisted. For example, even well into the twentieth century, it was generally understood that a woman’s household labor belonged to her husband. *Id.*; see also Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 *YALE L.J.* 1073 (1994). Married women’s domicile continued to be defined by their husband’s domicile, and even today most women take their husband’s surnames. In addition, despite the formal elimination of the husband’s right to chastise his wife, until the latter half of the twentieth century husbands rarely faced legal repercussions for such conduct, and marital rape largely remained unpunishable. Even today, many states treat rape by a spouse differently than rape by a stranger, imposing more stringent procedural requirements and/or treating it as a less serious offense.

An Increasing Diversity in Family Structure

While the nineteenth century brought about some changes in the rights and obligations within a marriage, a family consisting of two adults in their first marriage and their biological children continued to be the overwhelmingly dominant

family structure well into the twentieth century. Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567 (2007).

This began to change in the 1960s, when the rate of cohabiting couples began to increase dramatically. In 1960, fewer than half a million different-sex couples cohabited. According to the U.S. Census Bureau, this number increased almost 1,000 percent to 4.9 million by 2000. Also changing dramatically was the number of households headed by an unmarried person. According to the 2005 American Community Survey, 50.3 percent—a majority—were headed by an unmarried person.

Several forces contributed to these trends. Starting with *Griswold v. Connecticut*, 381 U.S. 479 (1965), striking down a Connecticut statute criminalizing the use of contraceptives by married couples, the Supreme Court extended constitutional protections for various forms of reproductive freedoms. These decisions also led to the repeal and overturning of statutes criminalizing sex outside of marriage. Coinciding with these legal developments were medical advances related to contraception, including the advent of the birth control pill, which became available in 1960. The right to engage in sex outside of marriage and women’s ability to have greater control over contraception and reproduction made nonmarital relationships more attractive.

As the number of cohabiting couples increased, so did the number of children born outside of marriage. In 1960, about 5 percent of children were born to unmarried mothers. According to the National Center for Health Statistics (NCHS), by 2007 39.7 percent of all children were born to unmarried women.

While cohabitation rates have increased across all demographic groups, they have been greatest for African Americans, Latinos, and lower income people of all races and ethnicities. Likewise, the percentage of children born outside of marriage is higher for children of certain races. According to a

2008 NCHS report, in 2005 69.3 percent of children born to black women were nonmarital and 48 percent of children born to Latina women were nonmarital. These single parent families tend to be poor. "Among individuals in families with an unmarried head and children present (five-sixths of whom are female unmarried heads), the poverty rate [is] 40.3 percent." Hilary Hoynes et al., *Poverty in America: Trends and Explanations*, 20 J. ECON. PERSP. 47, 49 (2006).

As the number of nonmarital children grew, the Supreme Court gradually chipped away at many of the legal disabilities that historically were imposed on these children in cases such as *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). Following the Court's lead, state legislatures began revising their statutes to extend protections to nonmarital children. All fifty states now extend the rights and responsibilities of parenthood on both the mothers and fathers of nonmarital children, and nonmarital children are entitled to inherit through both of their parents. Despite these advancements, nonmarital children continue to be treated differently from marital children. For example, it continues to be more difficult for nonmarital children to claim U.S. citizenship through their fathers. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

Another development that fueled the rise of cohabiting couples was the increase in divorce rates. Save the decade or two after World War II, divorce rates increased through much of the twentieth century. This large and growing class of divorced persons was more likely to cohabit prior to or in lieu of marrying again.

What divorce meant and how it was obtained also changed. During most of our history, divorces were granted only upon a showing of fault by an innocent spouse. In 1969, California became the first state to adopt "no fault" divorce, permitting parties to end their marriage simply upon a showing of "irreconcilable

differences." Within sixteen years, every other state had followed California's lead to some degree. While this shift did not have a dramatic impact on divorce rates, it did impact social and cultural understandings of marriage and divorce.

Progress with Same-Sex and Unmarried Couples

The end of the twentieth century also brought about dramatic developments related to lesbian and gay families. Starting in the 1980s, some private and public entities began to extend affirmative rights to same-sex couples. For example, in 1982 the *Village Voice* became the first employer to extend domestic partner health insurance benefits to the same-sex partners of its employees. Gradually some municipalities followed suit. In 1997, Hawaii became the first state to establish a statewide alternative legal status for same-sex couples when it passed its reciprocal beneficiary statute. In 2000, Vermont broke ground when it established civil unions. Couples in a civil union are extended all of the state-conferred rights and responsibilities of marriage; however, civil union spouses continue to be denied all of the 1,138 federal rights and responsibilities of marriage. Letter from Dayna K. Shah, Associate General Counsel, Government Accounting Office, to Senator Bill Frist, GAO-04-353R (Jan. 24, 2004), www.gao.gov/new.items/d04353r.pdf. (And, in fact, as a result of the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, same-sex couples who are validly married in their home states also are denied all of these 1,138 federal rights and responsibilities.)

Further, in *Lawrence v. Texas*, 539 U.S. 538 (2003), the Supreme Court struck down the remaining statutes prohibiting sodomy, including sodomy between same-sex couples. With the decline of barriers to lesbian and gay unions and the corresponding increase in legal protections, the number of lesbian and gay people living openly and forming families has expanded. Using data from the 2000

U.S. Census, the Williams Institute found that lesbian and gay couples lived in all fifty states and that 20 percent of them are raising children.

In addition to the more comprehensive alternative statuses noted above, other jurisdictions provide more limited protections to unmarried couples. Some states extend these protections to same-sex and different-sex unmarried couples. For example, Colorado recently passed a law that extends to registered couples a number of important rights, including property rights; the right to be a beneficiary under public employee retirement, pension, and health insurance plans; hospital visitation rights; and the right to sue for wrongful death.

Over time, the common law also has extended greater protections to same-sex and different-sex couples that are neither married nor in one of the formal alternative statuses referenced above. As Professor Ann Laquer Estin explained in her article *Ordinary Cohabitation*, courts in most states enforce contracts and/or recognize various equitable claims between unmarried cohabitants with regard to property interests. That said, for most legal purposes, these relationships are not treated like marriages under the common law. Generally speaking, in the absence of an agreement or a formal alternative legal status such as a civil union, unmarried cohabitants do not take on or acquire obligations to support each other or to share in their partner's earnings. There also has been very little movement toward extending tort claims to nonmarital partners.

Further Evolution of the Marital Family

Not only are many more people now living in family structures other than marriage, but there is also increasing diversity in what marital families look like. While the overall numbers remain relatively small, since the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), ren-

dered unconstitutional all remaining antimiscegenation statutes, the percentage of Americans who are in interracial relationships has continued to increase steadily. Sociologist Michael Rosenfeld has reported that while fewer than 2 percent of married couples were interracial in 1970, that number had increased to 7 percent by 2005.

With regard to sex, today, other than the gender requirements for entrance that still exist in most (but not all) states, states have repealed or struck down all or almost all other laws that distinguish between men's and women's roles and legal rights and responsibilities in marriage.

Recent decades also have brought about advancements with respect to the legal remedies for domestic violence between spouses. Although the notion that husbands had the right to chastise their wives had long been discredited, it was not until the 1980s that the legal establishment began to provide meaningful remedies for wives victimized by domestic violence. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WILLIAM & MARY L. REV. 1841, 1851–53 (2006). Before that time, courts tended to be reluctant to pierce the veil of “marital privacy” in most domestic violence cases. Moreover, today all states have revised and limited (at least to some degree) their statutes previously exempting marital rape. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

The formal legal breakdown of gender roles and greater flexibility in the structure and understanding of marriage has been reflected and reinforced by social and cultural changes with respect to the roles of men and women in the family. Historically, husbands were the financial providers for the family. The twentieth century has seen a dramatic surge in the participation of women, including wives, in the paid work force. According to the U.S. Department of Labor, in 1950 about one-third of women participated in the paid

labor force. By 1998, this number had increased to approximately 60 percent. As a result of this increase, by 2008 the Department of Labor reported that women made up almost 50 percent of the total paid labor force. Thus, only a small minority—fewer than 25 percent—of couples today reflect the traditional image of the one wage earner family. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 21 (2007). Since the 1970s, courts have been increasingly likely

There is increasing diversity in what marital families look like.

to enforce contractual arrangements between spouses, allowing them to further alter their respective rights and responsibilities in marriage.

The gendered roles in marriage have not, however, disappeared altogether. Despite the fact that more women are contributing financially to the household, women and wives generally continue to perform the vast majority of household and caretaking responsibilities in the home. As Arlie Hochschild and Ann Machung reported in *The Second Shift*, “[e]ven when couples share more equitably in the work at home, women do two-thirds of the daily jobs at home, like cooking and cleaning up.”

The partial but still incomplete process of breaking down gender distinctions in marriage is reflected and reinforced by the fact that, as of June 2009, six states permit or soon will permit same-sex couples to marry. Massachusetts led the way in 2004, following the state's high court decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). And in 2009 Vermont became the first state to extend marriage to same-sex couples legislatively. At the

same time, however, many states have been moving in the opposite direction. Currently, forty-two states have statutory or constitutional provisions limiting marriage to the union of one man and one woman. Some of these states refuse to extend any “marital rights” to nonmarital couples. See, e.g., *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

More Ways to Bring Children into Families

In addition to greater diversity in the legal and living arrangements of the adults in families, the way that children are brought into families has become more varied. A small but significant number of children are brought into the family through adoption. According to the U.S. Census, in 2000 2.5 percent of children were adopted. Adoption did not exist at common law. The first comprehensive adoption statute was not passed until 1851 in Massachusetts. Since that time, the types of adoptions available to prospective parents have increased. Today, in addition to agency adoptions, most states permit independent or direct placement adoptions. Agency adoptions generally involve the placement of children who have been removed from their homes or where the parent or parents have already voluntarily relinquished their rights to the child. In a direct placement adoption, the birth parents directly interact with and choose the prospective adoptive parents, with or without the assistance of an intermediary. Since World War II, increasing numbers of American families are adopting children born abroad through intercountry or international adoptions.

More families—marital and nonmarital—are creating families through various forms of assisted reproductive technologies. Although the simplest form of assisted reproduction—alternative or artificial insemination—has been available since the late eighteenth century, it did not become commonly used

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The Federalization of Family Law

By Linda D. Elrod

Historically, family law has been a matter of state law. State legislatures define what constitutes a family and enact the laws that regulate marriage, parentage, adoption, child welfare, divorce, family support obligations, and property rights. State courts generally decide family law cases. But since the 1930s, Congress has enacted numerous federal statutes to address serious problems regarding family law matters that states have been either unwilling or unable to resolve, especially when the welfare of children is involved. Today, congressional legislation, decisions of the U.S. Supreme Court, and the participation of the United States in more international treaties have “federalized” more and more areas of family law traditionally left to the states.

A multitude of federal laws now regulate and impact families; some specifically confer jurisdiction on federal courts. As a result, federal courts now hear a growing number of family law cases, especially those that involve complex interjurisdictional or full faith and credit issues. The Supreme Court has contributed to this federalization by “constitutionalizing” family law. It has repeatedly used the U.S. Constitution, in particular the Fourteenth Amendment, to extend constitutional privacy protections to increasing numbers of persons and to invalidate state laws in areas of law previously thought to be the exclusive province of state legislatures.

Internationalization of the law likewise contributes to federalization. As people and goods move freely across country borders, so do their family law issues and problems. The U.S. State Department now actively participates in the drafting of international treaties, working with the



In recognition of Child Abuse Prevention Month, a worker for Texas Court Appointed Special Advocates arranges cutouts of children for a Stand Up for Abused and Neglected Children rally.

Hague Conference on Private International Law and the United Nations (UN) to address family law issues on a global scale. The United States has ratified and implemented many international law conventions. The Supreme Court has noted the judicial opinions of the European Court of Human Rights in cases involving privacy rights of same-sex partners and the juvenile death penalty.

Congressional Action since the 1930s

For almost two hundred years, the fifty states regulated family law because the federal government did not. The Tenth Amendment left states with “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it.” Beginning with the New Deal legislation of the 1930s, Congress has used its powers under the Commerce Clause, the Full Faith and Credit Clause, and the spending power to set policy. A brief look at the areas of child support and child protection illustrate how Congress has set the national social welfare agenda by passing laws, allocating money for programs, and requiring states to comply with federal regulations to receive funding.

Child support establishment and enforcement. Title IV-A of the Social Security Act of 1935 included a provi-

sion for Aid to Families with Dependent Children (AFDC). AFDC was a partnership between the federal government and the states to provide a minimum support payment for children in single parent homes, if the states adopted plans approved by the then-U.S. Secretary of Health, Education and Welfare. AFDC quickly became welfare for single mothers with children whose fathers were absent from the home; in the majority of cases, there were no paternity or support orders. Rising numbers of children born out of wedlock and in poverty led to increasingly larger demands for welfare funds.

In an attempt to shift costs to parents, Congress enacted Title IV-D of the Social Security Act in 1974 and established the Office of Child Support Enforcement. Because of state reliance on federal monies to operate the AFDC system, this office could dictate standards for establishing and enforcing child support, including a requirement that each state set up its own “IV-D” agency. Ten years later, a unanimous Congress passed the Child Support Enforcement Amendments of 1984 that changed the federal government’s role from merely enforcing child support to encouraging states to establish *adequate* support orders. The 1984 amendments mandated that

Associated Press, AP

states offer child support services to all child support obligees, enact wage-withholding provisions to ensure payment of child support, and develop expedited procedures for establishing and enforcing child support orders. The legislation created a national panel to develop models for objective support guidelines that reflected the costs of rearing a child so that states could adopt advisory child support guidelines.

Within four years, Congress passed the Family Support Act of 1988 that required states to make the “advisory” guidelines presumptive and to develop expedited procedures for establishing paternity throughout a child’s minority. The act also created the U.S. Commission on Interstate Child Support. That commission recommended criminal sanctions for nonpayment of support. The Child Support Recovery Act of 1992 made it a federal crime to willfully fail to pay child support to a child in another state. Federal courts upheld that act against challenges, finding it to be a valid exercise of congressional power under the Commerce Clause in “pursuit of the general welfare.” To prevent modification of one state’s support order by another state, Congress enacted the Full Faith and Credit for Child Support Orders Act of 1994, which required states to enforce, and not modify, child support orders from other states.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) marked a new era in federal government involvement. It ended the AFDC program guarantee of cash subsistence benefits in favor of block grants to states, called Temporary Assistance to Needy Families. The PRWORA required that states enact tougher enforcement laws, create new registries for support orders and new hires, and streamline procedures for paternity establishment. Most significantly, Congress mandated that states enact the Uniform Interstate Family Support Act, which provided states with enforcement tools for out-of-state

enforcement orders. Until the PRWORA, states had been free to choose whether to enact a uniform law. Federal courts again rebuffed challenges to the federal mandates on the basis that Congress may condition federal funds upon a state’s enactment of laws or regulations as long as the condition is in pursuit of the public welfare—and collecting child support is for the general welfare.

In another move to protect children, Congress mandated that every custody order include a qualified medical child support order to ensure that children are covered under a parent’s health insurance policy. Individual states, however, still control the amount and duration of child support, with some states ending support at age eighteen and others allowing postmajority support. Some have suggested that a national child support guideline should provide all children with parents of comparable income the same level and duration of support.

Child welfare. The New Deal legislation also provided the roots for the federalization of child welfare. The 1935 Social Security Act that created AFDC also provided money to enable the federal Children’s Bureau to cooperate with state public welfare agencies in establishing, extending, and strengthening protections of and care for homeless, dependent, and neglected children. In the 1960s, Congress created the AFDC Foster Care Program to help states with the cost of placing children from poor families in government-supported foster care.

The Child Abuse Prevention and Treatment Act, enacted in 1974, authorized the use of federal funds to improve state responses to child neglect. CAPTA required states to have legal definitions of abuse and neglect covering children through their eighteenth birthday, to expand the types of mandatory reporters of child abuse, to provide a twenty-four-hour hotline to report child abuse and neglect, and to appoint guardians *ad litem* in abuse and

neglect cases. A National Center on Child Abuse and Neglect was set up to fund research and to shape nationwide child protective services. When it appeared that too many Native American children were being placed in foster care or adoptive placements outside the tribe, Congress enacted the Indian Child Welfare Act of 1978 (ICWA). ICWA requires notice to tribes, allows tribal intervention, and requires a higher standard for removal of Indian children to non-Indian placements.

Congress has enacted a host of other pieces of child welfare legislation, including:

- The Child Abuse Prevention and Treatment and Adoption Reform Opportunities Act of 1978,
- The Adoption Assistance and Child Welfare Act of 1980,
- The Abandoned Infants Assistance Act of 1988,
- The Victims of Child Abuse Act of 1990,
- The Family Preservation and Support Initiative,
- The Multiethnic Placement Act and the Interethnic Adoption Provision of the Small Business Job Protection Act of 1996,
- The Crimes Against Children and Sexually Violent Offender Registration Act and Megan’s Law,
- The Adoption and Safe Families Act of 1997,
- The 1999 Foster Care Independence Act,
- The PROTECT Act,
- The Child and Family Services Improvement Act of 2006,
- The Safe and Timely Interstate Placement of Foster Children Act of 2006, and
- The Adam Walsh Child Protection and Safety Act of 2006.

Child abduction. Relying on its powers under the Full Faith and Credit Clause of the Constitution, Congress enacted the Parental Kidnapping Prevention Act of 1980

(PKPA) to deter parental child abduction and to prevent interjurisdictional conflicts over the proper location for child custody decisions. Because two states could exercise child custody jurisdiction simultaneously under the then-applicable uniform law (the Uniform Child Custody Jurisdiction Act), the PKPA prioritized a “home state” basis (often called the six-month rule) for jurisdiction. Only if there is no home state could a court use another basis for jurisdiction. The PKPA also detailed the concept of continuing exclusive jurisdiction in which the decree state retains jurisdiction so long as one contestant remains there and the child maintains contacts. State courts need only give full faith and credit to custody orders made in accordance with the PKPA. Although the Supreme Court later held that the PKPA did not create a private right of action in federal courts, it led to the drafting of the Uniform Child Custody Jurisdiction and Enforcement Act, which uses the same jurisdictional language as the PKPA and will soon be the law in all fifty states.

Congress also addressed international abductions by enacting a federal criminal law for international parental kidnapping. In implementing the Hague Convention on the Civil Aspects of International Child Abduction, the International Child Abduction Remedies Act confers concurrent jurisdiction on federal and state courts for return of a child.

Congress has affected child welfare in numerous other ways: the child labor regulations of the Fair Labor Standards Act of 1938; the many laws on public schools and education, including the Education for All Handicapped Children Act of 1975; the English Language Acquisition Act; the Individuals with Disabilities Education Act; and the No Child Left Behind Act of 2001.

Miscellaneous. In addition to matters affecting a child’s welfare, Congress has legislated in the areas of abortion, childbirth, family planning, and domestic violence. The Violence

Against Women Act of 1994 made it a federal crime to cross a state line with intent to injure or harass an intimate partner and required interstate enforcement of protection orders. Reauthorizations in 2000 and 2005 continued funding and expanded coverage to assist more women.

By adding Title VII to the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex, Congress ended a century of protective labor legislation that had kept married women from the workplace. The

A multitude of federal laws now regulate and impact families.

Equal Pay Act of 1963, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the Pregnancy Discrimination Act of 1978 also helped end discriminatory practices. Federal laws help spouses who are divorcing by allowing continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act and by providing a framework for the division of pensions (qualified domestic relations orders) under the Retirement Equity Act of 1984, amending the Employment Retirement Income Security Act. Federal laws in the tax, immigration, bankruptcy, and military areas all affect families.

Probably the most controversial and direct foray into family law came in 1996, when Congress passed the Defense of Marriage Act (DOMA). Enacted in response to a Hawaii Supreme Court decision that placed Hawaii on the verge of permitting same-sex marriages, DOMA provides that federal law will only recognize a marriage between a man and a woman. DOMA expresses congressional intent to limit the applicability of the Full Faith and Credit Clause by providing that no state shall be required to recognize a same-sex marriage

from another state. There are currently a number of cases challenging the federal benefits provision of DOMA filed by married couples and by government agencies in states that now allow same-sex marriage.

The Constitutionalization of Family Law

Because family law has mainly been state law, state trial judges generally have broad discretion to interpret their own state statutes. There is no statutory bar to federal courts hearing these cases if they involve citizens of different states where the amount in controversy exceeds \$75,000. A nineteenth century judicially created “domestic relations exception,” however, allows federal courts to avoid judicial involvement in substantive domestic relations matters, such as divorce and its incidents. As late as 1992, the Supreme Court observed that the whole subject of the domestic relations belongs to the laws of the states.

That said, beginning with the Warren Court in the mid 1960s, Supreme Court decisions have affected nearly every area of family law, transforming what had been seen as ordinary state-regulated family issues—regulation of marriage, criminal laws on contraception, etc.—into constitutional issues of equality, privacy, and federalism. Over 100 Supreme Court cases have dealt with such issues as establishing and terminating parental status; child abuse and neglect; marriage; jurisdiction for divorce, alimony, division of property, child custody, and child support; family property rights such as homestead, pensions, and insurance proceeds; family living arrangements; child custody and visitation; and child rearing. The Supreme Court has set the framework for examining domicile, jurisdiction, and full faith and credit issues for recognizing sister state divorce decrees.

For example, in a series of cases, the Supreme Court established that the Due Process Clause of the Fourteenth Amendment protects a “private realm” of family life—the freedom of personal choice in matters of marriage

and procreation. The Court also has held that citizens have a fundamental right to marry that is rooted in liberty and privacy, and have a right to marital and individual privacy in contraception and procreation.

As early as the 1920s, the Supreme Court recognized the rights of parents to raise and educate their children as part of the liberty protected by substantive due process. Parental rights, however, are not absolute, as the state as *parens patriae* can act to protect children from harm. The state can terminate parental rights. To terminate parental rights, however, requires clear and convincing evidence, and parents must be provided with counsel if they cannot afford it.

The Supreme Court has also recognized and protected family relationships that were not dependent on marriage. Unwed fathers who establish a relationship with their child or who follow state-prescribed procedures for establishing parentage are entitled to protection of their parental rights, except in some limited instances. A grandmother living with two grandsons who were cousins was protected as a “family” from removal from public housing under a city zoning ordinance.

Children are “persons” under the Fourteenth Amendment entitled to equal protection in education, in laws that establish ages of majority for child support, and in custody disputes involving interracial parents. Children, including those born out of wedlock, are persons within the Bill of Rights entitled to benefits that are for children generally, such as child support, the right to sue for wrongful death, and depending on circumstances inheritance through intestate succession. Children have procreative rights as well as First Amendment rights (although these rights are somewhat more limited than those held by adults).

Children have both procedural and substantive due process rights when subjected to state action or school disciplinary proceedings. In delinquency proceedings, children

have the right to counsel and to confront witnesses. In addition, the Supreme Court has prohibited states from using the death penalty for crimes committed while a minor.

The Supreme Court has stricken regulations that discriminated on the basis of gender in child support, alimony, and in education, and has removed restrictions on marital testimonial privilege. The Supreme Court has also interpreted federal pension statutes and other laws.

This ongoing constitutionalization of family law is likely to continue because the Supreme Court appears willing to recognize new rights protected by substantive due process. In addition, the protection is not limited to traditional families. As families become even more diverse and problems more complex, the Supreme Court is likely to be the final voice.

The World’s Children

Child welfare issues have united the countries of the world. Family law has become internationalized through U.S. participation in international organizations such as the UN and the Hague Conference on Private International Law. Although the Hague Conference started working on problems facing international families at the end of the nineteenth century, the United States did not join until 1964. The problem of parental abduction of children across international borders brought the United States into the active drafting process for the Hague Convention on the Civil Aspects of International Child Abduction (1980). Over eighty countries, including the United States, have ratified or acceded to the abduction convention.

The increasing number of babies crossing international borders for adoptions in other countries, many in the United States, has raised concerns about “baby selling.” The United States participated in the drafting and ratified the Hague Convention on Inter-country Cooperation with Respect to International Adoption. Three other conventions await ratification:

the Hague conventions on the protection of children (1996), that on the protection of adults (1999), and that on the international recovery of child support (2007).

The United States signed, but has not ratified, the UN Convention on the Rights of the Child, although 192 other nations have. This convention recognizes the rights of a child for continuity of relationships, for a voice in judicial or administrative custody decisions if the child is mature enough, and for protection in the formation and preservation of their identity, including nationality, name, and family relations. The language of the UN convention recognizes that the child may have separate legal interests from his parents, such that the child might intervene as a party or have appointed counsel to advocate the child’s position in a divorce case. The United States also has not ratified the Convention on Elimination of All Forms of Discrimination Against Women, although many states have used some of its provisions.

In finding that the Eighth Amendment prohibited sentencing juveniles to death for crimes committed as juveniles, the Supreme Court looked at the UN Convention on the Rights of the Child as evidence of an international consensus against the juvenile death penalty. Increasing “globalization” will make international treaties and laws of even more importance.

Increasingly, family law issues transcend state boundaries. When issues involve protecting children, as in sheltering them from abuse and abduction and in ensuring that they receive adequate child support and health care, a national solution may be necessary. The village is now national, and rapidly becoming international.

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Interstate Recognition of LGBT Families

By Shannon Price Minter

Family law for lesbian, gay, bisexual, and transgender (LGBT) people is a confusing patchwork of conflicting state laws. Six states permit same-sex couples to marry. Eight states and the District of Columbia permit same-sex couples to register as partners in civil unions or domestic partnerships. In most states, however, same-sex couples are denied any official recognition. With regard to children, many states either automatically recognize both partners in a same-sex couple as legal parents of a child born to one of them or permit the couple to obtain a second-parent adoption. But in a number of states, there is no way for both partners to become legal parents to their children. Because state laws differ so significantly, a couple that is legally married in one state may be treated as legal strangers in another, with devastating legal consequences. Likewise, a same-sex parent who is presumed to be a legal parent in one state may be deemed to have no parental rights even in a neighboring state.

The Full Faith and Credit Clause of the U.S. Constitution provides some protection against these risks, but not in every situation. Under well-settled law, every state must honor valid court judgments from other states, even when those judgments conflict with a state's own public policies. Therefore, even if a state's own laws are extremely hostile to LGBT parents, that state must give full faith and credit to a judgment of adoption or parentage that was validly granted to a same-sex parent by the court of another state. For example, the Florida District Court of Appeal recently held that Florida must recognize an adoption granted to a lesbian mother in Washington even though the adoption would have been unlawful in Florida. Similarly, in 2008 the Tenth Circuit struck down an Okla-

lahoma law that purported to withhold recognition of same-sex parent adoptions from other states.

But while the law is clear that judgments of adoption or parentage must be honored in every state, it is less clear that the Full Faith and Credit Clause protects a same-sex parent who did

Because state laws differ so significantly, a couple that is legally married in one state may be treated as legal strangers in another.

not obtain a court judgment. For instance, the laws of several states now include a presumption that a child born to a same-sex couple through assisted reproduction is the legal child of both partners, without the need for an adoption. But if the family were to move or even travel to another state that does not provide similar recognition, that state might not recognize the parent-child relationship. That is because, while states must recognize the judgments of sister states, they are not necessarily required to give effect to the laws of other states. For both policy and constitutional reasons, states should honor existing parent-child relationships, but until those are fully tested, families are at risk if they do not take the extra step of obtaining an adoption or parentage judgment to ensure that their parental relationships will be respected anywhere in the United States.

Similarly, it is also unclear whether officially recognized relationships between same-sex couples—such as marriages, civil unions, or domestic

partnerships—will be honored by other states. The federal Defense of Marriage Act purports to establish that states are not required to give full faith and credit to the marriages of same-sex couples from other states, and historically, courts have held that the requirement of full faith and credit does not ordinarily mandate recognition of marriages that are contrary to the policy of the forum state. In practice, however, some jurisdictions that do not affirmatively allow same-sex couples to marry, including New York and Washington, D.C., recognize marriages of same-sex couples that were entered elsewhere. That policy follows the sensible and long-established rule of comity, which provides that marriages valid where entered ordinarily should be valid everywhere.

While the status or rights that a couple's home state provides may not always be portable if the family travels or moves to another state, there are steps that same-sex couples can take to ensure that their families receive maximum protection wherever they travel or live. Before traveling or moving, same-sex parents should seek legal advice to ascertain the best means to protect their families. Couples with children should obtain a parentage judgment or adoption to make sure that the child's legal relationship to both parents is protected. Each partner should execute a will and other documents, such as a health care proxy. These extra steps are burdensome and obtaining them may impose serious financial and practical hardships on some couples, but until full equality is achieved, they are necessary to ensure that LGBT families have at least some measure of protection.

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Advancing the Freedom to Marry in America

By Mary L. Bonauto
and Evan Wolfson

The year 2009 marks the fortieth anniversary of the Stonewall rebellion, the defining event celebrated as the beginning of the modern lesbian, gay, bisexual, and transgender (LGBT) rights movement. Those forty momentous years could be divided into two basic periods. The first constitutes the twenty “premarriage” years, from 1969 to 1989, when gay people were primarily fighting to be *left alone*—that is, not criminalized, not pathologized, and not attacked. This was followed by the nearly twenty years of struggle and progress framed by the family and freedom to marry efforts, including the Hawaii and Washington, D.C., marriage cases launched in 1990–91.

Of course, dividing the movement’s history into those two periods oversimplifies, even as to marriage. Gay people have been fighting for their families and challenging the exclusion from marriage since Stonewall. In fact, the first marriage cases brought by couples in three states were underway by 1971.

The significant difference between the first marriage cases and those that came later was that in the 1980s the HIV/AIDS epidemic shattered the silence about gay people’s lives. AIDS forced society to see LGBT people as human beings—partnered, grieving, and injured by discrimination—and prompted LGBT people to better understand their vulnerability and power. The LGBT movement began prioritizing the need to protect our families and children. It had become imperative to fight for the freedom to marry and the protections, security, and respect that LGBT people, like others, deserve and need.



In June 2008, Del Martin and Phyllis Lyon became the first officially married same-sex couple in California. Later that year, California’s Proposition 8 passed by a slim margin, changing the state constitution to strip away, for now, same-sex couples’ freedom to marry.

During the second period, the years shaped by the crucible of HIV/AIDS and framed by the freedom to marry, the LGBT justice movement expanded its focus, claiming not just the human right to be “left alone,” but also the right to be “let in.” For LGBT people, the history of civil rights is, in the words of Supreme Court Justice Ruth Bader Ginsburg, the “story of the extension of constitutional rights and protections to people once ignored or excluded.” *United States v. Virginia*, 116 S. Ct. 2264, 2287 (1996).

In the 1990s, same-sex couples in Hawaii, the District of Columbia, Alaska, and Vermont brought challenges to their exclusion from marriage and effectively launched an ongoing national—indeed, international—conversation about the reality and diversity of LGBT people’s lives and families, the meaning of equality in society and under the law, and why marriage itself matters. While the District of Columbia case fell short, the Hawaii and Alaska victories were stripped away by political assaults that changed

the constitutional rules for same-sex couples. The Vermont case did not at first lead to marriage but instead led to the nonmarriage marital status of “civil union.” These cases propelled an ongoing growth in public support, bringing acceptance of marriage equality to a near majority nationwide. They also furthered a willingness on the part of judges, elected officials, clergy and civic leaders, and ordinary Americans to ask what reason does the government have for denying same-sex couples doing the work of marriage day to day, and who have made a commitment in life, the equal commitment under the law that is marriage?

Freedom to marry victories came in the new millennium, as Canada’s courts and then its Parliament ended marriage discrimination just across the border. (This made Canada the fourth country to treat same-sex couples equally, after the Netherlands, Belgium, and Spain.) Then marriage equality came to our shores with the Gay & Lesbian Advocates & Defenders’ (GLAD) historic triumph in Massachusetts.

Building to 2009

In 2003, the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass 2003), that state constitutional guarantees of equality forbid the exclusion of same-sex couples from marriage. A few months later that court reaffirmed its decision in a follow-up opinion that *only* the freedom to marry—not separate mechanisms such as civil unions—satisfies the constitutional command. On May 17, 2004, the fiftieth anniversary of *Brown v. Board of Education*, Massachusetts began issuing marriage licenses to same-sex couples. As the majority of the state embraced marriage equality, the legislature in 2007 ratified the historic breakthrough in a three-quarters supermajority vote rejecting a proposed constitutional amendment that would have undone marriage equality.

The legal ruling in Massachusetts—and the lived experience of thousands of married same-sex couples and their loved ones and neighbors—helped refute the fears, questions, and attacks, and spurred more and more conversation and public support for the freedom to marry.

From 2004 to 2008, thanks to Massachusetts, Canada, and other countries such as South Africa, Americans saw that the sky did not fall when same-sex couples joined in marriage—and that gay people didn't even use up all the marriage licenses! Even the ferocious campaigns orchestrated by various antigay groups, some religious organizations, and political opportunists that foisted antigay constitutional amendments on more than half the states did not stop the national discussion about marriage and loving same-sex couples. Nor did they prevent new legislative and judicial victories for the freedom to marry.

More court cases followed Massachusetts. In 2006, the Washington and New York state high courts considered marriage equality, but in closely divided decisions neither was ready to affirm the freedom

to marry. Later that year, the New Jersey Supreme Court unanimously ordered equal responsibilities and protections for same-sex couples but fell short of ordering the direct remedy of equality in marriage. The state legislature promptly enacted a civil union law. In 2007, Maryland's high court handed same-sex couples a split decision loss.

These losses in court and at the ballot box mattered, threatening the few legal protections couples had in some states. But setbacks proved to be opportunities for more conversation, more organizing, more reflection by people of good will struggling to resolve their conflicted feelings of both discomfort with LGBT equality and marriage and the desire to be fair. Advocates in Oregon rebounded from the 2004 ballot loss, which wrote marriage discrimination into the state constitution, and secured passage of a broad “all but marriage” partnership law. Official government commissions and panels of experts in New Jersey and Vermont reported that the states' civil union laws were failing to protect families and ensure equal treatment, underscoring that separate regimes and mechanisms such as partnership and civil union are no substitute for the freedom to marry itself.

2008–09: Momentum

In May 2008, the California Supreme Court ruled in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), that excluding loving, committed couples from marriage harms them and their families and helps no one. Exclusion also violates the constitution's command of equality for all, said the highest court in our nation's biggest state, and lacks any real justification.

Just five months later, the Connecticut Supreme Court also ruled in favor of the freedom to marry in another case brought by GLAD. As in California, the court noted that civil unions are separate from and unequal to marriage. Couples began marrying in Connecticut in November 2008,

and the following spring the legislature voted to codify marriage equality and phase out civil union.

Even as most Americans, gay and nongay, celebrated the election of the nation's first African American president and the dawn of a new political era, Election Day 2008 also brought passage of California's Proposition 8 by a slim 52–48 percent margin. This changed the state constitution so as to strip away, for now, same-sex couples' freedom to marry. The significant shift in public opinion in just eight years—a 2000 ballot measure barring couples from marrying had passed by a margin of almost 60–40 percent—showed progress, but the loss was real and painful. Going into 2009, Prop 8 proved to be a wake-up call, energizing gay and nongay people across the country, many of whom repented of their complacency and inaction. The people organized, rallied, and pledged to be more engaged in the battles to win the freedom to marry in other states and in Congress, as well as to restore marriage in California in 2012.

As state legislative sessions opened in 2009, a record number of freedom to marry bills were filed in states from Washington to New Jersey. And refuting the pundits who had, after Prop 8, pronounced marriage unattainable or not worth the fight, on April 3 the Iowa Supreme Court handed down a unanimous decision bringing marriage equality to America's heartland. Days later, the Vermont legislature passed a marriage bill, overriding the governor's veto with a two-thirds majority in each chamber. The Vermont vote had particular significance because the first state to create civil union as an alternative to marriage itself resoundingly affirmed that civil union was not good enough. Years of work had made numerous states ready to affirm the freedom to marry through the legislative process, but Vermont was the first state to do so, and others were soon to follow. The momentous strides definitively established that the freedom to marry cause is

not just advancing on the coasts, not just moving in the courts, and certainly not just going away.

One month later, Maine's Governor John Baldacci signed into law a freedom to marry bill overwhelmingly approved by the state Senate and House. Upon signing the bill, Baldacci stated, "I have come to believe that this is a question of fairness and of equal protection under the law, and that a civil union is not equal to civil marriage." News Release, State of Maine, Office of the Governor (May 6, 2009).

Immediately following the law's passage, antigay forces started paying signature collectors to collect signatures in support of a November 2009 "people's veto" vote to overturn the marriage law. The strategy in Maine had always included preparation for this possible attack, and in early July the ProtectMaineEquality.org campaign to defend the freedom to marry for all Maine families was launched with a vow never again to have rights taken away at the ballot box. No more Prop 8's!

One month after Maine passed its marriage bill, New Hampshire became the sixth state to embrace the freedom to marry when Governor John Lynch signed into law a bill approved by both houses of the state legislature. The governor, who had been opposed to extending marriage to gay couples and had previously contended that civil union was adequate, said his evolution in support was due to the many conversations he had with people and hearing from gay and nongay constituents that New Hampshire should treat all committed couples equally.

Shortly thereafter, the District of Columbia also took a step in the right direction and passed a law saying that it will honor the marriages between same-sex couples conducted in other states. It joins New York, Rhode Island, and New Mexico, where court rulings and state attorney general opinions support the common-sense notion of respecting marriages rather than destabilizing

them. Congress declined to overturn the District law, an attempt to undo it by ballot measure failed, and Americans can now see with their own eyes married same-sex couples treated with respect in our nation's capital. Human rights advocates in the District may now move toward a bill that would end the denial of marriage there, making it easier for District residents to enjoy the freedom to marry.

Not lost in all the marriage momentum was striking progress in two more states still burdened with antigay constitutional amendments precluding the freedom to marry and other legal protections. Nevada and Wisconsin both enacted partnership laws. In Nevada, the law includes virtually all of the state-level responsibilities and rights that come with marriage, much like laws in Washington, Oregon, and California. It was enacted by the legislature, overriding a gubernatorial veto. Wisconsin's law provides forty-three of the more than 200 legal protections that marriage brings. Wisconsin Domestic Partnership Protections Reference Guide (rev. Sept. 1, 2009), www.fairwisconsin.org/downloads/DP_Reference_Guide.pdf.

Fourteen percent of the U.S. population now lives in states that either have the freedom to marry for gay couples or honors out-of-state marriages of gay couples—and we are just two-thirds through 2009! As of this writing, marriage bills seem likely to pass in New Jersey and New York this year, and both governors have pledged to sign them into law. New York's Assembly has already passed the bill—for the second time. The former Senate majority leader, a Republican who had single-handedly blocked the measure in 2007–08, recently declared: "Life is short, and we should all be afforded the

same opportunities and rights to enjoy it. I support the freedom to marry."

Elizabeth Benjamin, *Same-Sex Surprise: Joe Bruno, Former NY Senate Leader, Now Supports Gay Marriage*, N.Y. DAILY NEWS, June 14, 2009. He added his voice to the many others who have announced support for marriage equality, including Republicans such as George W. Bush's Solicitor General Ted Olson, party operative Roger Stone, and McCain campaign manager Steve Schmidt. Democrats such as former President Bill Clinton and U.S. Senators Chris Dodd and Chuck Schumer have likewise embraced the freedom to marry, as have the National Education Association and the U.S. Conference of Mayors in powerful resolutions this summer.

Religious leaders and communities, too, are key voices that have been and continue to be important allies in building support for marriage equality. Rev. Dr. Serene Jones, the president of New York City's renowned Union Theological Seminary, and Rev. Dr. Bradford Braxton, the senior pastor of Riverside Church and one of America's leading black preachers, recently wrote to fellow people of faith and the New York legislature supporting the freedom to marry. In July 2009, the Episcopal Church voted to authorize church celebration of marriage rites for same-sex couples, joining other denominations and clergy. More than 100 pastors and faith leaders recently voiced their support for marriage equality in Washington, D.C. Similar coalitions have spoken out in California, Maine, Vermont, New Hampshire, and across the country as the marriage conversation continues.

Americans are seeing people like Karen Schuster of Rochester, New York, standing up for her gay son,

For more information

- Freedom to Marry: www.freedomtomarry.org
- Gay & Lesbian Advocates & Defenders: www.glad.org
- ACLU: www.tell-three.org
- Current maps: www.freedomtomarry.org/get_informed/maps.php

whom she believes should have the same rights as her daughter Jessica. Or Gail and Mark Home, parents in Vermont, who talked about how their lesbian daughter should be able to marry the person she loves. Frances Nicholson and Cynthia Allar's daughter shared her desire for her moms to be able to marry in California. Philip Spooner, a WWII veteran and lifelong Republican, brought thousands to their feet when he testified in Maine that he did not fight in Europe to come home to a country where three of his sons were treated equally but his gay son was not. The movement has also launched public education campaigns, like Let CaliforniaRing.org and the ACLU's Tell-Three.org, which ask people to talk with three people in their lives about what it is like to be LGBT, or care about a LGBT person, and why they support the freedom to marry.

When the Hawaii case was decided in 1996, a Gallup poll showed that only 27 percent of the U.S. public supported ending marriage discrimination. Recent polls show nationwide support reaching the high 40 percents, a near majority of the country. In April 2009, ABC News/Washington Post showed 49 percent—a first-time-ever plurality—in support, while a December 2008 Harris Interactive poll showed 47 percent in support. There is majority support for marriage equality in several states and in several demographic groups, notably those under age 35, who support marriage equality by a powerful 63 percent (Harris Interactive, Dec. 2008). Similarly, opposition is declining across ideological groups (ABC News/Washington Post, Apr. 2009). As a result of this growing support and the continuing work of the freedom to marry movement, by July 2009 nearly 40 percent of the population lives in a state that provides at least some protections for same-sex couples.

After five years of experience with the freedom to marry in Massachusetts, public support has increased 10

percentage points. In the Lake Research Partners poll in April 2009, 74 percent of persons polled in Massachusetts stated that they think society is stronger as a result of same-sex couples marrying.

Next Steps

The dawn of a new political era, and Americans' willingness to move past the divisive attack politics of recent years and to take a fresh look at the denial of marriage to same-sex couples, opened opportunities to make progress at the federal level alongside advances in the states. Then candidate and now President Barack Obama repeatedly has pledged support for full repeal of the federal antimarriage law, the Defense of Marriage Act (DOMA), stampeded through Congress in 1996. As he marked the Stonewall anniversary, Obama again called on Congress to undo that discriminatory law. A bill to repeal DOMA and have the federal government return to treating all marriages equally under the law was introduced in September.

In a case brought by GLAD, same-sex couples married in Massachusetts filed suit seeking equal access to important federal protections in employee benefits, Social Security, and income taxation, for which they are eligible and for which they applied—but which were denied to them because of DOMA. GLAD argues there is no basis for the federal government to split the one class of marriages in Massachusetts into two, or to respect all state-licensed marriages except those of same-sex couples. Massachusetts Attorney General Martha Coakley subsequently brought the commonwealth's own federalism challenge to DOMA's restrictions on "marriage" and "spouse," noting that it has always been the states who decide if people are married, not the federal government. She also invoked the Spending Clause, contending that DOMA is a string attached to federal monies that forces the com-

monwealth to discriminate against some of its own citizens. Other lawsuits have been brought challenging Proposition 8 and California's targeted stripping away of the freedom to marry despite the state supreme court's findings that there is no good reason for excluding same-sex couples from marriage.

As summed up in Evan Wolfson's *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, the human rights struggle for marriage equality follows the pattern of every other social justice cause in America: it is a patchwork. Some states advance toward equality faster while others resist and even regress. Along with good lawyering and serious organizing, the key to winning is changing hearts and minds by engaging the public in conversations about who LGBT people are and how denying marriage harms same-sex couples and helps no one.

Looking past 2009, more states and federal progress shimmer within reach. If legislatures continue to vote to end marriage discrimination; if courts continue to strike down repugnant inequality and needless exclusion; if LGBT people and others continue to talk to their circles of friends, family, and fellow citizens about the reality of gay people's lives, the denial of the freedom to marry will soon come to an end. And as the history of America, and the history of marriage, remind us, soon thereafter people will have a hard time believing that others (including even themselves) ever believed that there was a reason to tell these loving, committed couples that they could not join, and share, in marriage.

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Miscegenation An American Leviathan

By Kevin Noble Maillard

The U.S. Supreme Court declared antimiscegenation laws unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). Richard Loving, a white man, and Mildred Jeter, an African American woman, had legally married in Washington, D.C., and were arrested shortly after their return to Virginia. Their marriage violated the Virginia Racial Integrity Act of 1924, a legislative enactment of eugenics. This governmental interest in selective breeding led the trial judge to declare “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . [H]e did not intend for them to mix.” *Id.* at 1. Overturning this ruling, the Court held that prohibitions on racial intermarriage violated both equal protection and due process.

Loving established a new context for racial possibilities in the United States. In addition to allowing marriage across the color line, *Loving* required states to give legal credence to the existence of interracial sex and romance. This decriminalization shifted the legal condition of miscegenation from illicit to legitimate, beginning with the status of mixed race offspring. Legal obstacles to interracial kinship became a thing of the past.

The number of interracial marriages has increased as a result of *Loving*. The U.S. Census reports a growth from 157,000 marriages in 1960 to 1,161,000 in 1992 to over 3,000,000 in 2000. According to a recent Gallup poll, white approval of interracial marriage has increased from 4 percent in 1958 to 75 percent in 2007. The U.S. Census began counting the multiracial population in 2000, with 2.4 percent of Americans reporting two or more races.

Interracial marriage walks a fine line between being explicitly legal and implicitly criminal. Even in the age of President Barack Obama, the son of an African father and a white

woman from Kansas, American patterns of interracialism have remained relatively static. Interracial marriages still account for fewer than 5 percent of all marriages, hardly a statistic suggesting a significant change in marital patterns. Of this percentage, whites are the least likely racial group to marry interracially, with a 96.5 percent rate of marrying within their race. Blacks follow closely behind, at 93 percent. Hispanics and Asians marry within the same racial group at a rate of approximately 70 percent, with American Indians collectively reversing that statistic by marrying interracially at 70 percent. RANDALL KENNEDY, *INTERRACIAL INTIMACIES* 120, 127 (2003).

The stigma of miscegenation still flourishes in the political realm. As recently as 1999, Senator Robert Bennett (R-UT) predicted that George W. Bush’s presidential nomination was secure unless “some black woman [came] forward with an illegitimate child.” In Tennessee’s U.S. Senate election in 2006, opponents of Congressman Harold Ford Jr., aired commercials that drew attention to his interracial dating history. Further, Alabama only removed the antimiscegenation provision from its state constitution in 2000, with 40 percent of voters wishing to maintain the moribund provision.

The ghost of antimiscegenation law remains a persistent force in Americans’ view of family formation and racial difference. However, focusing only on interracial *marriage* fails to account for other private relationships that are also racially mixed. Heralding *Loving* as the beginning of a multiracial nation mistakenly attributes all gains to a

single marriage case without recognizing the banality of interracialism—married or unmarried—that preceded it. If 1967 marks the inaugural year of interracial possibilities, it reinforces the legal authority of the antimiscegenation regime that preceded it. This would erase the history of intermixture that preexisted *Loving* while obscuring those states that never passed antimiscegenation laws. Not all states had such laws, but the sting of restriction in a substantial number of states contributed to a national impression of the illegitimacy of mixed race.

Just as race endures as a historical leviathan in American culture, few changes have occurred in the realm of sexual intimacy. Personal preferences for marital and nonmarital partners have not greatly changed since 1967. Even the most fervent advocates of colorblindness zealously maintain color consciousness while selecting their partners. Just as law in the past prevented people from marrying someone of another race, it simultaneously does not encourage it in the present. It does maintain, however, a collective belief in the anomalous nature of racially mixed families and people. *Loving* and similar laws that preceded it assume that interracial marriage begins from a clean slate. But as long as this legacy of separation persists, current deviations from the norm of racial purity will remain just that—deviant.

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For more information

- Loving Day: Celebrating the Anniversary of *Loving*: www.lovingday.org
- Mildred Loving’s Obituary: www.nytimes.com/2008/05/06/us/06loving.html
- The Alternatives to Marriage Project: www.unmarried.org

Forming Families by Law

Adoption in America Today

By Joan Heifetz Hollinger and Naomi Cahn

Adoptive families are created through the law, not by biology or blood. Although there is a long history in this country of some children being raised by adults other than their biological parents, legal recognition of these families was not generally available until states began enacting formal adoption laws in the mid-nineteenth century. Today, an adoption decree is only available from state courts—and in some instances Indian tribal courts—once they find that the necessary legal prerequisites have been satisfied and that the proposed adoption is in the best interests of the child. The decree confers the legal status of parent and child on people who are not each other's biogenetic parent or child. Except for adoptions by the spouses or non-marital partners of birth parents with whom they intend to coparent, the other major consequence of an adoption decree is that it severs the legal and economic relationship of the child to both biogenetic parents and provides that the child becomes "for all purposes" the child of the adoptive parents. The adoptive family replaces and becomes the permanent legal equivalent of the child's birth family, subject to the same rights, responsibilities, and constitutional protections as other legally recognized families. Once the state court decree is final, it is entitled under the U.S. Constitution's Full Faith and Credit Clause to be recognized as valid by every other state.

By legitimizing a parent-child relationship between biogenetic strangers, adoption strikes some skeptics as an imperfect legal fiction that defies common understandings of family as defined by blood and genes. From



Martin Gill of Miami, Florida, has taken care of his foster children, John and James, since 2004. His adoption case, which is now before an appellate court, presents a significant challenge to Florida's law against gays.

this perspective, adoption is less a story of the personal and societal benefits that follow from the creation of new families than of loss: the "natural" parents' loss of the opportunity to raise biological offspring, the adoptive parents' loss of the opportunity to have "natural" children, the child's loss of biogenetic kin, and the state's loss of its commitment to preserve "natural" families when it relieves itself of the burdens of caring for dependent children by shifting responsibility for their well-being to adoptive parents.

In fact, a substantial body of research testifies to the success of adoption. On a variety of outcome measures, adopted children do as well as children living with their biogenetic parents and significantly better than children whose parents are indifferent or abusive, or children who spend years in foster care, group homes, or other institutional settings. These outcomes are especially positive for children placed as infants but are also evident for older children and for those who are adopted into families with different racial, ethnic, or religious backgrounds. Although

adopted children with a legacy of pre- or postnatal maltreatment often have developmental delays or psychological difficulties, longitudinal research has found that by early adulthood these conditions are largely overcome.

Adoption Law and Practice

A complex, confusing, and conflicting system of laws and policies facilitates, but also significantly impedes, the formation of adoptive families. Since the 1950s, the basic consequences of adoption have become fairly standardized: the child is treated in all legal and economic respects as the child of the adoptive parents. By contrast, the laws pertaining to most other aspects of adoption are anything but uniform. Moreover, while still primarily the product of state laws, adoptive relationships, like other parent-child relationships, are increasingly affected by a multitude of federal laws and regulations, as well as by constitutional doctrines and international treaties.

The necessary prerequisites for a valid adoption are (1) parental consent or a constitutionally sound

Associated Press, AP

reason for dispensing with parental consent but requiring, instead, the acquiescence of the child's public or private custodian; (2) the consent of the child, if of sufficient age or maturity; (3) a determination that the prospective parents are eligible and suitable to adopt; (4) proof that any payments for adoption-related expenses were not intended to induce a birth parent's consent or relinquishment; and (5) a judicial finding that the adoption is in the child's best interests.

The criteria for satisfying these prerequisites differ substantially from one state to another. For example, parental consent, or proof that a parent has forfeited the right to block an adoption, has always been a necessary prerequisite to judicial consideration of an adoption petition. State common law and federal constitutional doctrines honoring family privacy and parental autonomy have incorporated cultural traditions and theories of natural law and delegated duties that endow biogenetic parents with superior rights to the possession and control of their offspring. Central to these doctrines is the presumption that biogenetic parents are fit to raise their children without interference by the state, which has no authority to separate children from their parents simply in order to seek a "better" placement.

Procedures governing the timing, content, formality, and revocability of consents vary greatly. State laws that define "unfitness" as a ground for an involuntary termination of parental rights also vary, as do the laws that determine the rights of unwed fathers to participate in an adoption proceeding. The U.S. Supreme Court has ruled that the mere existence of a biogenetic link to a child is not by itself sufficient to merit constitutional protection. Only unwed fathers who promptly grasp the unique "opportunity interest" arising from this connection and establish a genuine parental relationship have a right to consent to, or veto, a proposed adoption. Men who fail to take certain formal steps to

establish their parentage, for example, by signing a state registry, may even be denied a right to be notified of an adoption. Yet states differ on whether to require birth mothers to disclose the identity or whereabouts of alleged fathers or to protect men who are actually caring for and supporting their child but not those who are unable to assume a parental role because their efforts to do so were thwarted by the birth mother.

By contrast to the protections accorded biogenetic parents, persons who wish to parent through adoption find their personal values and most intimate behaviors subject to intense scrutiny and bureaucratic regulation. A powerful cast of social workers and counselors evaluate the "suitability" of prospective parents. Child welfare experts, lawmakers, and public policy groups, including the American Bar Association, have long since eschewed policies that categorically excluded some prospective adopters, for example, on the basis of marital status, age, income, race, ethnicity, physical disabilities, gender, or sexual orientation. A more inclusive approach is now favored based on individualized assessments of each applicant's parenting capacity. Nonetheless, the lack of reliable tests of parental suitability, along with evidence of "matching" policies that remain implicitly and, in some states, explicitly discriminatory, contribute to the resentment many adoptive parents feel about intrusive and costly home studies. Instead of having to prove their fitness to parent on the basis of criteria that arguably have little to do with their actual capacity to be loving and competent parents, adoptive parents want more preadoption preparation and postadoption assistance to alleviate the unanticipated, or insufficiently disclosed, needs of the children they adopt. These concerns are especially acute in the international context, where many prospective parents may be discouraged from pursuing adoption by the onerous suitability criteria in the federal

regulations implementing the Hague Convention on Intercountry Adoption or by narrow interpretations of who qualifies as an adoptable child under federal immigration law.

Modern Adoptive Families

The faces within adoptive families have changed dramatically while the total number of adoptions has declined from an estimated high of 170,000 to 200,000 per year during the 1960s to an estimated 130,000 to 140,000 per year in the past decade.

A substantial number of these adoptions are by stepparents, grandparents, or other relatives who are already caring for children whose lives were disrupted by their parents' divorce, separation, or remarriage, or who have been removed from their parents involuntarily by state child protection agencies. No more than 15 to 20 percent of contemporary adoptions conform to the traditional model of a healthy white infant placed voluntarily by an unwed mother with an infertile married white couple. As reliable contraceptives and abortion have become more accessible, and as the social stigma of out-of-wedlock birth has dissipated, fewer and fewer of the skyrocketing number of unwed mothers are placing their newborns up for adoption. Since the 1970s, the percentage of white unwed mothers who place infants for adoption has plummeted from 3 or 4 percent to 1 percent. The percentage of African American and Hispanic unwed mothers who place infants has consistently been less than 1 percent.

Interest in adoption has not abated. Estimates are that more than 250,000 people consider adoption each year. While the number of these people using assisted reproduction has increased dramatically, many continue to pursue adoption, but, unlike a generation ago, fewer are determined to reinscribe the "natural" families they cannot have by adopting an infant matching their own appearance. Increasingly, infertile couples and individuals, as well as adults who can or already have biological

children, are adopting across racial, ethnic, and national boundaries. Many are not averse to adopting older children or children with disabilities.

The driving force is the stepped-up efforts by state agencies to secure permanent families for the hundreds of thousands of children whose birth parents' rights are terminated because of neglect or abuse and who cannot be raised by other family members. On average, these children have been adrift in foster care for three years or more. African American children, who are disproportionately represented at all stages in this system, wait far longer. Largely because of recent federal legislation and funding initiatives, approximately 50,000 children are now being adopted from foster care every year, a number that has more than doubled since the 1980s, but is still far less than half of the nearly 130,000 foster children and youth waiting to be adopted.

Federal laws and policies have spurred the increase in adoptions of children from state agencies. The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, identifies adoption as the most appropriate option for children who cannot be reunified with their birth families, sets strict time limits for states to approve and implement permanency plans, provides financial incentives to states that increase the number of adoptions from foster care, and encourages states to provide continuity for children by allowing their foster parents to adopt them once their biological parents' rights are terminated. In most states, a third or more of the children placed from foster care are being adopted by the individuals or couples who had served as their foster parents. The Multiethnic Placement Act (MEPA), Pub. L. No. 103-382, 108 Stat. 4056, prohibits federally funded state agencies from denying or delaying adoptive placements on the basis of race, color, or national origin but also mandates diligent recruitment of foster and adoptive parents who reflect the racial and ethnic diversity

of the children. The consequences of MEPA remain unclear. Recruitment efforts are underfunded and there is evidence of a pervasive resistance to MEPA among caseworkers who continue circumventing MEPA's core prohibitions on race-based placement decisions. Other federal laws require equal treatment of adoptive and biological children in family leave and employee benefit programs, allow income tax credits or reimbursements for adoption-related expenses, and provide subsidies and health care for adopted children with special needs.

Among the most striking developments in recent years is the growth of families headed by a single lesbian or gay adoptive parent, by a lesbian or gay adoptive couple, or by a lesbian or gay couple consisting of one biological parent and one adoptive parent. Based on data from the U.S. Census and the National Survey of Family Growth, the Williams Institute estimates that at least 270,000 children are living in households headed by same-sex couples and, as of 2005, approximately 65,500 adopted children were being raised by lesbian or gay parents.

Although a few states prohibit lesbians or gay men, or all unmarried couples, from adopting children, most states allow lesbians and gay men to adopt foster children. Some states even encourage it. Only Florida has a statutory ban on public or private adoptions by "practicing homosexuals" which, regrettably, the Eleventh Circuit Court of Appeals sustained against a federal constitutional challenge in *Lofton v. Secretary of Department of Children and Families*, 358 F.3d 804 (11th Cir. 2004). This categorical ban is now being challenged in Florida state courts as contrary to national child welfare standards because it irrationally denies many foster children the benefits of a permanent adoptive placement.

For the tens of thousands of lesbians and gays who have children through assisted reproduction and who want to establish joint legal

parentage of their children with their same-sex partners, adoption is the most appropriate option for the non-biogenetic parent. In these families, adoption is not a response to infertility but a way to ensure legal protection of an existing parent-child relationship not available through private contract or marriage. In the twenty or more states that allow second parent adoption, a lesbian or gay man is able to adopt a same-sex partner's child without requiring that parent to relinquish parental rights. As a result, the child has two legal parents. Courts that grant second parent adoptions do so based on statutory interpretations that emphasize the importance of either "strict" or "liberal" constructions of adoption statutes in order to promote the best interests of children.

Intercountry adoptions are the most prominent example of families being formed across ethnic and racial lines. Annual adoptions of children from other countries by U.S. citizens tripled between the 1980s and 2004, to nearly 23,000 per year. Most of these children come from China, Russia, and Guatemala. Now that the United States and more than seventy other countries are parties to the Hague Convention on Intercountry Adoption, such adoptions by U.S. citizens were expected to increase at an even faster pace. Instead, the future of intercountry adoption is in doubt. Since 2005, incoming adoptions from Hague and non-Hague countries have declined precipitously, by nearly 25 percent, to fewer than 17,500 in 2008. There are many reasons for this decline, including (1) the U.S. State Department's suspension of adoptions from Guatemala and Vietnam because of alleged baby trafficking and unethical practices, (2) Russia's and South Korea's sudden commitment to in-country adoption, (3) China's imposition of strict eligibility requirements for adoptive parents and its decision to limit placements of healthy young children while favoring intercountry adoption of older special needs children, and (4) prospective parents' growing concerns about

the prognosis for children who have endured prolonged neglect or institutional care. These developments are illustrative of the persistent tensions in intercountry adoption policy. These include protecting birth parents and children against abusive and exploitative practices, sustaining children's cultural connections to their countries of origin, and creating viable child welfare and adoption programs in impoverished or war-torn countries.

Openness in Adoption

For much of the twentieth century, the assertion that families formed through adoption are in all respects the equivalent of families formed through procreation was based on the expectation that the psychological and emotional qualities of "normal natural" families would be replicated in adoptive families. The goal was to look and feel as close as possible to the biogenetically related children they cannot have. State laws that seal adoption records, substitute the names of adoptive parents for birth parents on birth certificates, and permit anonymity and strict separation between birth and adoptive families all reflect the equivalence model.

Since the 1970s this model has been subject to mounting criticism for trivializing the psychosocial and biogenetic differences between birth and adoptive families. Claims of equivalence are further undermined by the burgeoning numbers of adopted children and adoptive parents who do not resemble each other. Adoptive families continue to seek legal equivalence but are more likely to seek social and cultural acceptance by proclaiming their distinctive characteristics.

A key element of the acknowledgment-of-difference mantra is the attack on secrecy in adoption. This has spurred the successful efforts by adopted persons in some states to obtain their original birth certificates as well as efforts by adoptive parents and adoptees to learn more about their original families. Every state now mandates the release of "reasonably available" medical and nonidentifying

information to adoptive parents, preferably before they accept an adoptive placement, and to adopted persons when they reach adulthood. In addition, since the 1970s, states have established a variety of procedures for the consensual disclosure of identifying information between adoptees and their birth families. These procedures are cumbersome and underutilized and

Most adoptive parents now prefer, and even demand, greater openness.

fall short of the more direct contact desired by many adult adoptees and birth parents and that is often more readily obtainable through various private and Internet-based search services. About a dozen states now allow adoptees access to their original birth certificates when they are eighteen or older, but efforts to ensure access to adoption records or birth certificates appear to have stalled in other states. The fear of "open records" may stem from broader societal concerns about the privacy of personal information. By contrast, access to one's own birth certificate touches on a core element of an adopted person's identity and, as such, may eventually elicit more widespread support from state legislatures.

The trend toward more open adoptions is complicated by a shift in power from adoptive to birth parents in the context of domestic private adoptions. As the competition among would-be adoptive parents has intensified in response to the sharp decline in adoptable infants, a more distinctive "seller's market" has emerged. Birth parents are not only choosing the persons who will parent their children but are often asking to remain a part of the new adoptive family's life. Those who harbor doubts about meeting or having contact with birth parents are less likely to be able to adopt.

Although most adoptive parents

now prefer, and even demand, greater openness when it means access to the medical and psychosocial histories of the children they adopt, many are uneasy about continued contact with birth parents if it goes beyond annual exchanges of photographs or letters and encompasses visitation. As more countries encourage birth parents to provide some background information when they "abandon" a child, and as more adoptive parents come to understand that their children may someday want to establish ties to their countries of origin, openness may become a prominent aspect of intercountry as well as domestic adoptions. If so, U.S. immigration laws that discourage and penalize contact between prospective adoptive parents and birth families in other countries will be even more anachronistic than they now are.

As the legal edifice that once so completely separated birth and adoptive families crumbles, and as the diverse faces within adoptive families belie the goals of the traditional equivalence model, reliable guideposts are needed to assist birth and adoptive parents who are uncertain whether anonymity or ongoing contact is preferable for them and their children. In lieu of the multilayered, highly articulated, and prescriptive system of laws and child welfare practices that now regulate adoptive families, the well-being of adopted children and their families might be better served by less formal practices to be crafted over time by adoptive and birth families, who may learn to rely more on each other, and on their own negotiated arrangements, than on the purported wisdom of lawmakers and child welfare experts whose earlier dominion over the meaning of adoption is now being challenged.

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Family Integrity and Children's Rights A UN Convention

Perspective

By Jonathan Todres

Normally, a 99 percent approval rating is ideal. Yet even though 99 percent of eligible states have ratified the UN Convention on the Rights of the Child (CRC) since its adoption in 1989, one prominent holdout remains. The United States has not ratified the CRC despite its active role in drafting the treaty. The Obama administration has indicated it will review the U.S. stance. In contemplating ratification of a treaty affecting children, a related question should be asked: What impact will it have on parents and families, given their vital role in children's development? Thus, this article examines the CRC's conception of family.

The CRC's guiding principle on the family, set forth in its preamble, recognizes the family as "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children." Nineteen CRC provisions explicitly acknowledge the essential role of parents and families in the lives of children. In situating children and their rights within the family, the CRC articulates important protections for parents and families.

The CRC's umbrella provisions reinforce the position that the family is entitled to special protections as a way of advancing the child's rights. First, Article 5 mandates that governments defer to parents and legal guardians in the upbringing of children, requiring that states "respect the responsibilities, rights and duties of parents" and other guardians to provide appropriate direction and guidance to their children. Family integrity is preserved by positioning government as a safety net, not as the primary caretaker.

Second, similar to other human rights treaties, the CRC incorporates the principle of nondiscrimination in its text, in Article 2, requiring that states ensure the rights of every child *without discrimination of any*

kind, including on the basis of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." Importantly, the CRC's protections extend not only to discrimination based on the child's traits or opinions but also to discrimination against the child based on the parents' background, status, or beliefs. Thus, for example, a government cannot target a child as a means of pressuring parents to retract a social or political position that is contrary to government or majoritarian views.

Third, Article 3, the CRC's cornerstone provision, establishes that the best interests of the child shall be a primary consideration in all actions concerning children. It reaffirms that as countries strive to provide children the protection and care they need, they must do so "taking into account the rights and duties of [each child's] parents" or guardians. Thus, in these foundational provisions, the CRC cements the state's position as insurer of children's rights and well-being while preserving the sanctity of the family.

A number of more specific provisions also safeguard family integrity by ensuring children's right to a name, identity, and family relations (Article 7); by requiring that governments refrain from unlawfully interfering with children's privacy, family, or home (Article 16); and by prohibiting separation of parents and children except in limited circumstances, such as abuse and neglect cases, and even then only if separation is in the child's best interest and due process rights are afforded to interested parties (Article 9). Other provisions obligate states to facilitate family reunification in abduction and refugee settings (Articles 10 and 22) and to ensure children's right to family contacts in juvenile justice settings (Article 37).

Although the CRC is oriented toward the child's perspective, the enshrined protections of the child's family life and relationship with his or her parents imply considerable protections for parents and other family members. For example, for a child to realize his or her right to a name, identity, and family relations, the state must not interfere with parents' rights to name their child, to obtain an identity for their child, or to care for their child. Thus, children's rights to family imply rights for families to live free from government discrimination and persecution.

Given the implied protections for parents and other family members, lawyers will be quick to ask what is meant by "family." The CRC does not define the term but recognizes that family takes different forms around the world. Article 5 notes that governments must respect the rights and duties of "parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child." Beyond that, the CRC defers to individual states to give meaning to the term "family," provided that any definition does not violate the nondiscrimination principle or other rights of the child. What the CRC makes clear is that in protecting the rights and well-being of children, governments must respect the rights and duties of parents and families who are best positioned to foster the well-being and development of all children.

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Assisted Reproduction

Preserving Families and Protecting the Rights of Individuals

By **Bruce L. Wilder**

People wanting to form families using assisted reproduction technology (ART) do so for a number of reasons, including infertility, aversion to sexual intercourse, avoidance of unprotected sexual intercourse for fear of disease transmission, or eugenic considerations (a subcategory of which may be avoidance of the risks of genetically transmitted disease or of genetically determined traits deemed to be undesirable). In the case of gestational ART, prohibitive risk of pregnancy and/or delivery, coupled with a desire to perpetuate one's own genetic legacy, is often the primary consideration. For the infertile, a wish to avoid the legal complexities and other inconveniences of the adoption process may be an important factor.

A rapidly changing body of scientific knowledge and technology in the field of assisted reproduction has required the law to develop fair and logical solutions to problems that arise when the rights of individuals clash with traditional notions of what a family is. Indeed, we have been forced to rethink the concept of family, which is so important to social stability and the rearing of children in our society.

When disputes have arisen, with a few exceptions, courts have generally had to apply law, both statutory and case-made, that was developed before the many novel fact situations created by ART were contemplated. As a result, there continues to be a great deal of uncertainty surrounding the rights and responsibilities of individuals involved in assisted reproduction, including the resulting children, who, of course, did not



Three mothers, artificially inseminated by the same donor, located one another through the Donor Sibling Registry website.

exist at the time decisions about reproduction were made.

Definitions

In the context of assisted reproduction, the following definitions are generally accepted—and, for the purposes of this article, are—as follows:

“Assisted reproduction” is defined as the achievement of a pregnancy without sexual intercourse.

“Infertility” is defined as inability to achieve a pregnancy that eventually results in a live birth, after one year of unprotected intercourse.

“Donors” are individuals who provide gametes, embryos, or other genetic material (such as enucleated eggs) with the understanding they have relinquished any and all parental or other legal relationships with the resulting offspring. In the case of donated embryos, an embryo is not a donated embryo unless all progenitors have relinquished their legal connection with the resulting offspring.

“Intended parent” is an individual who has manifested an intent to be legally bound as the parent of the resulting child.

“Gestational carrier (surrogate)” is a woman who has agreed to bear a child, either from a transferred embryo, or by artificial insemination, for an intended parent(s), and who has agreed that she will have no parent-child or other legal relationship with the resulting child.

“*Legal status of the embryo.*” Much has been written about the “legal status” of the embryo, in legislation, case law, and by commentators. Generally, the debate has been dualistic, i.e., whether the embryo is property or potential human life, if not a human being. Whatever an embryo is, it seems to have the peculiar distinction of being something that cannot be the subject of an enforceable contract if it is to be gestated to live birth, but can be if it is to be destroyed. Under Louisiana statute, (LA. REV. STAT. ANN. § 9:121–133), an embryo that has not implanted is considered a “juridical person,” with certain legal rights.

Determination of Parentage

A number of states have passed legislation designed to delineate the rights of individuals participating in assisted reproduction, and there

is considerable variation in the volume and specifics of that legislation. The Uniform Parentage Act (UPA) (1973), 9B U.L.A. 377 et seq. (2001), defined the rights of individuals in sperm donation. Now enacted in nine states, the revised UPA (2002), 9B U.L.A. 4 et seq. (2009 pocket part), broadened considerably the application to ART. Generally, it has been left to the courts to develop law or to provide the impetus for legislation. Not surprisingly, there has been considerable variation in holdings among the different states.

In re Marriage of Buzzanca, 61 Cal. App. 4th 410 (1998), exemplifies perhaps more than any other case, just how far courts have come in addressing the disconnect between new reproduction technology and established law. In *Buzzanca*, the trial court came to the bizarre conclusion that a child born as the result of a married couple's efforts to have a child by donor egg, donor sperm, and a gestational carrier, had "no parents." The appellate court held that both of the divorced couple were the child's legal parents. At least implicit in the court's opinion is the concept that both of the couple committed acts that made them legally bound as the child's parents. In the case at hand, the legally significant acts were their obtaining donor gametes and arranging for in vitro fertilization (IVF) and a gestational carrier. The universal importance of this idea cannot be underestimated. Of course, reasonable minds may differ as to what it takes to establish that individuals are "legally bound" as parents, but the concept encompasses even traditional paths to parentage, e.g., sexual intercourse resulting in the birth of the child, but would seem to relegate a genetic connection between child and putative parent to *evidence* of sexual intercourse, rather than a fact that is dispositive of parentage with a slew of exceptions created by case-made and statutory law.

Access to ART services

Individuals with HIV infection may face barriers to receiving ART treatment. Under the Americans with Disabilities Act, 104 Stat. 327 (1990),

treatment could not be refused because of HIV infection alone. While "sperm-washing" is probably a safe method for men infected with HIV to have children without transmission to the birth mother or the fetus, women infected with HIV still represent a small risk to the fetus/child, and ART services might reasonably be refused on the basis of that risk if the clinic could demonstrate that it has previously refused treatment because of a comparable risk of an equally serious condition in the child.

Sexual orientation cannot be the basis for refusing to provide ART services in California, *see North Coast Women's Care Medical Group, Inc. v. S.C. (Benitez)*, 81 Cal. Rptr. 3d 708, and it is unlikely that a refusal in other jurisdictions would succeed, even though some clinics are still reluctant to provide ART to same-sex couples.

Nontraditional Families

Almost from the time artificial insemination by donor began to be used, lesbian couples have employed it, often without the involvement of any medical professional. Typically, this would involve one of the couple being inseminated noncoitally with donor sperm, often from a close relative of the woman's partner. In that way, a family in which a female couple had children that had a close genetic relationship to both women began to look more and more like the traditional "nuclear" family. With the development of IVF, women could have families even more closely connected biologically, i.e., one of the couple could gestate embryos created by IVF of eggs from the other, again, often with sperm from a close relative of the gestating partner. With the introduction of gestational arrangements, male same-sex couples could similarly create families with genetically related children, by, for instance, mixing sperm from each of the couple to fertilize donor eggs by IVF and employing a gestational carrier. Or, sperm from one of the male couple could be used to fertilize an egg from a woman closely related to

the other partner. While these methods seemed to approximate the ideal of a biologically connected "nuclear" family, the rights of the individuals involved were, and in some jurisdictions, still are, anything but certain.

In the early years of ART, when disputes arose, the concept of "family" seemed to have little force, when measured against the uncertainties in the law in general, prejudice against homosexual relationships, and the rights asserted by donors or gestational carriers. However, we have come a long way from *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (1991), in which a nonbiological partner was denied standing to sue for visitation, and *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386 (1986), where a sperm donor was able to establish parental rights to the exclusion of the nonbiological female partner. With the development of the equitable doctrines of parentage by estoppel, in loco parentis, de facto parent, and equitable parent (the characteristics and acceptance by courts of these doctrines vary by state), same-sex partners have acquired more and more rights to standing and parentage. Moreover, the so-called doctrine of "intended" parentage has also furthered the claims of same-sex partners who participated in ART, but in the past found themselves distanced from the children they helped to create because of the lack of a genetic relationship. Different results have been reached in different jurisdictions, but generally, there has been a trend to recognize the importance of preserving family relationships, without regard to the fact that the adults are in same-sex relationships. Although difficult to measure, this phenomenon has undoubtedly had a significant influence on the debate about same-sex marriage, and its recent acceptance by courts and legislatures.

Posthumous Reproduction

The possibilities for posthumous reproduction enabled by ART have not been the primary driver for advances in this area of medicine, but the idea is by no means new. As far back as 1866,

Paolo Mantegazza (aka Montegazza), an Italian physician, speculated that sperm could be preserved by freezing, and that soldiers going into battle might have their sperm frozen beforehand, so that, in the event they were killed in battle, their wives might use the sperm to beget heirs posthumously. In any discussion of posthumous reproduction, it is important to parse its goals by discussing the desire to preserve a genetic legacy separately from the desire to preserve or alter the legal rights of offspring.

While the awarding of Social Security survivor benefits to biological offspring not conceived at the time of the decedent's death is, in itself, a reasonable end result, the justifying determination that the individual is an heir may have far-reaching consequences when a substantial estate is at issue. Rather than complicating estate law to accommodate a family of modest means with Social Security survivor benefits for an individual born posthumously, some consideration might be given to amending the Social Security statute to permit survivor benefits if posthumous genetic offspring are born within a certain time window, regardless of whether they are "children" or heirs of the deceased. California has enacted a statute that explicitly permits and establishes heirship where the child is conceived within two years of the decedent's death if certain other conditions are met. *See* CAL. PROBATE CODE § 6407. Amendments to the Uniform Probate Code (UPC) in 2008, Sections 2-120 and 2-121, 8 U.L.A. Pt. 1 57 et seq. (2009 pocket part), thus far enacted only in Colorado and North Dakota, provide that, under certain circumstances, a child that was in utero within thirty-six months, or born within forty-five months, of death, is the child of the intended parent.

A related issue is the extraction of gametes from deceased individuals. A common scenario is a spouse or other family member requesting, or sometimes demanding, extraction of gametes where someone has died suddenly, where time is of the essence in making a decision to extract gam-

etes. This circumstance may present a dilemma for a health care provider, since a delay of just a few hours may result in loss of the chance to obtain viable gametes. If retrieval is covered by the Uniform Anatomical Gift Act, 8A U.L.A. 33 et seq. (2009 pocket part), retrieval may be accomplished without prior consent of the deceased, unless the deceased explicitly refused posthumous retrieval. *See* Bethany Spielman, *Post Mortem Gamete Retrieval After Christy*, ABA HEALTH ESOURCE, Oct. 2008, www.abanet.org/health/esource/Volume5/02/spielman.html. A reasonable solution for the health care provider (physician or hospital) may be to establish policy that would require the requesting party to agree to an escrow of the gametes pending a court order to permit transfer, so that issues of parentage can be decided before transfer.

Marriage Dissolution

In the context of a marriage dissolution, courts in the United States have thus far consistently ruled that an embryo may not be transferred for gestation if one of its progenitors objects. If there was a contract that would permit gestation against objection, the contract has been found to be void or unenforceable, but if there was a contract that prohibited transfer against objection, then the contract was found to be valid and enforceable. Exactly what remedy under law would be available if an embryo were transferred over objections is not clear, and fashioning one could be problematic. It is worth noting that even an intended parent not genetically related to the child may "veto" transfer. *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002). Although a "right to procreate" has been enunciated, courts have universally opted for a superior "right not to procreate," with little analysis. *See* Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Forced Parenthood" in Embryo Disputes*, 53 AM. U. L. REV. 1021 (2004). One commentator has suggested an implied contract to not transfer against objection, based on the concept of a "joint reproductive

goal," i.e., an assumption or legal fiction that both progenitors at the time of embryo creation agreed that the embryo would not be transferred without mutual contemporaneous consent. *See* Robyn Shapiro, *Who Owns Your Frozen Embryo? Promises and Pitfalls of Emerging Reproductive Options*, HUMAN RIGHTS, Spring 1998.

Courts have avoided the partial solution of at least giving an objecting intended parent/progenitor the option of relinquishing parental rights and responsibilities prior to transfer of any embryo (assuming, of course, that there is at least one adult who will be legally bound as a parent). The 2002 UPA would relieve an individual of parental rights and responsibilities if there were no writing or if consent were revoked prior to embryo transfer. Amendments to the UPC in 2008, referred to above, would extinguish, or establish, parental rights and responsibilities in a divorced or deceased individual based on a writing executed before transfer, within certain time limits in the case of the deceased. Although designed to facilitate embryo "adoption," a recent Georgia statute could be interpreted to apply to a situation where an ex-spouse objecting to embryo transfer could lawfully relinquish parental rights and responsibilities prior to embryo transfer, leaving the party desiring embryo transfer as the sole parent. *See* GA. CODE ANN. § 19-8-41 (2009).

As matters of policy, two concerns remain. If embryo transfer occurs, for whatever reason, over the objections of one party, what is the effect on the objecting progenitor, and what is the effect on the future child of the transferring party/intended parent? Those considerations need to be weighed against the rights of the party wishing to transfer the embryo.

Putting aside for a moment any religious belief or moral ethic about the uniqueness of the embryo that resulted, where does the idea that one party can force destruction (or indefinite cryopreservation) of the embryo against the wishes of the other—particularly when the party who did not change his or her

mind will have to undergo additional invasive procedures to have a child—come from? If a party undergoes invasive procedures required for IVF in the reliance that the other party intends to have and also wants a child, is the right of the latter to destroy the embryo (i.e., the right not to procreate) unfettered by the rights of the party who will have to undergo more invasive procedures as a result? It is quite likely that a frozen embryo dispute will come before the U.S. Supreme Court. If that occurs, the issue will likely involve delineating the scope of the so-called right to procreate and that of the right not to procreate. Remember, in constitutional doctrine these rights are not absolute, but rights that are to be exercised without governmental interference.

Embryo and Gamete Mix-ups

Perhaps one of the most problematic areas in the law of assisted reproduction is that of embryo and gamete mix-ups. Closely related is the problem of intentional deception in this context. The common denominator is a “parent” with a child whose genetic makeup is different than planned. Such a situation could result from carelessness in the handling of embryos or gametes, or it could result from intentional substitution for any number of reasons.

Of course, these kinds of situations have arisen throughout history in the form of accidental or intentional baby mix-ups and are not restricted to assisted reproduction. In the spe-

cific context of assisted reproduction, the object of the mix-up is a tiny gamete or embryo not visible to the naked eye. While it may be easier to accidentally switch a small vial, the chances of discovering that a mix-up has occurred are relatively small, absent some other circumstance, e.g., when a black baby is born to white parents, or if genetic testing is routinely employed postbirth, as may often be the case in a gestational carrier arrangement, but not necessarily in gamete or embryo donation.

While no solution is perfect, generally, the child should be returned to the parents for whom he or she was originally intended as soon as possible. If the mistake is not discovered until after the passage of several years, then a shared custody arrangement may be appropriate. The passage of time that occurs during the litigation should probably never be a factor in assessing “bonding,” where the party having physical custody acts to prolong litigation.

The Rights of Children Born through ART

It ought to be generally assumed as a matter of policy that children should be born with at least one legal parent, and that there be certainty in that regard.

A child’s right to know the identity of a donor or gestational carrier, when those individuals object, is controversial. A donor’s medical history should not be problematic in this

regard, as detailed medical information can be provided anonymously. If donors assured of anonymity become at risk of losing their anonymity, the willingness of individuals to be donors may diminish. Yet, the child was necessarily never a party to such an agreement and may successfully assert a right to know the identities of his or her biological parents.

Children who are born with genetic defects or illness as a result of negligence may also have rights against the fertility practitioner or clinic, or even the donor.

As the use of assisted reproduction to build families becomes more commonplace, the rights of the individuals involved have become better defined over the last two or three decades, but there continue to be gaps in the law that result in uncertainty. Particularly in the case of same-sex couples, so-called nontraditional families have gained wider acceptance, not just in the eyes of the law, but of society as well. The law of assisted reproduction will continue to develop and change in a positive way, but such a course depends upon a recognition of the changing concept of the family as its rudder.

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Evolution

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until the 1960s, when sperm banks began to open. Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1049 (2002). In the early 1980s, in vitro fertilization became available, making it possible to separate genetics from gestation. These developments in turn led to greater use of surrogacy, whereby a woman agrees to gestate an embryo with the intention

of relinquishing the resulting child to the intended parent(s). To varying degrees, all of these technologies raise difficult and interesting questions about parentage.

The Future of the Family

It remains to be seen what the American family will look like in ten or twenty years. Will the average age of first marriages continue to increase? Will the divorce rate remain stable or even decrease? Will gendered roles within marriage persist? Will more states provide legal protections for nonmarital families? The available data suggest

that the number of adults and children who spend some portion of their life in a nonmarital family will continue to increase. That said, while marriages today look different, are formed at different times, and are dissolved differently and at different times than they were in the past, at least in the near future it appears that marriage will remain a prominent family structure and cultural force.

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Introduction

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become breadwinners in addition to caring for the home and children. These stresses contributed to an increase in the divorce rates.

After the war, the GI Bill enabled many young men to purchase single-family tract homes in suburban developments. The average age of marriage dropped and the birthrate doubled. Youthful marriage and early childbearing meant that many women were free of the early child-rearing responsibilities by their early to middle thirties. This, combined with the rising cost of maintaining middle class standards, lead many women to enter the workforce.

Between 1960 and 1980, the birthrate fell by half, the number of

working mothers doubled, half of all marriages ended in divorce, and the number of couples cohabitating outside of marriage quadrupled. By the end of the century, two-thirds of all married women with children worked outside the home, and three in ten children were born out of wedlock. Over a quarter of all children lived with only one parent, and fewer than half lived with both their biological parents.

All these changes have produced “family values” crusaders who bemoan the decay of the family structure in America. An historical perspective shows that, rather than decaying, the family is evolving and adapting to fit current social and economic conditions. In many respects, the family is stronger than before. With technological advances, infant and child mortality has declined, many parents who could not conceive can now have children through in vitro fertilization or through surrogacy.

Mothers rarely die in childbirth. Children are more likely to have living grandparents. Fathers have become more actively involved in child rearing.

The American family is facing unique stresses. Working parents find it difficult to balance the demands of work and family. Many people care for their aging parents as well as their children.

We also have seen a shift in public opinion regarding same-sex marriages. We already have a number of states that permit these marriages. I hope the American population and the courts will be tolerant and respectful of the wishes of some who seek this form of relationship. The rights and protections of our Constitution must apply to everyone. We must ensure that laws such as the Defense of Marriage Act are repealed. As Martin Luther King Jr., once said, “An unjust law is no law at all.”

humanrights heroes

continued from back cover

saw more and more ways in which GLBT couples and their children were denied basic rights and benefits because states denied them the right to marry.

In 1991, Wolfson joined local attorney Dan Foley to fight for marriage under the Hawaii state constitution in *Baehr v. Miike*. In 1993, the Hawaii Supreme Court held that denying same-sex couples the right to marry presumptively constituted sex discrimination, for which the state must establish a “compelling reason.” On remand, the trial court held that Hawaii failed to meet that burden and ruled for the plaintiffs. Although the victory was short-lived because Hawaiians voted to amend the state constitution to ban gay marriage while the matter was on appeal, the case sent ripples through the GLBT rights community and the nation.

In 1997, Bonauto and GLAD joined lawyer Beth Robinson to fight for same-sex marriage in *Baker v. Vermont*. They won, but the state supreme court left it to the state legislature to decide between marriage and the “separate but equal” status of civil unions. It chose the latter. In 2001, Bonauto took the fight to Massachusetts in *Goodridge v. Massachusetts Department of Public Health*. She insisted that only marriage—and not civil union—would satisfy the equal protection provisions of the Massachusetts Constitution. While Bonauto awaited a decision, the legal landscape began to change. The Canadian provinces of Ontario and British Columbia

authorized same-sex marriage, and the U.S. Supreme Court reversed its infamous *Bowers v. Hardwick* decision and voided Texas’s sodomy law in *Lawrence v. Texas*. Months later, the Massachusetts Supreme Court cited *Lawrence* in ruling that the state must allow same-sex couples to marry. This time there were no “buts” and no state constitutional amendments. Gay marriage was here to stay.

In 2003, Wolfson left Lambda to start Freedom to Marry. Shortly thereafter he published a book entitled *Why Marriage Matters: America, Equality, and Gay People’s Right to Marry*. Since then, he has continued to work with Bonauto and other GLBT advocates to help win same-sex marriage through the courts and/or legislatures in Connecticut, New Hampshire, Maine, and even Iowa. Despite recent setbacks in California (where residents approved Proposition 8 to amend the California constitution to preclude same-sex marriage after its state supreme court held otherwise), the march toward the freedom to marry continues on at a pace unimagined by anyone twenty, ten, or even five years ago—except by Wolfson and Bonauto.

Twenty years ago, the nation did not know or think much about GLBT civil rights. Now, thanks to the work of Wolfson and Bonauto, the nation and its legal landscape have changed and we can all look forward to a day when all citizens have the freedom to marry.

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Evan Wolfson and Mary Bonauto

By Kristen Galles

Twenty years ago, only one state prohibited discrimination on the basis of sexual orientation (Wisconsin). No state and few companies offered domestic partnership benefits. In 1986, the U.S. Supreme Court in *Bowers v. Hardwick* upheld the constitutionality of laws that criminalized gay sex, thus giving official sanction and support for other laws and policies that discriminated against gays and lesbians. In such a dismal landscape, no one imagined the possibility of civil unions or same-sex marriage—except Evan Wolfson and Mary Bonauto.

This was the world Evan Wolfson faced when he entered Harvard Law School in the early 1980s. Although he had the courage and forethought to write his senior law thesis on “Same-Sex Marriage and Morality: The Human Rights Vision of the Constitution,” he started his legal career on a fairly traditional track by joining the Brooklyn district attorney’s office out of law school. While there, he became known for his pro bono civil rights work, writing amicus briefs for *Batson v. Kentucky* (racial discrimination in jury selection) and *People v. Liberta* (marital rape), and cocounseling with Lambda Legal Defense and Education Fund. After stints as a law professor and as associate counsel to Lawrence Walsh during the Iran-Contra investigations, Wolfson settled into his true calling as a pioneer in the modern GLBT rights movement by joining Lambda in 1989.

During his years at Lambda, Wolfson represented clients and submitted amici briefs in cases involving the definition of “spouse” and “family,” discrimination against people with HIV and AIDS, the military’s “don’t ask, don’t tell” policy, and state sodomy laws. He even argued the case of *Dale v. Boy Scouts of America* in the U.S. Supreme Court,



Image by Jeff Sheng



Image by Mainframe Photographics, Inc.

after the New Jersey Supreme Court held that the Boy Scouts’ policy against gay members violated its state public accommodations law. Wolfson also started Lambda’s marriage project.

Mary Bonauto began her legal career at a private firm in Portland, Maine. Although she became known for representing GLBT clients and causes, life changed in 1989, when Massachusetts became the second state to prohibit discrimination based upon sexual orientation. Boston’s Gay & Lesbian Advocates & Defenders (GLAD) decided to hire an attorney to enforce the new law. Bonauto answered the call.

While at GLAD, Bonauto has become one of the nation’s premier thinkers and litigators on GLBT issues, especially those related to family law, including second parent adoption, visitation and custody for nonbiological de facto parents, and the enforcement of documents such as durable powers of attorney for same-sex couples. While fighting these battles, she

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