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## **THE INCIPIENT STAGES OF A NATION RECOGNIZING SAME-SEX MARRIAGES AND THE BATTLES THEIR CHILDREN FACE**

*Gina I. Thomas\**

### INTRODUCTION: SAME-SEX COUPLES IN AMERICA

America is a nation of liberty, morality, and equality. These principles have formed the fundamental basis of what it is to be an American and what it is supposed to be like growing up in an American family. In such a dynamic nation, with an aggregation of cultures and beliefs, individuals have the ability to stimulate change and progression within the law. Just this past year, individuals within the lesbian, gay, bisexual, and transgender (“LGBT”) community, have pushed for an epoch that will forever change the way the law views same-sex marriage.

The battle for equality within the LGBT community has been arduous. Until 1973, the American Psychiatric Association listed homosexuality as a psychiatric disorder in the Diagnostic and Statistical Manual.<sup>1</sup> Although the LGBT community has won many battles, there are still many more ahead—the everyday battle for their children is ubiquitous.

Irrespective of one’s beliefs about whether same-sex marriage should be accepted across the nation, this comment will discuss the many battles children born from same-sex couples face in states that do not recognize a legal union of their parents. Children of same-sex couples are placed in vulnerable positions in regard to health care, financial aid, and simply the right to have two parents in the eyes of the law.

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<sup>1</sup> Susan D. Cochran, *Emerging Issues in Research on lesbians’ and Gay Men’s Mental Health: Does Sexual Orientation Really Matter?*, AMERICAN PSYCHOLOGISTS, Nov. 2001, at 932.

## BACKGROUND

When discussing marriage, it is important to understand the different ways in which a same-sex couple can be considered a partnership. The state government can issue a license and legally establish what is known as a civil marriage.<sup>2</sup> Additionally, civil authority can sanction a civil union between same-sex couples—a legal status similar to that of a civil marriage.<sup>3</sup> Although the nation can exercise both options, no state is required to do so. Once The Defense of Marriage Act (“DOMA”) passed, no state was required to recognize a same-sex marriage from another state.<sup>4</sup>

In 1999, Vermont was the first state to be a catalyst for change by, legally recognizing same-sex civil unions.<sup>5</sup> Four year later, Massachusetts was the first state to recognize same-sex marriage.<sup>6</sup> In 2003, the United States Supreme Court (“Supreme Court”) recognized the constitutional right of American citizens to be free from governmental invasion, into the intimate details of one’s sexual relationships.<sup>7</sup> In a 5-4 decision in the *Windsor* case on June 26, 2013, the Supreme Court ruled Section 3 of DOMA unconstitutional.<sup>8</sup> Despite that ruling, states that do not recognize same-sex marriage are not required to recognize same-sex marriage from another state. However, the *Windsor* case has become a landmark decision—essentially, voicing the Supreme Court’s legal recognition of same-sex marriage. The Obama administration’s interpretation of the *Windsor* decision allows legally married same-sex couples to:

be treated as married for all federal tax purposes, including income, estate and gift taxes. The ruling applies regardless of whether the couple resides in a state or jurisdiction that recognizes their marriage; take up to 12 weeks of unpaid leave for their own serious medical needs or to care for a family member—including a spouse—without getting fired; enjoy

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<sup>2</sup> James G. Pawelski, et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS, 349, 350 (2006).

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

<sup>4</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 1 U.S.C. § 7, 28 U.S.C. § 1738(C) (1996) (federal law allowing states to refuse to recognize same-sex marriage granted under the laws of other states).

<sup>5</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>6</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>7</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>8</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013) (suit was filed on behalf of surviving same-sex spouse whose inheritance from her deceased partner had been subject to federal taxation due to the fact the couple was not legally married. The surviving spouse challenged the definition of marriage within DOMA’s Section 3).

spousal and family benefits extended to all legally married military spouses, including military I.D. cards, healthcare coverage, housing allowances and survivor benefits; apply for a green card; and much more.<sup>9</sup>

A study done by the Williams Institute discovered that four percent of Americans are gay, lesbian, bisexual, or transgender.<sup>10</sup>

#### THE FAMILY DYNAMIC AMONG SAME-SEX COUPLES

Recent studies have estimated that nearly one to nine million children in the United States have one parent who is gay.<sup>11</sup> According to the 2000 Census, there are approximately 594,000 same-sex partner households.<sup>12</sup> “Surveys suggest that 37% of more th[a]n 8 million LGBT adults in the United States report having had a child.”<sup>13</sup> On average, same-sex couples are reported to have two children—approximating at least six million Americans having a LGBT parent.<sup>14</sup> An estimated one-quarter of all same-sex households are raising children.<sup>15</sup>

According to an analysis by the Williams Institute, twenty-seven and thirty-three percent of same-sex couples were raising children in Hawaii and Alabama respectively, two very different states both geographically and socially.<sup>16</sup> According to Census data, New York has 42,000 same-sex couples raising 14,000 children.<sup>17</sup> Rural states such as Wyoming and Kansas also have higher rates of child-rearing by gay couples.<sup>18</sup> “Same-sex couples who live in places with relatively high concentrations of same-sex couples tend to be less likely than other

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<sup>9</sup> Carolyn Simon, *Best of 2013: The Single Largest Granting of Rights to Lesbian and Gay Couples in History*, HRC BLOG (Dec. 13, 2014), <https://www.hrc.org/blog/entry/best-of-2013-the-single-largest-granting-of-rights-to-lesbian-and-gay-coupl>.

<sup>10</sup> Susan Donaldson James, *Census 2010: One-Quarter of Gay Couples Raising Children*, ABC NEWS (June 23, 2011), <http://abcnews.go.com/Health/sex-couples-census-data-trickles-quarter-raising-children/story?id=13850332>.

<sup>11</sup> Deanna Linville et al., *Same-sex Parents and Their Children*, AM. ASS'N FOR MARRIAGE AND FAMILY THERAPY, [http://www.aamft.org/imis15/content/consumer\\_updates/Same-sex\\_Parents\\_and\\_Their\\_Children.aspx](http://www.aamft.org/imis15/content/consumer_updates/Same-sex_Parents_and_Their_Children.aspx) (last visited Dec. 10, 2014).

<sup>12</sup> *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NCSL, <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx> (last visited Sept. 19, 2014) (Hereinafter NCSL).

<sup>13</sup> Gary J. Gates, *The real 'modern family' in America*, CNN OPINION, (Dec. 7, 2014, 5:30 PM), available at <http://www.cnn.com/2013/03/24/opinion/gates-real-modern-family/index.html>.

<sup>14</sup> *Id.*

<sup>15</sup> James, *supra* note 10.

<sup>16</sup> James, *supra* note 10.

<sup>17</sup> James, *supra* note 10.

<sup>18</sup> James, *supra* note 10.

same-sex couples to be raising children . . . [c]hild-rearing among same-sex couples is more common in conservative states like Alabama than in more liberal states like Hawaii,” according to Gary J. Gates, a Williams Institute demographer.<sup>19</sup>

#### THE BATTLES CHILDREN OF SAME-SEX COUPLES FACE

Children of same-sex couples face a number of insecurities—whether it is financial, legal, or familial—when the bond to their nonbiological parent is not recognized in the eyes of the law.<sup>20</sup> “Current public-policy trends, with notable exceptions, favor limiting or prohibiting the availability of civil marriage and limiting rights and protections to same-gender couples.”<sup>21</sup> While many states and jurisdictions may recognize some form of legal partnership, these partnerships do not carry the same rights, benefits, and protections that are conferred by civil marriage.<sup>22</sup> Unfortunately, due to the nature of these legal constructs, children of same-sex couples are born into a battle, a battle that should already be won in their best interest.

The best interest standard has been universally adopted among state legislatures.<sup>23</sup> The best interest of the child standard should be

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<sup>19</sup> James, *supra* note 10.

<sup>20</sup> Pawelski, *supra* note 2, at 352.

<sup>21</sup> Pawelski, *supra* note 2, at 352.

<sup>22</sup> Pawelski, *supra* note 2, at 352.

<sup>23</sup> Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 117 (2009) (citing, ALA. ADV. LEGIS. SERV. §§ 30-3-1 (LexisNexis 2014); ALASKA STAT. § 25.20.060 (2014); ARIZ. REV. STAT. §§ 25-403 (LexisNexis 2013); 2012 ARIZ. LEGIS. SERV. §§ 25-403, 25-409 (West); ARK. CODE ANN. § 9-13-103 (West 2009); CAL. FAM. CODE §§ 3000, 3080, 3100 (West 2014); CAL. FAM. CODE §§ 3102-3104 (Deering 2014); CONN. GEN. STAT. ANN. § 46B-59 (West 2013); DEL. CODE ANN. tit. 13, § 727 (West 2008); DEL. CODE ANN. tit. 13, § 728 (West 2009); D.C. CODE ANN. §§ 16-911 (a)(5), 16-914 (LexisNexis 2008); FLA. STAT. ANN. §§ 61.13 (West 2010); GA. CODE ANN. § 19-9-3 (West 2011); HAW. REV. STAT. ANN. §§ 571-46.1, 571-46.2 (LexisNexis 2014); IDAHO CODE ANN. §§ 32-717B, 32-719 (2014); 750 ILL. COMP. STAT. ANN. 5/601, 5/607 (2013); 750 ILL. COMP. STAT. ANN. 5/602, 5/602.1, (2010); IND. CODE ANN. § 31-17-2-8 (West 2014); IOWA CODE ANN. § 598.41 (West 2012); KAN. STAT. ANN. § 23-3201 (West 2011); KY. REV. STAT. ANN. §§ 403.270, 405.021 (West 2014); ME. REV. STAT. ANN. tit. 19A, §1651-1654 (2014); MD. CODE ANN. §§ 5-203, 9-102 (West 2014); MASS. GEN. LAWS ANN. ch. 119, § 39D (West 2014); MASS. ANN. LAWS ch. 208, § 28, 208, § 31, 209C, § 10 (LexisNexis 2013); MICH. COMP. LAWS ANN. §§ 722.26(a), 722.27(b) (West 2014); MINN. STAT. ANN. §§ 518.17, 518.175, 257C.08 (West 2014); MISS. CODE ANN. §§ 93-5-24, 93-16-1 (2014); MO. REV. STAT. § 452.402 (2014); MONT. CODE ANN. §§ 40-4-212(1), 40-9-102(4) (2009); NEB. REV. STAT. §§ 42-364(2), 43-1802(3) (2009); NEV. REV. STAT. ANN. §§ 125C.050(4), 125.465, 125.480(1), 125.490(1) (West 2009); N.H. REV. STAT. ANN. § 461-A:6(I) (2009); N.J. STAT. ANN. §§ 9:2-1, 9:2-4(c), 9:2-7.1(b)(8) (West 2009); N.M. STAT. ANN. §§ 40-9-1, 40-9-2(G)(1), 40-9-3, 40-9-4 (West 2009); N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2009); N.C. GEN. STAT. §§ 50-11.2, 50-13.2(a) (2009); N.D. CENT. CODE § 14-09-06.2

compelling in order to protect the child's underlying fundamental right to preserve an existing parental relationship.<sup>24</sup> Most states have recognized this as a fundamental right protected by the best interest of the child standard.<sup>25</sup>

As this comment discusses the many battles children born to same-sex couple face, it is important to ask yourself whether these battles are a question of discrimination, cultural dynamic, or simply a lag in policy. Lack of education and ignorance play pivotal roles in how we can gauge the change. The LGBT movement itself leaves many areas of debate open, often making unanswered decisions politically driven.

### *The Battle of The Adopted Child*

On December 24, 2007, loving foster parents Kathryn Kutil and Cheryl Hess were asked by the state of West Virginia to foster a brand new baby girl, TiCasey,<sup>26</sup> a beautiful red headed baby born with cocaine and opiates in her system.<sup>27</sup> Because TiCasey suffered from extreme withdrawal symptoms, the couple needed to take extra care of her and decided to try adoption.<sup>28</sup> The West Virginia State Department of Health and Human Resources ("DHHR") relied on the couple to foster high-risk

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(2013); OHIO REV. CODE ANN. §§ 3109.04(B)(1), 3109.051(A) (LexisNexis 2009); OKLA. STAT. ANN. TIT. 43, § 112(C) (West 2009); OR. REV. STAT. ANN. §§ 107.105(1), 107.169(5), 109.119(3)(b) (West 2009); 23 PA. CONS. STAT. ANN. § 5328(a) (West 2014); R.I. GEN. LAWS §§ 15-5-16(d), 15-5-24.1 to 24.3(a)(2)(i) (2009); S.C. CODE ANN. §§ 20-3-160, 63-3-530 (2012); S.D. CODIFIED LAWS §§ 25-4-45, 25-4-52, 25-5-7.1 (2009); TENN. CODE ANN. §§ 36-6-101(a)(2)(A)(i), 36-6-106(a) (West 2009); TEX. FAM. CODE ANN. §§ 153.005, 153.007 (West 2009); UTAH CODE ANN. § 30-3-10(1)(a) (West 2009); VT. STAT. ANN. TIT. 15, § 665(b) (2009); VA. CODE ANN. §§ 20-107.2, 20-124.3 (West 2009); WIS. STAT. ANN. §§ 767.41(5), 767.451(1)(a) (West 2009); WYO. STAT. ANN. § 20-2-201(a) (2009).

<sup>24</sup> *Id.* (citing Eric G. Anderson, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 940 (1998)).

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

The phrase 'interests of the child' or 'best interests of the child' is commonplace in the law. It appears in the legislation and case law dealing with children in various legal settings, such as adoption, child protective services, and custody disputes between divorcing parents. Its deceptively smooth surface covers something quite complex for, as typically used, it refers not to one person's (i.e., a child's) interests, but to a legal standard. In unpacking that standard one finds the very collection of competing goals and interests discussed in this article.

<sup>26</sup> Nadia Stewart, *Adoption by Same-Sex Couples and the Use of the Representation Reinforcement Theory to Protect the Rights of the Children*, 17 TEX. WESLEYAN L. REV. 347, 348 (2011) (citing Pamela Paul, *The Battle over a Baby*, N.Y. TIMES MAG. (July 26, 2009), <http://www.nytimes.com/2009/07/26/magazine/26lesbian-t.html>).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

children.<sup>29</sup> The couple had fostered over eighteen children throughout the years.<sup>30</sup> DHHR issued a permanency plan knowing the couple was interested in adopting TiCasey.<sup>31</sup>

“Although West Virginia had approximately 4,200 children in state custody, with almost one-third of them living in group homes or institutions, adopting TiCasey proved to be a difficult feat.”<sup>32</sup> After a routine visit, TiCasey’s court-appointed attorney established she was in a good place doing well, however, stated that she should be removed from the home because she was in a homosexual household.<sup>33</sup>

After eleven months, the court ordered that TiCasey be removed from the only home and family she knew.<sup>34</sup> The court stated, “the best interest of a child is to be raised by a traditional family, mother and father.”<sup>35</sup> TiCasey was placed at the Thompson’s home and five days later was placed in yet another home, after the Thompson’s were no longer interested in adopting TiCasey.<sup>36</sup> “Three hours after TiCasey’s second upheaval and removal from a foster home, the West Virginia Supreme Court granted an emergency stay and allowed the baby girl to reunite with Kutil and Hess so that she could remain in their home with her brothers and sisters.”<sup>37</sup>

On June 5, 2009, the West Virginia Supreme Court issued a unanimous opinion condemning the lower court’s decision to ignore the bond forged between TiCasey and her foster parents.<sup>38</sup> West Virginia is currently a state that does not recognize same-sex marriage.<sup>39</sup> The best interest of the child is to be raised by the people he or she identifies as mom or dad.<sup>40</sup> Children ready for adoption far outweigh the number of qualified adoptive families.<sup>41</sup> “[A]lmost all states base the ultimate decision on the ‘best interest of the child,’ a determination that is made by individual judges frequently without the benefit of well-defined guidelines.”<sup>42</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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

<sup>32</sup> Stewart, *supra* note 26.

<sup>33</sup> Stewart, *supra* note 26, at 348–49.

<sup>34</sup> Stewart, *supra* note 26, at 349.

<sup>35</sup> Stewart, *supra* note 26, at 349.

<sup>36</sup> Stewart, *supra* note 26, at 349.

<sup>37</sup> Stewart, *supra* note 26, at 349.

<sup>38</sup> Stewart, *supra* note 26, at 349.

<sup>39</sup> NCLS, *supra* note 12.

<sup>40</sup> McLaughlin, *supra* note 23, at 128.

<sup>41</sup> Stewart, *supra* note 26, at 350.

<sup>42</sup> Stewart, *supra* note 26, at 350.

“[A]n adoption order remains the best form of protection for out-of-state recognition.”<sup>43</sup> Many states do not grant second-parent adoptions to same-sex couples.<sup>44</sup> “A second-parent adoption occurs when one parent in an unmarried couple adopts the other partner’s biological or adoptive child; this can occur in both gay and straight relationships.”<sup>45</sup> Second-parent adoption should be conducted on a case-by-case basis in the best interest of the child.<sup>46</sup> It is a well-known fact that children are better off when raised in secure and loving homes; and second-parent adoption is used to facilitate protection for these families.<sup>47</sup> “When it comes to second-parent adoption, the only question is whether these children will have two legal parents who can protect and care for them.”<sup>48</sup> Second-parent adoption countenances two able, willing, and loving parents to provide the legal and psychological support a child needs.<sup>49</sup>

The legal sanction provided by co-parent adoption guarantees that the second-parent’s custody rights will be protected if the first parent were to die or become incapacitated.<sup>50</sup> “In the absence of co-parent adoption, members of the family of the legal parent, should he or she become incapacitated, might successfully challenge the surviving co-parent’s rights to continue to parent the child, thus causing the child to lose both parents.”<sup>51</sup> Additionally, the second-parent’s rights to custody and visitation will be protected if the couple separates.<sup>52</sup> This right would give children the capability of maintaining a relationship with a person they have known as mom or dad. And in the event the parents separate, the second-parent adoption establishes the requirement for child support and the basis for financial support in the event of the death of either parent.<sup>53</sup>

Another form of adoption is joint adoption.<sup>54</sup> Joint adoption is different from second-parent adoption because it is completed in one

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<sup>43</sup> Susan Silber & Susan Francis, *The Evolution of Family Law, Marriage and the LGBT Community - the Long Road for Family Recognition and the Remaining Gaps in the Patchwork of Protections*, 46 Md. B.J. 42, 48 (2013).

<sup>44</sup> *Id.*

<sup>45</sup> *Securing the Ties That Bind: Second Parent Adoption in North Carolina*, ACLU.COM, available at <https://www.aclu.org/second-parent-adoption-nc> (last visited Dec. 14, 2014).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109, PEDIATRICS. NO. 2, 339 (2002) (discussing the importance of stability in second parent adoptions).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Stewart, *supra* note 26, at 356.

step.<sup>55</sup> Second-parent adoption requires one parent to adopt and another parent to file for a second-parent or co-parent adoption.<sup>56</sup> Joint parent adoption obligates both parents to provide care and support for the child.<sup>57</sup> Few courts have addressed the issue of joint parent adoption and unmarried same-sex couples.<sup>58</sup> Joint parent adoption assures the continued relationship between both parents, making the children eligible for both public and private benefits.<sup>59</sup>

Equitable adoption is another form of adoption used by children of same-sex couples to protect their rights should a parent die intestate.<sup>60</sup> A child who was never formally adopted by one or both of his or her parents may be able to assert that he or she was equitably adopted.<sup>61</sup> However, five elements must be proven:

- (1) an agreement must have existed between the natural parents and the adoptive parents;
- (2) the natural parents must have performed by giving up the child;
- (3) the child must have performed by living in the adoptive parents' home;
- (4) the adoptive parents must have partially performed by raising the child as their own; and
- (5) the adoptive parent(s) must have died intestate.<sup>62</sup>

If the adopted child is able to prove all five elements to the satisfaction of the court, the adopted child will be able to inherit his or her intestate share of the parents' estate. Because this doctrine is grounded in probate law, most states refuse to apply the equitable adoption doctrine.<sup>63</sup> The equitable adoption doctrine was put in place to protect a child's interest rather than punish them when his or her parents have not completed the necessary documents to create the legal status of the parent-child relationship.<sup>64</sup>

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<sup>55</sup> Stewart, *supra* note 26, at 356.

<sup>56</sup> Stewart, *supra* note 26, at 353.

<sup>57</sup> Stewart, *supra* note 26, at 356.

<sup>58</sup> Stewart, *supra* note 26, at 357. (citing Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 Am. U. J. Gender Soc. Pol'y & L. 659, 644 (2009)).

<sup>59</sup> Stewart, *supra* note 26, at 357 (citing *In re Adoption of M.A.*, 2007 ME 123, PP 26, 29, 930 A.2d at 1097-98.)

<sup>60</sup> Stewart, *supra* note 26, at 357.

<sup>61</sup> Stewart, *supra* note 26, at 357.

<sup>62</sup> Stewart, *supra* note 26, at 357-58.

<sup>63</sup> Stewart, *supra* note 26, at 358 (citing Lindsay Ayn Warner, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 STETSON L. REV. 577, 587-88 (2009)).

<sup>64</sup> Stewart, *supra* note 26, at 358 (citing Lindsay Ayn Warner, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 STETSON L. REV. 577, 587-88 (2009)).

According to Gary J. Gates, a Williams Institute demographer, “[t]he number of same-sex couples who are adopting has doubled, from 8 percent to 19 percent, even in states where they cannot legally marry, according to research by The New York Times.”<sup>65</sup> “Still, more than 80 percent of the children being raised by gay couples are not adopted . . . [a]nd the largest number of children in same-sex families are a result of previous heterosexual marriages, according to Gates.”<sup>66</sup> Data suggests that 16,400 children being raised by same-sex couples are stepchildren and 22,500 are adopted according to the United States Census Bureau.<sup>67</sup> Moreover, same-sex couples are four times more likely to adopt and six times more likely to foster a child.<sup>68</sup> A stepparent or adoptive-parent can become a legal stranger by simply crossing the border from a state that recognizes same-sex marriage to a state that does not.<sup>69</sup>

“Due to the fact that adoptive children are a class of citizens that are not adequately represented in the democratic political process, the Supreme Court should use the theory of representation reinforcement to ensure the rights of these children are protected.”<sup>70</sup> Because adoptive children do not have adequate resources, the children lack the ability to ensure their rights are being protected.<sup>71</sup> “Adoptive children like TiCasey and her siblings will be afforded the legal, social, physical, and emotional benefits derived from the stability of having two legal parents.”<sup>72</sup> “The representation reinforcement theory establishes that as far as fundamental rights are concerned, the courts have the duty to ensure that no group or class is subject to the permanent control of the majority.”<sup>73</sup> In *United States v. Carolene Products*, Justice Stone described in footnote four certain situations where a higher level of scrutiny should be applied.<sup>74</sup> This footnote laid down a foundation for a

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<sup>65</sup> James, *supra* note 10.

<sup>66</sup> *Id.*

<sup>67</sup> Gates, *supra* note 13.

<sup>68</sup> Gates, *supra* note 13.

<sup>69</sup> Gates, *supra* note 13.

<sup>70</sup> Stewart, *supra* note 26, at 350.

<sup>71</sup> Stewart, *supra* note 26, at 350.

<sup>72</sup> Stewart, *supra* note 26, at 350.

<sup>73</sup> Stewart, *supra* note 26, at 352.

<sup>74</sup> Stewart, *supra* note 26, at 352. (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

It is unnecessary to consider now whether legislation which restricts those political processes [such as voting, expression, and political association] which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or

stricter level of judicial review and a system where discrete and insular minorities receive a higher level of protection.<sup>75</sup> “Although minors are not considered a discrete and insular minority, the subset of minor children who do not have parents and who can potentially be adopted by same-sex parents are likely a discrete and insular minority.”<sup>76</sup> If the courts adopted this theory suggested by Nadia Stewart in regard to same-sex adoption, much confusion would undoubtedly be alleviated.

It is clear that the representation reinforcement theory would be in the best interest of the child. It is also clear that adoption for same-sex couples, who have been raising a child for an extended period of time, is in the best interest of the child. Whatever theory the courts use in order to determine adoption, it must be one that promotes stability, consistency, and equality. The best interest of the child standard has remained the paramount consideration in every adoption.<sup>77</sup> As a nation, it is important to recognize truly what is in the best interest of the child. It does not make sense for the law to take away mom or dad if that is the only mom or dad the child knows. Caring and devoted parents should be afforded equal protection in the eyes of the law notwithstanding gender. “While a nonlegal parent may have a custody or visitation petition rejected without even a hearing in many states, some states have recently recognized a new legal concept that has alternately been called ‘psychological parenthood,’ ‘de facto parenthood’ or ‘parenthood by estoppel.’”<sup>78</sup> While this legal concept appears to give courts the impetus to recognize this relationship, it is not always the case.<sup>79</sup>

### *The Battle For Healthcare*

Children of same-sex couples are often in a battle for health insurance.<sup>80</sup> Many companies are offering more expensive than

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racial minorities[;] [conditions], whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

<sup>75</sup> Stewart, *supra* note 26, at 352.

<sup>76</sup> Stewart, *supra* note 26, at 353.

<sup>77</sup> *McCann v. Doe*, 377 S.C. 373, 389 (2008).

<sup>78</sup> *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, available at <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited Dec. 7, 2014).

<sup>79</sup> See *Kazmierczak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (holding the alleged psychological parent lacked a parental status equivalent to the biological mother and was not entitled to any visitation).

<sup>80</sup> Gilbert Gonzales & Lynn A. Blewett, *Disparities in Health Insurance Among Children With Same-Sex Parents*, 132, PEDIATRICS, 703 (2013) (discussing a study conducted by the Academy of Pediatrics).

comparable health plans or none at all to same-sex couples—placing their children at a disadvantage for the best coverage.<sup>81</sup> Gilbert Gonzales, MHA, and Lynn A. Blewett, PhD, from the University of Minnesota in Minneapolis, used data from the 2008–2010 American Community Survey, and examined disparities in health insurance coverage for children with same-sex parents.<sup>82</sup> Data were used from 5,081 children with same-sex parents; 1,369,789 children with married opposite-sex parents; and 101,678 children with unmarried opposite-sex parents.<sup>83</sup> Ultimately, the study concluded that same-sex marriage and second-parent adoptions secure the child’s eligibility for private health insurance from both parties.<sup>84</sup> State support policies and pediatricians have the power to modify or even reduce disparities in private health insurance for children in need of care.<sup>85</sup>

Although it appears that more companies are offering health insurance options for domestic partnership, there are still many issues that need to be addressed. It comes down to the wellbeing of children born into an unfavorable position. Children should not be denied the coverage they deserve when one parent is able to give them superlative protection. “While more of these families might have access to health insurance after the implementation of the Affordable Care Act, right now, among same-sex couples raising biological, adopted or stepchildren, at least one parent or child does not have health insurance in 38% of same-sex couple families.”<sup>86</sup> For heterosexual couples the figure is half that at eighteen percent.<sup>87</sup>

#### *The Battle For Medical Care And Emergency Treatment*

Children of same-sex couples are precluded from receiving consent for medical care or emergency treatment authorization if their parents are non-biological or not their legally adoptive parent.<sup>88</sup> “Children’s wellbeing relies in large part on a complex blend of their own legal rights and the rights derived, under law, from their parents.”<sup>89</sup> While many

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<sup>81</sup> Gates, *supra* note 13.

<sup>82</sup> Gonzales, *supra* note 80, at 704–10.

<sup>83</sup> Gonzales, *supra* note 80, at 704–10.

<sup>84</sup> Gonzales, *supra* note 80, at 704–10.

<sup>85</sup> Gonzales, *supra* note 80, at 704–10.

<sup>86</sup> Gates, *supra* note 13.

<sup>87</sup> Gates, *supra* note 13.

<sup>88</sup> Pawelski, *supra* note 2.

<sup>89</sup> Pawelski, *supra* note 2.

hospitals have policies in place to prevent discrimination on the basis of sexual orientation, these policies are not always correctly implemented.<sup>90</sup>

There are many examples of unfair treatment towards gay couples. A hospital in Barksfield, California, denied the nonbiological parent to stay with their child, after the child was rushed to the hospital with a 104-degree fever.<sup>91</sup> Although the women were domestic partners, only the biological mother was only allowed to stay with the child.<sup>92</sup> “[H]ospitals typically allow both parents to stay with a child during treatment, in this case, the second parent was forced to stay in the waiting room.”<sup>93</sup> An Oregon man was asked to leave the hospital room where his domestic partner was unconscious.<sup>94</sup> The man was forced to leave the room when decisions were to be made by the family about his care.<sup>95</sup> While in the state of Florida, a woman from Washington collapsed and her partner was unable to see her.<sup>96</sup> The partner had power of attorney and documentation supporting the relationship.<sup>97</sup> She claimed hospital officials told her she was not a family member under Florida law.<sup>98</sup> The partner was eventually allowed access; however, her partner’s condition worsened by that point and she subsequently died.<sup>99</sup> The adopted children of the patient were not able to see their mother before she died.<sup>100</sup>

Unlike heterosexual couples, same-sex couples often must document their relationship to hospital officials before being allowed to take part in a partner’s care.<sup>101</sup> “There is a real disconnect between what might be a good written policy or state law and actual implementation of that policy or law,” said Ellen Kahn, family project director for the Human Rights Campaign (“HRC”).<sup>102</sup> Partners are advised to keep legal documents close by in the event of a family emergency.<sup>103</sup> Partners are also advised to have family and friends keep documents readily

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<sup>90</sup> Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, WELL, available at <http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/> (last visited Jan. 14, 2014).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> WELL, *supra* note 90.

<sup>97</sup> WELL, *supra* note 90.

<sup>98</sup> WELL, *supra* note 90.

<sup>99</sup> WELL, *supra* note 90.

<sup>100</sup> WELL, *supra* note 90.

<sup>101</sup> WELL, *supra* note 90.

<sup>102</sup> WELL, *supra* note 90.

<sup>103</sup> WELL, *supra* note 90.

accessible in the event the documents need to be faxed or e-mailed.<sup>104</sup> The common solution to the problem is often pretending to be a sibling.<sup>105</sup> “If you’re on the road and have a crisis, the word on the street is just say, ‘This is my sister,’ or ‘This is my brother,’” Ms. Kahn said.<sup>106</sup> “Most people won’t raise an eyebrow about it unless you look very different . . . [i]t’s sad that we have to think about that . . . [a]m I going to be better off saying this is my sister or this is my life partner?”<sup>107</sup>

In recent years, there has also been debate as to whether healthcare professionals can legally refuse to provide medical services that conflict with their moral or religious beliefs.<sup>108</sup> The debate is generally over certain procedures such as abortions and products such as contraception.<sup>109</sup> However, this debate extends to whether “healthcare professionals can legally refuse to provide lesbian, gay, or bisexual individuals with medical services, such as artificial reproductive technology, where their religious or moral objections pertain to the sexual orientation of the recipient, as opposed to the nature of the services.”<sup>110</sup> Federal and state conscience and refusal clauses allow healthcare providers and institutions to refuse to provide health services that violate their religious or moral convictions.<sup>111</sup>

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<sup>104</sup> WELL, *supra* note 90.

<sup>105</sup> WELL, *supra* note 90.

<sup>106</sup> WELL, *supra* note 90, at 49.

<sup>107</sup> WELL, *supra* note 90, at 49.

<sup>108</sup> Rachel Reibman, *The Patient Wanted the Doctor to Treat Her in the Closet, but the Janitor Wouldn’t Open the Door: Healthcare Provider Rights of Refusal Versus Lgb Rights to Reproductive and Elder Healthcare*, 28 TEMP. J. SCI. TECH. & ENVTL. L. 65, 66 (2009) (citing Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779, 782–83 (2007)) (“arguing healthcare professionals should not have broad immunity to refuse to provide reproductive treatments or give advice to patients because of moral or religious objections”); Martha S. Swartz, “Conscience Clauses” or “Unconscionable Clauses”: *Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL’Y L. & ETHICS 269, 278 (2006) (“arguing health professionals’ expected standard of care should be to place patients’ interests above their own in the context of reproductive services”).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (citing Guttmacher Institute, *State Policies in Brief: Refusing to Provide Health Services* (2009), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf); see also Health Programs Extension Act (Church Amendment) of 1973, Pub. L. No. 93-45, § 401(b), 87 Stat. 91 (codified as amended at 42 U.S.C. § 300a-7 (2000)):

(b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act ... by any individual or entity does not authorize any court or any public official or other public authority to require: (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or

Many hospitals are now implementing the Healthcare Equality Index (“HEI”) as a set of criteria offering equal care to the LGBT population.<sup>112</sup> In 2013, 464 healthcare facilities—representing seventy-four percent of total participants—earned the “2013 Leader in LGBT Healthcare Equality.”<sup>113</sup> “This new high represented a 199% increase in HEI participants who achieved Equality Leader recognition by protecting their LGBT patients and employees from discrimination, ensuring equal visitation for LGBT people and providing staff training in LGBT patient-centered care.”<sup>114</sup>

With measures in place such as the HEI, it is up to the healthcare industry to take precautionary steps to ensure successful implementation nationwide. When a child is in the emergency room and cannot see his or her mother because she has no legally recognized right, we are hurting the child. We need to do what is in the best interest of the child. A loving parent is in a better position to make a decision regarding the best interest of the child when it comes to medical consent and emergency treatment.

#### *The Battle For Financial Aid*

The Department of Education will now recognize same-sex marriages for the purposes of filing for financial aid; however, we are still uncertain as to how this change will impact children of same-sex couples applying for financial aid.<sup>115</sup> Before the Supreme Court ruling, the Department of Education was bound by the Defense of Marriage Act, which prohibited all federal agencies from recognizing same-sex marriage.<sup>116</sup> The Department of Education said it would recognize a

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moral convictions; or (2) such entity to: (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

<sup>112</sup> *HEI 2013 Leaders in LGBT Healthcare Equality*, HUMAN RIGHTS CAMPAIGN FOUNDATION, available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HEI\\_2013\\_final.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/HEI_2013_final.pdf) (last visited Dec. 14, 2014).

<sup>113</sup> *Id.*

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

<sup>115</sup> Denver Nicks, *Gay Marriage: More Federal Agencies to Recognize Same-Sex Marriages*, TIME (Dec. 13, 2013), available at <http://swampland.time.com/2013/12/13/federal-agencies-to-recognize-same-sex-marriages/>.

<sup>116</sup> *Changes Made for Couples Applying for Federal College Loans*, FOX NEWS (Dec. 13, 2013), <http://www.foxnews.com/politics/2013/12/13/changes-made-for-gay-couples-applying-for-federal-college-loans/>.

student's parent as legally married if, and only if, the couple was legally married in a state that permits same-sex marriage.<sup>117</sup> Children being raised by same-sex couples in states that do not allow same-sex marriage, still face the battle of not being able to account for both of their parents' income, if both parents are not legally married.<sup>118</sup>

Although the department's decision was a large step in the right direction, children are still being placed at a disadvantage. This disadvantage is premised on the stipulation that a student's parents be legally married. Once again, a child is being placed into an unfavorable position for not having parents as seen in the eyes of the law. A child can have two loving parents, and yet not be able to use their income for FAFSA calculation purposes.

#### CONCLUSION: LET US DO WHAT IS BEST FOR THE CHILDREN

Public policy designed to promote family stability and security needs to take into account the growing number of same-sex partners raising children. "For many American families, marriage helps to promote stability in family relationships and more efficient allocation of household financial resources."<sup>119</sup> Unfortunately, all of the characteristics associated with relatively lower incomes correlate to the LGBT population. More LGBT families tend to include young, female parents that are more racially and ethnically diverse.<sup>120</sup> There is a \$10,000 difference between the median annual household incomes of same-sex and different-sex couples raising children, \$63,900 verses \$74,000, respectively.<sup>121</sup> With such disparities, we need to do what we can to safeguard the best interest of the children born from same-sex couples. We are only punishing the children for something they have no control over.

The resolution behind this comment is not to fuel momentum behind gay marriage, but to simply expose the changes that need to occur, among a nation that is essentially hurting children born to same-sex couples. It would be too basic an assessment if we did not address the actual resistance within the families themselves. Often times, the families among the LGBT community are internally battling a set of new norms. Multifaceted responses of grief, anger, fear, and lack of

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<sup>117</sup> Dan Brekke, *DOMA Ruling Prompts Change in Federal Student Aid Rules*, KQED NEWS, (Dec. 13, 2013), <http://blogs.kqed.org/newsfix/2013/12/13/doma-same-sex-student-financial-aid-fafsa>.

<sup>118</sup> *Id.*

<sup>119</sup> Gates, *supra* note 13.

<sup>120</sup> Gates, *supra* note 13.

<sup>121</sup> Gates, *supra* note 13.

understanding fuel the absence of transformation within our nation. The law is trying to provide guidance; however, there is a lack of education and groups among the nation really needed to instruct organizations that are for the purpose of creating change. American citizens need to commit to an alteration of beliefs, behaviors, and ideals.

In the United States of America, children are our future, and the universally recognized standard is that of their best interest. States need to do what they can in order to warrant protection and equal opportunity in what can be unfortunate circumstances. We are really in the incipient stages of a nation recognizing that two loving and willing parents just want to do what is best for the child they have raised since birth.