Developments in Law and Policy: Emerging Issues in Family Law

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Emerging Issues in Family Law

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Family law is intrinsically provocative because it governs a fundamentally important aspect of human life. Unlike fields such as securities or evidence, family law exerts a direct and profound effect upon our most deeply cherished relationships. It becomes most relevant at the happiest moments of our lives—weddings and births—and the saddest—divorces and deaths. Many of the disputes at the unsettled frontiers of this field where the law is rapidly evolving touch something deep within us and frequently evoke passionate, if not visceral, reactions. This Article surveys a variety of intriguing family law controversies that have arisen alongside developments in reproductive technologies and evolving social attitudes toward homosexuals and battered women.

Part I of this Article focuses on bioethical problems involving non-traditional forms of reproduction. It surveys case law concerning disputes over frozen embryos, the legal status of children conceived from frozen gametes after the death of the gamete donor, and the enforceability of surrogacy agreements. Part II turns to homosexual and transsexual marriage, examining recent cases in this area and exploring the impact of the Federal Defense of Marriage Act. Part III analyzes the right of homosexuals to raise children, considering disputes over visitation and custody of biologically-related children, as well as controversies concerning adoption. Part IV investigates developments in domestic violence policy, focusing on laws requiring the arrest and prosecution of offenders. It also discusses the gradually developing tendency of some judges to punish victims who re-initiate contact with their abusers. Part V briefly concludes.

I. BIOETHICS AND THE FAMILY

Advances in medical and reproductive technologies have raised intriguing bioethical issues in family law. Although children have long been one of the central concerns of this field, modern developments in artificial insemination, \textit{in vitro} fertilization (IVF), and cryopreservation (storing gametes or embryos in a frozen state for future use) have expanded its reach to encompass embryos, as well. As the range of available reproductive options continues to grow, so
too does the spectrum of potential legal problems. This Part discusses the various approaches courts have taken in resolving these new types of controversies. Section A examines disputes over frozen embryos. Section B analyzes posthumous reproduction, which most frequently involves frozen gametes from a recently-deceased spouse. Section C concludes with an examination of contemporary developments in the area of surrogate motherhood.

A. Frozen Embryos

*In vitro* fertilization is the process by which sperm is used to fertilize eggs outside of a woman's body. The resulting zygotes (also called pre-embryos) can then be implanted into her uterus, thereby affording the woman the opportunity to experience pregnancy and childbirth. Because of the time, expense, and inconvenience associated with retrieving eggs for this procedure from a woman's body, doctors often harvest more than are necessary for a single IVF attempt. Similarly, given the relatively low odds that a zygote created through IVF will successfully implant itself in the woman's uterus, it is not uncommon for IVF clinics to fertilize these extra eggs in an effort to facilitate subsequent implantation attempts. The resulting zygotes are cryogenically preserved—frozen—until they are needed; zygotes stored in this manner can be successfully implanted years after their creation.

Florida is currently the only state that requires couples to enter into agreements, prior to engaging in IVF, concerning the disposition of frozen pre-embryos. Florida further provides that, in the absence of such an agreement, both parents must agree to the pre-embryos' disposition.

Louisiana law states that an *ex utero* zygote "is a juridical person" to whom its parents owe "a high duty of care and prudent administration." Couples may not have such zygotes destroyed; if they no longer wish to save their zygotes for reproductive purposes, "[i]f the in vitro fertilized human ov[a] shall be available for adoptive implantation in accordance with written procedures of

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1. The eggs can be taken from either the intended gestational mother, see, e.g., Cahill v. Cahill, 757 So. 2d 465, 465 (Ala. Civ. App. 2000), or an egg donor, see, e.g., Litowitz v. Litowitz, 48 P.3d 261, 262 (Wash. 2002).
2. Courts use the terms "zygote" and "pre-embryo" interchangeably. In discussing each case, this Article will adopt the terminology of the particular court that decided it.
3. FLA. STAT. ANN. ch. 742.17 (Harrison 1994) ("A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.").
4. Id. § 742.17(2) ("Absent a written agreement, decisionmaking authority regarding the disposition of pre-embryos shall reside jointly with the commissioning couple.").
6. Id. § 9:129 ("A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person").
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the facility where it is housed or stored."  

Legislatures in other states have yet to offer guidance in this area. As a result, disputes between divorcing spouses over control of cryogenically preserved zygotes can become acrimonious. Early courts considering this issue suggested that such conflicts should be resolved according to whatever agreement the couple entered into prior to undergoing IVF. Later courts have adopted this approach whenever the contract called for the destruction of the frozen zygote. For example, the appellate court in Cahill v. Cahill affirmed the trial court’s decision to enforce such a contract, under which control over the frozen zygotes reverted back to the in vitro fertilization clinic. The contract had specified that the clinic would take control of the zygotes upon “[a] dissolution of [the Cahills’] marriage by court order,” or if they had not contacted “the IVF Program for a period of time exceeding three (3) years.”

The Washington Supreme Court, facing a similar scenario, also decided to abide by the terms of the cryopreservation contract. In Litowitz v. Litowitz, the agreement specified that the pre-embryos would be “thawed but not allowed to undergo further development” by the IVF center if they had been in cryopreservation for more than five years and the Litowitzes had not contacted the center to extend their contract. Finding this to be the case, the court held

7. Id. § 9:130.
8. The landmark case in this area is Davis v. Davíó, 842 S.W.2d 588 (Tenn. 1992), in which the Tennessee Supreme Court held:
   [An agreement regarding disposition of any untransferred pre-embryos in the event of contingencies . . . should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision-making authority as to their disposition.]
   Id. at 597. The couple in Davis had not made such an agreement, however, so the court balanced the interest of the wife in either donating the frozen pre-embryos to an infertile couple or having them implanted in her own uterus against the interest of the husband in avoiding involuntary parenthood. It ruled in favor of the husband, stating, “[O]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the pre-embryos in question.” Id. at 604.
   In Kass v. Kass, the New York Court of Appeals endorsed this approach, holding:
   Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them . . . Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision.
   9. The Kass court enforced a contract the spouses signed prior to the IVF process which provided that if they were “unable to make a decision regarding disposition of [their] stored, frozen pre-zygotes . . . [the pre-zygotes would be] disposed of by the IVF Program for approved research investigation as determined by the IVF Program.” Kass, 696 N.E.2d at 181.
   10. Cahill v. Cahill, 757 So. 2d 465, 467 (Ala. Civ. App. 2000) (affirming the trial court’s ruling that under “the only evidence presented, the [clerk], a nonparty, ‘appears’ to be the owner of the zygotes”).
   11. Id. at 466.
that "the contractual rights of the parties under the pre-embryo cryopreservation contract" had lapsed,\textsuperscript{14} and the embryos should be thawed without being allowed to develop.\textsuperscript{15} In reaching this conclusion, the Washington Supreme Court reversed the trial court's decision, approved by the court of appeals, to apply a "best interest of the child" test and award custody to the husband, who wanted to make the pre-embryos available for "adoption."\textsuperscript{16}

Courts have consistently refused to enforce contracts, however, that would result in one party becoming a parent against his or her will. In \textit{A.Z. v. B.Z.}, a woman wanted to be implanted with her frozen pre-embryos, but her ex-husband (whose sperm had been used to create them) did not want her to have his children.\textsuperscript{17} The form they had signed prior to creating the embryos stated that if the couple separated, they "agree[d] to have the embryo(s) . . . return[ed] to [the] wife for implant."\textsuperscript{18} The Massachusetts Supreme Judicial Court identified several technical problems with the form,\textsuperscript{19} but went on to stress: [E]ven had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen pre-embryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement.\textsuperscript{20}

In discerning Massachusetts's policy in this area, the court looked to the

\textsuperscript{13. Id. at 269 ("The probable date of implantation of the three pre-embryos actually used was April 20, 1996. More than five years have passed since that date. Neither Petitioner nor Respondent claims extension of the contract beyond five years.").}
\textsuperscript{14. Id. at 271.}
\textsuperscript{15. The court held, "We base our decision in this case solely upon the contractual rights of the parties under the pre-embryo cryopreservation contract . . . . Under terms of the contract, then, the remaining pre-embryos would have been thawed out and not allowed to undergo further development five years after the initial date of cryopreservation . . . ." Id.}
\textsuperscript{16. Id. at 264.}
\textsuperscript{18. A.Z., 725 N.E.2d at 1054.}
\textsuperscript{19. First, the court noted that there was no indication that the couple intended the form "to act as a binding agreement between them should they later disagree as to the disposition. Rather, it appears that it was intended only to define the donors' relationship as a unit with the clinic." Id. at 1056. Second, it did not contain a "duration provision." Id. The court refused to assume that "the donors intended the consent form to govern the disposition of the frozen pre-embryos four years after it was executed, especially in light of the fundamental change in their relationship (i.e., divorce)." Id. at 1057. Third, the literal language of the form addressed what would happen if the couple became "separated." The court ruled, "Because divorce legally ends a couple's marriage, we shall not assume, in the absence of any evidence to the contrary, that an agreement on this issue providing for separation was meant to govern in the event of a divorce." Id. The court also noted that the husband signed the form before the wife filled in the section concerning her right to take the embryos for implantation upon separation. "We therefore cannot conclude," the court held, "that the consent form represents the true intention of the husband for the disposition of the pre-embryos." Id. A final reason the agreement was deemed technically invalid was because it did not "contain provisions for custody, support, and maintenance, in the event that the wife conceives and gives birth to a child." Id.}
\textsuperscript{20. Id. at 1057-58 (internal footnote omitted).}
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state’s laws abolishing the cause of action for breach of contract to marry\(^{21}\) and preventing mothers from surrendering children for adoption sooner than four days after their birth.\(^{22}\) It saw these measures as evidence of the legislature’s belief that “individuals should not be bound by certain agreements binding them to enter or not enter into familial relationships.”\(^{23}\) The court found further support for its conclusion in its historic “hesitancy to become involved in intimate questions inherent in the marriage relationship.”\(^{24}\)

The New Jersey Supreme Court agreed with this result. In \textit{J.B. v. M.B.}, the husband wanted to save the frozen zygotes for future implantation and the wife wanted them destroyed. The court held, “Even if the wife were relieved of the financial and custodial responsibility for her child, the fact that her biological child would exist in an environment controlled by strangers is understandably unacceptable to the wife.”\(^{25}\)

The reluctance of courts to enforce agreements that would result in a person involuntarily becoming a parent largely eviscerates the value of such agreements in resolving disputes between divorced spouses; indeed, the substantive result in these cases is the same as if there had been no agreements at all. For example, in \textit{Bohn v. Ann Arbor Medical Associates, P.C.}, a woman sued her fertility clinic, arguing that the clinic had breached its contract with her by refusing to implant in her, without her ex-husband’s permission, frozen zygotes that had been created during their marriage.\(^{26}\) Because the couple had not entered into an agreement before beginning the IVF process concerning the disposition of their frozen zygotes in the event of divorce, they had expressed no intentions for a court to enforce.\(^{27}\) Consequently, the appellate court essentially remanded the matter to the couple to decide on their own. It upheld the trial court’s rulings that “neither plaintiff nor her ex-husband . . . have a unilateral right to disposition of the zygotes and that, until they reach an agreement, the zygotes will remain cryopreserved in the possession [of the fertility clinic].”\(^{28}\)

The practical effect of this approach is that it gives the individual opposed to implantation a virtual veto power, because the zygotes must stay

\(^{21}\) \textit{Id.} at 1058 (citing MASS. GEN. LAWS ANN. ch. 207, § 47A (West 1998) (“Breach of contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor.”)).

\(^{22}\) \textit{Id.} (citing MASS. GEN. LAWS ANN. ch. 210, § 2 (West 1998) (“Such written consent [to adoption] shall be executed no sooner than the fourth calendar day after the date of birth of the child to be adopted.”)).

\(^{23}\) \textit{Id.}

\(^{24}\) \textit{Id.}


\(^{27}\) \textit{Id.} at *8-10.

\(^{28}\) \textit{Id.} at *1.
cryopreserved until the couple reaches a resolution; this is exactly what happens when a court refuses to enforce a contract over the objection of a party seeking to avoid reproduction. The other notable aspect of the Bohn court's ruling was its refusal to extend the state's Child Custody Act to frozen zygotes. It stated, "We decline to stretch the definition of 'child' to the degree suggested by plaintiff and suggest that such an extension would require legislative, rather than judicial action." 29

Even more contentious than disputes over frozen zygotes are controversies concerning parental rights to children born from those zygotes. In Interest of O.G.M., Donald McGill and Mildred Schmit, a married couple, had zygotes cryogenically preserved at an IVF clinic. 30 Following their divorce, McGill accompanied Schmit to the clinic, where she underwent IVF. 31 Once Schmit gave birth, the parties disagreed over McGill's paternal rights. "Schmit claim[ed] McGill donated the pre-embryos to her, while McGill claim[ed] they agreed he would be the father." 32 Given McGill's biological relationship to the baby, as well as the fact that he was listed as the baby's father on the birth certificate and paid child support, the Texas Court of Appeals upheld the trial court's ruling that he was the father. 33

Thus, most courts have implicitly endorsed the conclusion of Davis v. Davis that frozen pre-embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." 34 In some cases, pre-

29. Id. at *16.
31. Id. at 474.
32. Id. at 475.
33. Id. at 478.
34. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992). If frozen zygotes were considered "persons," courts would not be permitted to order or acquiesce in their destruction. If, on the other hand, they were considered mere "property," there would be no basis for refusing to enforce contracts that would result in a person becoming a biological parent against his or her will—the terms of the contract would simply be enforced. The property-like aspect of frozen zygotes is most clearly discernable in disputes between couples and third parties. Courts have recognized that a couple has a property interest in its frozen zygotes as against the rest of the world, until this interest is terminated pursuant to the terms of an IVF agreement, as in Cahill v. Cahill, 757 So. 2d 465, 468 (Ala. Civ. App. 2000), or Litowitz v. Litowitz, 48 P.3d 261, 269 (Wash. 2002). In York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), for example, a couple wished to switch IVF clinics, but their original clinic refused to transfer their frozen zygotes. The court held that, in storing the couple's zygotes, the clinic had entered into a bailment relationship with the couple which obligated the clinic to return "the subject matter of the bailment to the bailor." Id. at 425. The court went on to state that "[t]he obligation to return property is implied from the fact of lawful possession of the personal property of another." Id. (emphasis added).

In Del Zio v. Presbyterian Hosp., No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 14, 1978), the plaintiffs were permitted to recover damages for intentional infliction of emotional distress resulting from the destruction of their zygotes. The couple had fertilized the wife's eggs with the husband's sperm and placed the resulting zygotes in an incubator at Presbyterian Hospital. The chief of Presbyterian's Obstetrical and Gynecological Service, upon learning of the zygotes, ordered their destruction because he did not feel that IVF technology had yet progressed to the point where it was sufficiently safe to be performed at his hospital. In upholding the plaintiffs' award, the District Court discussed its charge to the jury concerning an alternate theory of liability—conversion. "[A]s to the
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cryopreservation contracts can be used as the basis for the Solomonic decision that neither spouse is entitled to control over the frozen zygotes, because their contractual right to them “expired” and ownership has reverted to the IVF clinic. However, due to the reluctance of courts to make people become parents involuntarily, contracts are no longer a useful means of resolving disputes between spouses when the couple (as opposed to the clinic) still retains a legal right to the zygotes. In such cases, the zygotes remain in their state of frosty slumber until a compromise can be reached.

B. Posthumous Reproduction

Because gametes and zygotes can be cryogenically preserved, people who participate in IVF can become parents even after death. Early cases in this area addressed the question of whether a person may be impregnated with a decedent’s frozen sperm when the decedent had expressly intended that it be used in this way.35 More recent cases focus on whether a child born in this manner is the legal offspring of its deceased parent for purposes of inheritance rights and eligibility for government benefits. Some states have attacked this problem legislatively, declaring that a child conceived after a person’s death cannot be considered that person’s legal progeny.36

The most recent case in this area is Woodward v. Commissioner of Social Security.37 In January 1993, Lauren and Warren Woodward were informed that Warren had leukemia. “Advised that the husband’s leukemia treatment might leave him sterile, the Woodwards arranged for a quantity of the husband’s

conversion claim,” it had instructed the jury that “[w]hen, as in this case, the property has no ascertainable market value, to determine the amount of plaintiffs’ loss you may consider the replacement costs, if any, of the specimen. You may not take into account the sentimental value of the property to the plaintiffs.” Id. at *16 (emphasis added). While these decisions affirm that couples have property-type rights in their frozen zygotes as against third parties, courts do not treat frozen zygotes as property for the purpose of resolving disputes inter se.

35. See Hecht v. Superior Court, No. B097742, 1996 Cal. App. LEXIS 1058 at *13 (Cal. Ct. App. Nov. 13, 1996) (“[N]either this court nor decedent’s adult children possess reason or right to prevent Hecht from implementing decedent’s preeminent interest in realizing his ‘fundamental right’ to procreate with the woman of his choice.”), order unpublished by No. S057498, 1997 Cal. LEXIS 131 (Cal. Jan. 15, 1997); see also Hall v. Fertility Inst., 647 So. 2d 1348, 1351 (La. Ct. App. 1994) (“We find no merit in the Executrix’ arguments that the authentic act of [sperm] donation should be set aside for reasons of public policy, and reject the notion that St. John’s proposed artificial insemination would be contra bonos mores in this State.”). These courts disagreed as to whether the frozen sperm was “property.” Compare Hecht, 1996 Cal. App. LEXIS 1058, at *10 (“Even Hecht lacks the legal entitlement to give, sell, or otherwise dispose of decedent’s sperm. She and she alone can use it.... [T]o the extent this sperm is ‘property’ it is only ‘property’ for that one person.”), with Hall, 647 So. 2d at 1351 (“If it is shown at trial that decedent was competent and not under undue influence at the time [when he donated his frozen sperm to St. John], the frozen semen is St. John’s property, and she has full rights to its disposition.”).

36. See, e.g., LA. CIV. CODE ANN. art. 939 (West 2000) (“A successor must exist at the death of the decedent.”); N.D. CENT. CODE ANN. § 14-18-04(2) (Michie 1997) (“A person who dies before a conception using that person’s sperm or egg is not a parent of any resulting child born of the conception.”).

semen to be medically withdrawn and preserved, in a process commonly known as "sperm banking." That October, Warren died.

Two years later, Lauren gave birth to twin girls conceived through artificial insemination with Warren’s frozen sperm. Because Warren had been insured under the Social Security Act ("the Act"), Lauren applied for Social Security benefits for her daughters under 42 U.S.C. § 402(d)(1), and for herself under 42 U.S.C. § 402(g)(1). The Social Security Administration (SSA) rejected her application, insisting that the twins were not Warren’s “children” as that term was used in the Act.41 While appealing the SSA’s ruling, Lauren obtained an order from the Probate and Family Court amending the twins’ birth certificates to state that Warren was their father.42

The SSA nonetheless continued to reject her claim. An administrative law judge (ALJ) held that the twins were not Warren’s children under the Act because they were “not entitled to inherit from [him] under the Massachusetts intestacy and paternity laws.” The ALJ explained that Massachusetts intestacy law “contemplated an ascertainable child, one who had been conceived prior to the father’s death.” The ALJ further held that the Probate Court’s decision to amend the twins’ birth certificates was “inconsistent with Massachusetts paternity laws.” Lauren appealed to the Federal District Court of Massachusetts, which in turn certified the question of the twins’ paternity to the Massachusetts Supreme Judicial Court as a state-law question of first impression.

The Massachusetts Supreme Judicial Court began with the text of the state’s intestacy statute, which provided that a decedent’s “issue” were eligible to inherit. The term “issue” had been interpreted to mean “all lineal (genetic) descendants, and now includes both marital and nonmarital descendants.” Thus, the central question was whether “there [was] any reason that children conceived after the decedent’s death who [were] the decedent’s direct genetic descendants . . . [could] not enjoy the same succession rights as children conceived before the decedent’s death.”

38. Id. at 260.
40. Id. § 402(g)(1) (1994) (providing benefits to a surviving spouse of an individual who was insured under the Social Security Act, so long as the spouse has children who qualify for children’s benefits under § 402(d)(1)).
41. See id. § 416(e) (defining the term “child” as including the “child or legally adopted child of an individual”).
42. Woodward, 760 N.E.2d at 260-61.
43. Id. at 261.
44. Id. at 261 n.6 (internal quotations omitted).
45. Id. (internal quotations omitted).
46. Id. at 263 (citing MASS. GEN. LAWS ANN. ch. 190, § 1 (West 1990)).
47. Id.
48. Id. at 264.
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Because state law did not directly speak to the issue, the court balanced what it perceived to be the three main interests involved. First, it looked to the best interests of the children. It held, “Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be ‘entitled to the same rights and protections of the law’ regardless of the accidents of their birth.”

Next, the court turned to the State’s interest in the orderly administration of estates, which the State promoted in two ways: “(1) by requiring certainty of filiation between the decedent and his issue, and (2) by establishing limitations periods for the commencement of claims against the intestate estate.” It felt that, at least in this case, neither of these considerations precluded recognition of posthumous children as heirs under Massachusetts law. Certainty of filiation was not a problem because posthumous children, like all children conceived outside of marriage, would be statutorily required to “obtain a judgment of paternity” to be eligible to inherit. Moreover, the state’s limitation period, requiring that paternity be established within a year of the purported parent’s death, did not have to be considered in this case, because under federal Social Security regulations an applicant could not be denied benefits for failure to obtain a paternity judgment in a timely manner.

Finally, the court considered the reproductive rights of genetic parents. It

49. See id. at 262 (“Neither the state’s ‘posthumous children’ provision...nor any other provision of our intestacy law limits the class of posthumous children to those in utero at the time of the decedent’s death.”). The “posthumous children” statute, enacted in 1836, stated “Posthumous children shall be considered as living at the death of their parent.” MASS. GEN. LAWS ANN.ch. 190, § 8 (West 1990). It had been enacted to confirm an 1834 state supreme court ruling that “a child who was presumptively in utero as of the date of the decedent’s death was a child ‘in being’ as of [that day]” “in all cases where it will be for the benefit of such child to be so considered.” Woodward, 760 N.E.2d at 264 (quoting Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257, 258 (1834)). The text of this statute was not dispositive of the Woodward case because “[t]he Legislature...left the term ‘posthumous children’ undefined.” Id. However, due to “the Legislature’s overriding purpose to promote the welfare of all children” through its laws, the court rejected “the Commissioner’s position that the historical context of [the statute] dictate[d] as a matter of law that all posthumously conceived children [we]re automatically barred from taking under their deceased donor parent’s intestate estate.” Id. at 265-66 (emphasis added).

50. Woodward, 760 N.E.2d at 265 (citing MASS. GEN. LAWS ANN. ch. 209C, § 1 (West 1998)).
51. Id. at 266 (recognizing the State’s interest in “provid[ing] certainty to heirs and creditors by effecting the orderly, prompt, and accurate administration of intestate estates”).

52. Id.
53. Children conceived through advanced reproductive technologies after the death of a genetic parent are, by definition, conceived outside of marriage because marriage ends upon a spouse’s death. Id. at 266.
54. Id. at 267; see also id. at 263 (“[T]o enjoy inheritance rights as the issue of a deceased father, a nonmarital child, in the absence of the father’s acknowledgement of paternity or marriage to the mother, must obtain a judicial determination that he or she is the father’s child.” (citing MASS. GEN. LAWS ANN. ch. 190, § 7 (West Supp. 2002))).
55. Id. at 267 (citing MASS. GEN. LAWS ANN. ch. 190, § 7 (West Supp. 2002)).
56. Id. at 268 (“Because the resolution of the time constraints question is not required here, it must await the appropriate case, should one arise.”).
57. 20 C.F.R. § 404.355(b)(2) (2002) (“We will not apply any State inheritance law requirement that an action to establish paternity must be taken within a specified period of time measured from the worker’s death or the child’s birth...”).
reaffirmed its holding in A.Z. v. B.Z. that "individuals have a protected right to control the use of their gametes." The court inferred from this principle that a child conceived from a decedent’s frozen gametes should not be considered that person’s legal "issue" unless the decedent "clearly and unequivocally consent[ed] to posthumous reproduction." Such consent is necessary because the fact “[t]hat a man has medically preserved his gametes for use by his spouse thus may indicate only that he wished to reproduce after some contingency while he was alive, and not that he consented to the different circumstance of creating a child after his death.”

Based on these three factors, the court concluded:

[P]osthumously conceived children may enjoy the inheritance rights of “issue” under our intestacy law .... where, as a threshold matter, the surviving parent or the child’s other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.

Applying this standard, the court held that the probate court “should not have entered the paternity judgment.” Although Lauren had established that Warren was the twins’ genetic father, she had not presented evidence concerning his consent to posthumous reproduction. The Massachusetts Supreme Judicial Court noted, however, that Lauren could introduce such evidence back in the federal district court.

In re Estate of Kolacy was an strikingly similar case decided by the New Jersey Superior Court. William and Mariantonia Kolacy were married. Like Warren Woodward, William was diagnosed with leukemia and had sperm cryopreserved prior to undergoing treatment. He died over a year later, in 1995. Following his death, Mariantonia was implanted with embryos created using his frozen sperm. She gave birth to twin girls—Amanda and Elyse. Here too, the SSA refused to recognize them as children of their deceased biological father and considered them ineligible for Social Security benefits. Mariantonia sought a declaratory judgment that Amanda and Elyse were William’s heirs under New Jersey law.

The only applicable statute identified by the court provided, “Relatives of the decedent conceived before his death but born thereafter inherit as if they

58. Woodward, 760 N.E.2d at 269 (citing A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000)); see also supra Section I.A.
60. Id.
61. Id. at 272.
62. Id. at 271.
63. Id.
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had been born in the lifetime of the decedent.\(^65\) Although the twins did not fall within the scope of this law, the court did not interpret it so as to defeat their claim. It stated, “To the extent that there was a conscious legislative intent about reproductive processes involved, the intent was undoubtedly to deal fairly and sensibly with children resulting from traditional sexual activity in which a man directly deposits sperm into the body of a woman.”\(^66\) Instead of reading the statute so as to exclude posthumous children who are conceived after the gamete donor’s death, the court viewed it as evidence of the Legislature’s intent to protect children:

Although the Legislature has not dealt with the kind of issue presented by children such as Amanda and Elyse, it has manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death. It is my view that the general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us.\(^67\)

Thus, it concluded that once a child is proven to be “the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.”\(^68\) The New Jersey court did not include the requirement imposed by the Massachusetts Supreme Judicial Court that the decedent’s consent to posthumous reproduction be demonstrated. Whereas the Massachusetts court took both the children’s best interests and the decedent’s reproductive rights into account, the New Jersey court focused solely on providing for posthumously conceived children. Since no other courts have yet considered this issue, it remains to be seen which approach will prevail.

C. Surrogacy

Several states have codified their opposition to surrogacy; some prohibit it under all circumstances,\(^69\) while others ban only commercial surrogacy.\(^70\) The

\(^{65}\) Id. at 1260 (quoting N.J. STAT. ANN. § 3B:5-8 (West 1983)).

\(^{66}\) Id. at 1261.

\(^{67}\) Id. at 1262.

\(^{68}\) Id. With regard to the orderly administration of estates, the court held that it would “undoubtedly be both fair and constitutional for a Legislature to impose time limits and other situationally described limits on the ability of after born children to take from or through a parent.” Id. Moreover, it suggested that payments made to heirs before the conception of a posthumous child be treated as “vested and left undisturbed” upon its birth. Id.

\(^{69}\) Michigan law renders all surrogacy contracts unenforceable, MICH. COMP. LAWS ANN. § 722.855 (West 2002) (“A surrogate parentage contract is void and unenforceable as contrary to public policy.”), but imposes criminal penalties when the contract calls for compensation. Id. § 722.859(2) (stating that a person “who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000.00 or imprisonment of not more than 1 year, or both.”). The Utah code is very similar, declaring surrogacy contracts for compensation void, UTAH CODE ANN. §§ 76-7-204(1)(a), (c) (1999) (“[A] contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result . . . [is] null and void, and unenforceable as contrary to public policy.”),
New Jersey Supreme Court unequivocally condemned commercial surrogacy agreements in the classic case *In re Baby M*,\(^7\) where it refused to enforce a

and establishing criminal penalties for entering into them. *Id.* § 76-7-204(1)(d) ("A violation of this subsection is a class B misdemeanor."). Contracts that do not call for compensation for surrogates are also unenforceable under Utah law. *Id.* § 76-7-204(2) ("An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result, is unenforceable."); see also N.Y. DOM. REL. LAW § 122 (McKinney 1999) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."); *Id.* §§ 123(1), (2) (establishing criminal penalties for entering into commercial surrogacy contracts).

Arizona appears to be the only state where a surrogacy statute was successfully challenged on constitutional grounds. Like many other states, Arizona made it illegal to enter into a surrogacy contract, whether or not it involved compensation. ARIZ. REV. STAT. ANN. §§ 25-218(A), (D) (West 2000). Arizona law further provided, "A surrogate mother is the legal mother of a child born as a result of a surrogacy contract and is entitled to custody of that child." *Id.* § 25-218(B). Finally, the law stated that if the surrogate was married, there was a rebuttal presumption that her husband was "the legal father of the child." *Id.* § 25-218(C).

In *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994), Ronald and Pamela Soos had engaged the services of Debra Bellas, a surrogate, to carry to term an embryo created from the Soos' genetic material. Bellas became pregnant with triplets. During Bellas's pregnancy, Pamela filed for a divorce from Ronald and sought custody of the unborn triplets. Ronald contested her claim, arguing that he was the legal father and that, under ARIZ. REV. STAT. ANN. § 25-218(B) (West 2000), Bellas—not Pamela—was the legal mother. *Soos*, 897 P.2d at 1358. In the divorce and paternity proceedings, Pamela challenged the statute's constitutionality. The trial court struck down the statute and granted Pamela visitation rights until a hearing could be held to determine what custody arrangement would be in the children's best interests.

The Arizona Court of Appeals agreed that the statute violated Pamela's equal protection rights. The law was subject to strict scrutiny because it discriminated between women and men in areas of fundamental rights—the rights to procreate and to custody of one's offspring. *Id.* at 1360. Whereas § 25-218(B) established an irrebuttable presumption that a surrogate mother was the child's legal mother, § 25-218(C) established only a rebuttable presumption that a surrogate's husband is the child's legal father. Thus, a man genetically related to a child carried by a gestational surrogate had the chance to assert his parental rights, but a genetically related woman did not. *Id.* ("[The statute] allows a man to rebut the presumption of legal paternity by proving 'fatherhood' but does not provide the same opportunity for a woman. . . . By providing dissimilar treatment for men and women who are thus similarly situated, the statute violates the Equal Protection Clause."). (internal quotations omitted).

70. Louisiana law, for example, states that "[a] contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy." LA. REV. STAT. ANN. § 9:2713(A) (West 1991). However, it defines the phrase "contract for surrogate motherhood" as "any agreement whereby a person not married to the contributor of the sperm agrees, for valuable consideration, to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child." *Id.* § 9:2713(B) (emphasis added); see also KY. REV. STAT. ANN. § 199.590(4) (Michie 1999) ("[No one shall] be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. . . . Contracts or agreements entered into in violation of this subsection shall be void.").)

NEB. REV. STAT. §§ 25-21,200(1), (2) (1995) ("[A] contract by which a woman is to be compensated for bearing a child of a man who is not her husband is void and unenforceable."); WASH. REV. CODE ANN. § 26.26.240 (West 1997) ("A surrogate parentage contract entered into for compensation . . . shall be void and unenforceable in the state of Washington as contrary to public policy."); *Id.* § 26.26.250 (stating that anyone who enters into a commercial surrogacy agreement is 'guilty of a gross misdemeanor').

71. The court opined:

The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

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surrogacy contract against a surrogate who had been the baby’s genetic and gestational mother, and instead awarded custody of the baby based on the baby’s best interests. In *A.H.W. v. G.H.B.*, the New Jersey Superior Court took a similarly dim view of a non-commercial surrogacy agreement involving a surrogate who volunteered her gestational services to carry to term an embryo for her sister and brother-in-law that had been created from the couple’s genetic material. Before the baby was born, the intended parents petitioned the court for an order directing that their names be placed on the birth certificate. “Both the petitioning biological parents and the defendant surrogate who carried the baby agree that petitioners should be listed as the legal parents on the baby’s birth certificate.” The state Attorney General’s office opposed the petition, claiming it was contrary to both state law and public policy.

The court sided with the Attorney General, declaring, “A bond is created between a gestational mother and the baby she carries in her womb for nine months.” It further held that “a simplistic comparison [of a gestational surrogate] to an incubator disregards the fact that there are human emotions and biological changes involved in pregnancy.” Consequently, it ruled that not even a gestational surrogate who lacked genetic ties to the baby she carried could be compelled to surrender it pursuant to a surrogacy agreement, nor could the baby’s “intended” parents obtain a pre-birth order designating them as the child’s parents on its birth certificate.

The Massachusetts Supreme Judicial Court, faced with a similar, if not less sympathetic, set of facts in *Culliton v. Beth Israel Deaconess Medical Center*, reached the opposite conclusion. It held that where a couple engaged the services of a gestational surrogate to bring to term an embryo created from the couple’s genetic material, the couple had the right to a pre-birth order directing that they be listed on the baby’s birth certificate as its parents. Acknowledging “the importance of establishing the rights and responsibilities of parents as soon as is practically possible,” the *Culliton* court concluded that, under the circumstances, the couple was entitled to the relief it sought. The court carefully limited its holding, however, to cases where

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72. Id. ("In New Jersey the surrogate mother’s agreement to sell her child is void. Its irrevocability infects the entire contract, as does the money that purports to buy it.").
73. Id. at 1259 ("Based on all of this we have concluded... that Melissa’s best interests call for custody in the Sterns.").
75. Id.
76. Id. at 953.
77. Id. at 952.
78. Id. at 954.
80. The couple agreed to reimburse the surrogate’s “medically necessitated lost wages,” as well as a variety of other expenses incurred during her pregnancy—including “living expenses.” Id. at 1135 n.6.
81. Id. at 1139.
(a) the plaintiffs are the sole genetic sources of the [child];
(b) the gestational carrier agrees with the orders sought;
(c) no one, including the hospital, has contested the complaint or petition; and
(d) by filing the complaint and stipulation for judgment the plaintiffs agree that they have waived any contradictory provisions in the contract.

This reflects the approach taken by the California Supreme Court in the landmark case of Johnson v. Calvert, in which it held that a surrogate who entered into an agreement to provide either an egg or gestational services (but not both) was not the legal mother of the resulting child. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). The court ruled that California law recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship[, ] [However,] when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother . . . .

The court explained that a couple who engages a surrogate’s services should be considered the baby’s parents because they “affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.”

A California appellate court subsequently applied the Johnson decision in In re Marriage of Buzzanca. Luanne and John Buzzanca, a married couple, had an embryo that was not genetically related to either of them implanted in a surrogate. After the baby (Jaycee) was born, Luanne and John divorced; Luanne sought a judicial declaration that she and John were the baby’s parents, while he hoped to avoid any parental responsibility. “The trial court reached an extraordinary conclusion: Jaycee had no lawful parents.” Reversing this unfortunate holding, the appellate court began by noting that the baby “never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.” It then reasoned:

25 Cal. App. 4th 1218, 1230 (1994); see also In re Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1422-23 (1998) (noting the “important distinction between enforcing a surrogacy contract and making a legal determination based on the fact that the contract itself sets in motion a medical procedure which results in the birth of a child.”) (emphasis in original).

82. Id. at 1138.
84. Id. at 782.
85. Id. In In re Marriage of Moschetta, the California Court of Appeals clarified: [T]he [California Supreme Court] did not actually hold that the gestational surrogacy contract at issue in Johnson v. Calvert was enforceable as such. Rather, the court stated that such a contract is a proper basis on which to ascertain the intent of the parties because it does not offend public policy on its face.
25 Cal. App. 4th 1218, 1230 (1994); see also In re Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1422-23 (1998) (noting the “important distinction between enforcing a surrogacy contract and making a legal determination based on the fact that the contract itself sets in motion a medical procedure which results in the birth of a child.”) (emphasis in original).
87. The egg used to create the embryo had not been donated by the surrogate.
88. Moschetta, 25 Cal. App. 4th at 1412. The trial court had accepted a stipulation that the surrogate was not the baby’s mother. It then held that because Luanne had “neither contributed the egg nor given birth,” she could not be the mother. Id. Finally, “John could not be the father, because, not having contributed the sperm, he had no biological relationship with the child.” Id.
89. Id.
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Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.90

In commercial surrogacy cases where the surrogate is both the genetic and gestational mother, courts are much more likely to share the skepticism of the New Jersey judiciary.91 For example, in R.R. v. M.H., a married man (the "father") engaged the services of a married woman (the "mother") to act as a genetic and gestational surrogate.92 She was artificially inseminated with his sperm and carried the resulting child to term. Although they had originally agreed that the father would have custody of the child, during the sixth month of her pregnancy "the mother changed her mind and decided that she wanted to keep the child."93 The Massachusetts Supreme Judicial Court declined to apply a state law that provided, "Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."94 The court reasoned, "It is doubtful...that the Legislature intended [this provision] to apply to the child of a married surrogate mother."95

The court instead relied on statutes prohibiting a mother from transferring her parental rights less than four days after her baby’s birth,96 and from accepting money in exchange for terminating her parental rights.97 This approach required some creative interpretation, since the agreement specified that the payment was "solely [for] the mother’s services in carrying the child"98 and did not require the surrogate to formally relinquish her parental rights.99 The court nonetheless decided to "apply to consent to custody the same principle which underlies the statutory restriction on when a mother’s consent to adoption may be effectively given."100 Thus, the court upheld the mother’s rights to the child.

90. Id. at 1413.
91. See, e.g., In re Marriage of Moschetta, 25 Cal. App. 4th 1218 (1994) (holding that under California law, a surrogate who is a baby’s genetic and gestational mother is its legal mother).
93. Id. at 791.
94. Id. at 795 n.9 (quoting MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1994)).
95. Id. at 795.
96. Id. at 796 (citing MASS. GEN. LAWS ANN. ch. 210, § 2 (West 2002) (providing that a woman may not consent to the adoption of her child "sooner than the fourth calendar day after the date of birth of the child to be adopted").
97. Id. (citing MASS. GEN. LAWS ANN. ch. 210, § 11A (West 2002) (prohibiting unauthorized persons from "accept[ing] payment in the form of money or other consideration in return for placing a child for adoption").
98. Id.
99. The agreement specified that "the [surrogate’s] parental rights would not terminate if she permitted the father to take the child home and have custody...but that, if she attempted to obtain custody or visitation rights, she would forfeit her rights under the agreement." Id. at 792.
100. Id. at 796.
It also held that the surrogacy agreement was unenforceable "on public policy grounds," and went on to criticize commercial surrogacy, stating:

Eliminating any financial reward to a surrogate mother is the only way to assure that no economic pressure will cause a woman, who may well be a member of an economically vulnerable class, to act as a surrogate. . . . [C]ompensated surrogacy arrangements raise the concern that, under financial pressure, a woman will permit her body to be used and her child to be given away.

In conclusion, the goals of surrogacy agreements are much more likely to be accomplished when the surrogate acts out of altruism rather than for compensation. Similarly, courts are more likely to respect these agreements when the surrogate is implanted with a genetically unrelated embryo created through IVF, than when she undergoes artificial insemination, and is the resulting baby’s genetic as well as gestational mother.

II. HOMOSEXUAL AND TRANSSEXUAL MARRIAGE

This Part surveys recent developments in the law of homosexual and transsexual marriage. Homosexual marriage has given rise to particularly contentious and divisive debate among many Americans, a clear majority of whom opposes the practice. Interestingly, however, only a slight majority opposes the idea of allowing homosexual couples to form civil unions.

Section A surveys recent state court rulings on homosexual marriage, focusing on two cases from Massachusetts and Vermont. Section B reviews rulings on transsexual marriage from the only two states to have considered the issue in recent years—Kansas and Texas. Section C considers legislation on homosexual marriage, distinguishing among the three principal forms such statutes take: (1) definitional foreclosure, (2) withholding validity, and (3) explicit prohibition. Section D discusses legislation concerning alternate forms of official recognition for same-sex partners, focusing primarily on developments in Hawaii and Vermont. Section E then delves into the 1996 Federal Defense of Marriage Act (DOMA), which was enacted to define and protect the institution of marriage. This Section also examines the applicability of the constitution’s Full Faith and Credit Clause not only to DOMA, but also to its state law counterparts that express the unwillingness of individual states

101. Id.
102. Id. The court went on to opine,
If no compensation is paid beyond pregnancy-related expenses and if the mother is not bound by her consent to the father's custody of the child unless she consents after a suitable period has passed following the child's birth, the objections we have identified in this opinion to the enforceability of a surrogate's consent to custody would be overcome.

Id.

103. The Gallup Poll Organization, New York Times Policy Focuses Attention on Homosexual Civil Unions: A Slight Majority of Americans Now Oppose Same-Sex Unions, available at http://www.gallup.com/poll/releases/pr020822.asp (last visited Aug. 22, 2002) (reporting that 62% of Americans oppose homosexual marriage, while only 34% support the idea; also stating that 51% of Americans oppose homosexual unions, with 46% in favor).
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to recognize homosexual marriages granted in other jurisdictions.

A. State Court Rulings on Homosexual Marriage

In the past three years, there have been two significant state court rulings on homosexual marriage. The most recent, decided in May 2002, is Goodridge v. Department of Public Health.104 In Goodridge, seven same-sex couples filed suit against the State of Massachusetts for a declaratory judgment that they were entitled to obtain marriage licenses. They argued that the State’s refusal to sanction their marriages violated their fundamental right to marry the partner of their choice and the equality provisions of the Massachusetts Constitution. On cross-motions for summary judgment, the Massachusetts Superior Court ruled in favor of the State.105 It concluded that the Massachusetts Supreme Judicial Court’s historical interpretation of marriage as “the union of one man and one woman” foreclosed the possibility of same-sex marriages.106 In reaching this decision, the court held that same-sex marriage was not a fundamental right protected by the state constitution because it was neither explicitly mentioned in the document’s text nor deeply rooted in the history or traditions of the state.107 It further ruled that the state’s Equal Rights Amendment did not apply to discrimination based on sexual orientation.108

The Vermont Supreme Court reached a somewhat different conclusion in 1999 in Baker v. State, in which it held that same-sex couples were entitled to the common benefits and protections that flowed from marriage under state law.109 The case turned on the Common Benefits Clause of the Vermont Constitution, which reads in part: “[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”110 The court held that this clause entitled same-sex couples to the same benefits and protections that Vermont law afforded to heterosexual married couples.111

The court took great care to stress, however, that same-sex partnerships did not necessarily constitute marriages. The prerogative to determine “whether

105. Id. at *4.
106. Id. (citing Inhabitants of Milford v. Inhabitants of Worcester, 7 Mass. (1 Tyng) 48, 51 (1810)).
107. Id. (“Based on the legal application of the word ‘marriage,’ the construction of the marriage statutes and the history of marriage, Massachusetts’ marriage statutes cannot support same-sex marriage.”).
108. Id. at *5 n.6 (“Plaintiffs also assert that the state’s marriage regulations violate their rights to equal protection under the Massachusetts Declaration of Rights. This argument fails because Massachusetts’ Equal Rights Amendment (‘ERA’) does not apply to discrimination based on sexual orientation.”).
110. Id. at 867 (quoting VT. CONST. ch. 1, art. 7).
111. Id. at 886.
this [common benefit protection] ultimately takes the form of inclusion within the marriage laws themselves or a parallel ‘domestic partnership’ system or some equivalent statutory alternative, rests with the Legislature.”

It suggested some “potentially constitutional statutory schemes,” such as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.

Thus, while the tangible benefits of marriage must be made available to homosexual couples under the Vermont Constitution, the institution itself need not be.

B. State Court Rulings on Transsexual Marriage

Since 1999, there have been two significant cases regarding transsexual marriage. In 2002, in the case of In re Estate of Gardiner, the Kansas Supreme Court invalidated a marriage between a male and a post-operative male-to-female transsexual. J’Noel, the transsexual, had been born male but underwent surgery to become “a functioning, anatomical female;” her birth certificate was amended in September 1994 to state she was female. J’Noel met Marshall, the male, in May 1998, and soon thereafter told him about her history as a man. The two were married in September of the same year, and Marshall died nearly one year later in August 1999.

Marshall’s son from an earlier marriage, Joe, filed a petition opposing J’Noel’s receipt of a spousal share of Marshall’s estate. Joe argued that because J’Noel had been born a male, the marriage between J’Noel and Marshall was void and Joe consequently remained Marshall’s sole heir. J’Noel countered that she was a biological female at the time of her marriage to Marshall and was therefore entitled to her spousal share. Both the trial and appellate courts ruled in Joe’s favor, and the Kansas Supreme Court affirmed.

Joe based his argument on the Kansas marriage statute, which declared:

The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

112. Id. at 867.
113. Id. at 886.
115. Id. at 122-23 (quoting letter from Dr. Eugene Schrang, J’Noel’s doctor).
117. Gardiner, 42 P.3d at 123.
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He claimed that under this measure, a marriage is valid only if it is between two persons who are of opposite sex at birth. Alternatively, Joe asserted that the legislative intent behind the statute was to uphold the traditional institution of marriage, which did not embrace unions between anyone other than a biological male and a biological female.119

The court agreed with Joe’s interpretation of the statute, finding that: [t]he words “sex,” “male,” and “female” in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of “persons of the opposite sex” contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female.

The court recognized the great lengths to which J’Noel had gone, but did not let this affect its ruling. “[W]e recognize that J’Noel has traveled a long and difficult road. J’Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J’Noel remains a transsexual, and a male for purposes of marriage under K.S.A.2001 Supp. 23-101.”121

In 1999, the Texas Court of Appeals weighed in on a similar question in Littleton v. Prange.122 Christie was a transsexual who was born male and was later surgically transformed into a female. Christie married a man in 1989. In 1996, her husband died, and Christie filed a medical malpractice suit under the Texas Wrongful Death and Survival Statute as the man’s surviving spouse. The defendant doctor filed a motion for summary judgment, arguing that because Christie was a man, she could not be regarded as the surviving spouse of another man. At trial, the court granted the doctor’s motion.

The appellate court framed the issue as follows: “Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?”123 Texas law did not permit marriages between individuals of the same sex.124 Interpreting this statute, the court held that because “Christie was created and born a male[,] . . . both anatomically and genetically,” she could not be considered female, despite the fact that she “believe[d] herself to be a woman” and “ha[d] made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate.”125 Thus, since she was

119. Gardiner, 42 P.3d at 126.
120. Id. at 135.
121. Id. at 137. While not ruling in J’Noel’s favor, the court was sympathetic to her situation. It emphasized that it was “not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal.” Id.
123. Id. at 225.
124. Id. (citing TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998)).
125. Id. at 230-31.
born a male, Christie could not be lawfully married to another male, and therefore lacked standing to pursue the medical malpractice suit against the physician.

C. Legislation Concerning Homosexual Marriage

No state currently allows same-sex marriage. In attempting to prevent such marriages, states have employed one or more of three legislative approaches: (1) definitional foreclosure—defining marriage as a union between a man and woman; (2) withholding validity—refusing to recognize as valid any marriage other than between a man and woman; and (3) explicit prohibition—unambiguously banning homosexual marriage. While these models utilize different statutory constructions, their ultimate impact appears to be largely similar.

1. Definitional Foreclosure

In 1994, California enacted definition foreclosure legislation that stated, "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage." Louisiana law offers another example of this model—"Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law." Kansas and Wyoming have also opted for the definitional foreclosure approach.

2. Withholding Validity

Alaska has adopted the second method of preventing homosexual marriage—withholding validity. This type of law differs from the definitional foreclosure model in that the state explicitly refuses to recognize as valid any marriage between individuals of the same sex. For instance, Alaska's statute provides:

(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state;

(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

126. CAL. FAM. CODE § 300 (West 1994) (emphasis added).
127. LA. CIV. CODE ANN. art. 86 (West 1999).
130. ALASKA STAT. § 25.05.013 (Michie 2002).
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Other states adopting this approach include Idaho, Kentucky, Michigan, and North Carolina.

3. Explicit Prohibition

Many states have chosen the third model of preventing homosexual marriage, explicit prohibition. Illinois has taken this approach, declaring that “marriage[s] between 2 individuals of the same sex... are prohibited.” Other examples include Connecticut, Delaware, Maine, Montana, New Hampshire, South Carolina, and Texas.

There are also several hybrid states, whose legislation exhibits characteristics of more than one of the models enumerated above. For instance, Arkansas has adopted both the definitional foreclosure model—by narrowly defining marriage as a union between man and woman—and the withholding validity model—by asserting that homosexual marriages are void within its borders. Other states that have adopted a hybrid model include Alabama, Arizona, Indiana, Missouri, Utah, Virginia, and Washington.

133. MICH. COMP. LAWS ANN. § 551.271 (West 2002).
136. CONN. GEN. STAT. ANN. § 46a-81r (West 2000).
142. TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).
143. ARK. CODE ANN. § 9-11-109 (Michie 2002) (“Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void.”).
144. ALA. CODE §§ 30-1-19(c) to (e) (1998) (“Marriage is a sacred covenant, solemnized between a man and a woman... No marriage license shall be issued in the State of Alabama to parties of the same sex. The State of Alabama shall not recognize as valid any marriage of parties of the same sex... ”).
145. ARIZ. REV. STAT. § 25-101(C) (West 2000) (“Marriage between persons of the same sex is void and prohibited.”).
146. IND. CODE ANN. §§ 31-11-1-1(a), (b) (Michie 1997) (“Only a female may marry a male. Only a male may marry a female. A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.”).
147. MO. REV. STAT. §§ 451.022(1)-(2), (4) (West Supp. 2002) (“It is the public policy of this state to recognize marriage only between a man and a woman. Any purported marriage not between a man and a woman is invalid... A marriage between persons of the same sex will not be recognized for any purpose in this state... ”).
148. UTAH CODE ANN. § 30-1-2(5) (Supp. 2002) (“The following marriages are prohibited and declared void:... between persons of the same sex.”).
149. VA. CODE ANN. § 20-45.2 (Michie 1990) (“A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state shall be void in all respects in Virginia... ”).
150. WASH. REV. CODE ANN. §§ 26.04.010(1), 26.04.020(1)(c) (West 2002) (“Marriage is a civil contract between a male and a female... Marriage in the following cases are prohibited:... When the
D. Legislation Concerning Benefits for Homosexual Partners

Instead of amending the language of their marriage laws to allow for same-sex marriage, a few states have created the status of "domestic partnership." This form of relationship stops short of allowing same-sex couples to actually marry, but aims instead to extend the social and financial benefits of marriage to homosexual partners.

As Seventh Circuit Judge Richard Posner explained, this political compromise has its advantages. "[S]ince the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified, maybe the focus should be shifted to an intermediate solution that would give homosexuals most of what they want . . . ."\textsuperscript{151} Where marriage is not a politically feasible alternative, legislatures may recognize a form of "registered partnership . . . that homosexuals can use to create a simulacrum of marriage."\textsuperscript{152} Domestic partnerships allow the institution of marriage to retain its traditional inviolable sanctity, yet also reduce the patent inequity between, on the one hand, heterosexual couples who are entitled to myriad social and financial benefits and, on the other, homosexual couples who have traditionally been denied them.

Two states merit particular consideration for their enactments in this area: Hawaii and Vermont. In response to the Hawaii Supreme Court's decision in \textit{Baehr v. Lewin},\textsuperscript{153} the Hawaii legislature enacted a statute recognizing reciprocal beneficiary relationships.\textsuperscript{154} Its stated purpose was "to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law."\textsuperscript{155} Although the bill was designed to redress the inequities to which homosexual couples have been subjected, it also applied to non-homosexual couples, such as cohabiting relatives, who were unable to marry yet nevertheless wished have the benefits and privileges of matrimony.\textsuperscript{156}

\begin{footnotes}
\item[151] RICHARD A. POSNER, SEX AND REASON 313 (1992).
\item[152] \textit{Id.}
\item[153] \textit{Id.}
\item[154] \textit{Baehr v. Lewin}, 852 P.2d 44 (Haw. 1993); see infra Subsection II.E.
\item[155] HA\textsc{w.} REV. STAT. ANN. § 572C (Michie 1999).
\item[156] \textit{Id.} § 572C-1.
\item[156] The statute reads: [T]he legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another. \textit{Id.} § 572C-2.
\end{footnotes}
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The law establishes a number of requirements for individuals wishing to enter into a "reciprocal beneficiary relationship." Both parties must be at least eighteen years old, freely consent to the relationship, and be legally prohibited from marrying one another.\textsuperscript{157} Neither may be married nor party to another reciprocal beneficiary relationship.\textsuperscript{158} The statute does not explicitly list the privileges that reciprocal beneficiaries receive, except to note that they "shall be entitled to those rights and obligations provided by law for reciprocal beneficiaries," and that, unless a particular statute explicitly states otherwise, they "shall not have the same rights and obligations under the law that are conferred through marriage . . . ."\textsuperscript{159}

Vermont has instituted a form of domestic relation called a "civil union," through which "two eligible persons [may] establish[] a relationship . . . and may receive the benefits and protections and be subject to the responsibilities of spouses."\textsuperscript{160} The stated purpose of the law was to "respond to the constitutional violation identified by the Vermont Supreme Court in Baker v. State, and to provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples' as required by . . . the Vermont Constitution."\textsuperscript{161} Although the legislature found that the state had a "strong interest in promoting stable and lasting families, including families based upon a same-sex couple,"\textsuperscript{162} it nonetheless retained the model of definitional foreclosure to limit marriage to "the legally recognized union of one man and one woman."\textsuperscript{163}

Under the terms of the Act, parties to a civil union have the same rights and benefits as those granted to married couples.\textsuperscript{164} They are also "responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons."\textsuperscript{165} In addition to being subject to the law of domestic relations, including annulment, child custody and support, property division, and maintenance,\textsuperscript{166} parties to a civil union enjoy several legal rights, including: survivorship,\textsuperscript{167} spousal causes of action (such as wrongful death),\textsuperscript{168} adoption,\textsuperscript{169} hospital visitation and notification,\textsuperscript{170} power of

\begin{footnotesize}
\textsuperscript{157} Id. § 572C-4.
\textsuperscript{158} Id.
\textsuperscript{159} Id. § 572C-6.
\textsuperscript{160} VT. STAT. ANN. tit. 15 § 1201(2) (Supp. 2002).
\textsuperscript{162} Id. §1(7).
\textsuperscript{163} VT. STAT. ANN. tit. 15 § 1201(4) (Supp. 2001).
\textsuperscript{164} Id. § 1204(a) ("Parties to a civil union shall have all the benefits, protections, and responsibilities under law . . . as are granted to spouses in a marriage.").
\textsuperscript{165} Id. § 1204(c).
\textsuperscript{166} Id. § 1204(d).
\textsuperscript{167} Id. § 1204(e)(1).
\textsuperscript{168} Id. § 1204(e)(2).
\textsuperscript{169} Id. § 1204(e)(4).
\textsuperscript{170} Id. § 1204(e)(10).
\end{footnotesize}
attorney for health care, family leave benefits, estate tax advantages, marital communication privilege, and assignment of wages.

Like Hawaii, Vermont has extended these benefits and protections to non-homosexual couples as well. It “provides eligible blood-relatives and relatives related by adoption the opportunity to establish a reciprocal beneficiaries relationship so they may receive certain benefits and protections and be subject to certain responsibilities that are granted to spouses.” While given different labels, same-sex “reciprocal beneficiaries relationships” and “civil unions” between family members have similar effects under Vermont law. One scholar explains that the Vermont legislature felt compelled to include reciprocal beneficiary provisions in the civil union statute in part to allow legislators to claim that the act was not just about equality for homosexuals.

The major difference between the Hawaii and Vermont legislation is that Hawaii’s statute emphasizes that parties to a reciprocal beneficiaries relationship “shall not have the same rights and obligations under the law that are conferred through marriage.” Vermont, on the other hand, declares that “parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.” This means that in Hawaii, certain rights, benefits, and obligations that normally extend to married couples—for instance, rights in cases of negligent infliction of emotional distress or loss of consortium cases—are withheld from parties to reciprocal beneficiaries relationships. One scholar has observed that this provision denies to same-sex couples in Hawaii “virtual spouse” status. Another commentator has suggested that the measure may simply have been a political concession necessary to secure the passage of the Hawaii law.

In addition to Hawaii and Vermont, other states have taken steps toward

171. Id. § 1204(e)(11).
172. Id. § 1204(e)(12).
173. Id. § 1204(e)(14).
174. Id. § 1204(e)(15).
175. Id. § 1204(e)(23).
177. VT. STAT. ANN. tit. 15 § 1302(3) (Supp. 2002) (defining “reciprocal beneficiaries relationship” as one that allows parties to “be subject to the responsibilities that are granted to spouses in specifically enumerated areas of law”).
179. HAW. REV. STAT. ANN. § 572C-6 (Michie 1999).
182. Id.
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similar legislation. For instance, although Arkansas prevents homosexuals from getting married, it states that employers are free to extend benefits to employees' domestic partners. California has created a registry that is open to unmarried heterosexual couples over the age of sixty-two as well as homosexual couples; partners registered together are guaranteed hospital visitation rights and coverage under each other's health plans.

E. The Federal Defense of Marriage Act

In 1996, Congress enacted the Defense of Marriage Act (DOMA) to "define and protect the institution of marriage." It allows all states, territories, possessions, and Indian tribes to refuse to recognize an act of any other jurisdiction that designates a relationship between individuals of the same sex as a marriage:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

It goes on to declare that the terms "marriage" and "spouse," as used in federal enactments, exclude homosexual marriage:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

This restrictive definition of marriage is consistent with a number of older state and federal judicial pronouncements.

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184. ARK. CODE ANN. §§ 9-11-208(b), (c) (Michie 2002) ("No license shall be issued to persons to marry another person of the same sex and no same-sex marriage shall be recognized as entitled to the benefits of marriage. . . . Marriages between persons of the same sex are prohibited in this state.").

185. Id. § 9-11-208(d) ("[N]othing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.").


187. CAL. HEALTH & SAFETY CODE § 1261(a) (West 2000) ("A health facility shall allow a patient's domestic partner . . . to visit [the patient]. . . .").

188. See, e.g., CAL. GOV'T. CODE § 22867 (West Supp. 2002) ("It is the purpose of this article to provide employers the ability to offer health care coverage through this part to the domestic partners of their employees and annuitants.").


190. Id.


193. E.g., Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982) ("The term marriage ordinarily contemplates a relationship between a man and a woman. The term 'spouse' commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words.") (internal citations omitted), cert. denied, 458 U.S. 1111 (1982); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man
DOMA was conceived as a response to the possibility that Hawaii would issue marriage licenses to same-sex couples. This fear on the part of congressional leaders arose out of a 1993 Hawaii Supreme Court decision that ruled that the state's heterosexual-only marriage law was "presumed to be unconstitutional." In December 1990, the Hawaiian Department of Health had refused to issue marriage licenses to three homosexual couples because state law did not allow same-sex couples to marry. The couples filed suit in state court, which denied their claims. They then appealed to the state supreme court. In its 1993 ruling in *Baehr v. Lewin*, the Hawaii Supreme Court held that a ban on same-sex marriage discriminated on the basis of sex in violation of the Hawaii Constitution's Equal Protection Clause. It remanded the case back to the trial court to decide whether the policy could withstand strict scrutiny. DOMA was enacted in response to this ruling.

DOMA has not yet been the subject of a legal decision concerning its constitutional validity. One primary critique of the Act is that it is void under

and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union. . . . Therefore, the definition of marriage as the legal union of one man and one woman is permissible . . . .").

195. *Id.* at 67.
196. *Id.* at 48-49 (citing HAW. REV. STAT. ANN. § 572-1 (Michie 1999)).
197. *Id.* at 60 ("No person shall be . . . denied the equal protection of the laws . . . .") (quoting HAW. CONST. ART. I, § 5).
198. *Id.* at 68. On remand, the trial court ruled, as expected, that the marriage restriction was unconstitutional. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Applying the strict scrutiny standard mandated by the state supreme court, the trial court concluded that Hawaii had not met its burden of demonstrating that the law furthered a compelling state interest. *Id.* at *21. The state supreme court subsequently affirmed the trial court's opinion with a single-word decision. *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

In the Spring of 1997, the Hawaii legislature proposed a constitutional amendment—subsequently ratified by a majority of Hawaiians—declaring that "the legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23. The legislature also enacted HAW. REV. STAT. ANN. § 572C (Michie 1999), establishing civil unions for same-sex couples and close relatives who were ineligible to marry each other. In light of the constitutional amendment, the state supreme court reconsidered the constitutionality of HAW. REV. STAT. ANN. § 572-1 (Michie 1999), the law at issue in *Baehr v. Lewin* that restricted marriages to unions between a man and a woman. It held that

[the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawai'i Constitution . . . . Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is. In light of the marriage amendment, HRS § 572-1 must be given full force and effect. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *6-7 (Haw. Dec. 9, 1999). For more on the history of Hawaii's amendment, see David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000).

199. See Elizabeth Kristen, *Recent Developments: The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 113 (1999) ("Once it seemed as if Hawai'i might legalize same-sex marriage, the U.S. Congress enacted the Defense of Marriage Act (DOMA).")

200. In a federal tax-evasion case, the defendant claimed that he and his domestic partner were "economic partners" who should be afforded filing status equivalent to that of a married couple, and argued that DOMA was unconstitutional. The Seventh Circuit refused to consider this claim, holding that DOMA "was not in effect during the 10-year period for which Mueller was assessed deficiencies
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the Constitution's Full Faith and Credit Clause, which provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Because the clause requires states to give "full faith and credit" to other states' public acts and records—including marriage licenses—it has been argued that Congress cannot prohibit interstate recognition of same-sex marriage.

This claim was made with particular vigor on the floor of the House during deliberations on DOMA. One member argued, "If same sex marriages are to be excluded from this protection it must be done by a constitutional amendment. It cannot be done by statute." She continued:

"If a State decides not to honor the Hawaii Supreme Court decision it must justify its decision before a court of law. This congressional bill can not answer questions as to whether this refusal by one State violates the 'full faith and credit' of the U.S. Constitution. Congress can not pass a generic law to declare that every State may choose to ignore a duly decreed State court ordered decision."

An equally powerful argument against DOMA is the one-way ratchet theory. Under this interpretation, the Full Faith and Credit Clause allows Congress only to increase or augment the full faith and credit states must grant to official acts, records, and proceedings of sister states. Consequently, Congress may not authorize states to accord any less full faith and credit to each other through laws such as DOMA.

Some legal scholars have argued otherwise. For instance, one commentator explains that the Full Faith and Credit Clause requires states to give full faith and credit only to other states' court judgments. Mandatory recognition of other states' public acts and statutes is said to be subject to a balancing test where courts weigh the various states' competing interests. Thus, the...
The constitutional status of DOMA will remain ambiguous until the Supreme Court lays the matter to rest.

The Full Faith and Credit Clause has recently been used, however, to challenge the constitutionality of two states' "withholding validity" statutes\(^\text{208}\) that declare marriages between people of the same sex to be null and void. Such measures are essentially state-level DOMAs that express the unwillingness of individual states to recognize the validity of homosexual marriages solemnized in other jurisdictions.

The Georgia Court of Appeals decided the first case of this nature, *Burns v. Burns*, in January 2002.\(^\text{209}\) When Darian and Susan Burns divorced in 1995, they agreed that "no child visitations would occur during any time the party being visited cohabitated with or had overnight stays with any adult to whom that party was not legally married or related within the second degree."\(^\text{210}\) Five years later, Susan and a female partner entered into a civil union in Vermont. Shortly thereafter, Darian filed a motion for contempt, alleging that Susan had violated the court order by living with her female lover. Susan claimed that "she was not in violation of the visitation requirements in that she had complied with the legally married requirement by virtue of her civil union with an adult female."\(^\text{211}\) The trial court held Susan in contempt because a civil union was not a marriage.\(^\text{212}\)

On appeal, Susan argued that the Full Faith and Credit Clause required Georgia to recognize her civil union. The appellate court dismissed her claim out of hand, saying that Vermont law "expressly distinguishes between 'marriage,' which is defined as the 'legally recognized union of one man and one woman,' and 'civil union,' which is defined as a relationship established between two eligible persons pursuant to that chapter."\(^\text{213}\) Consequently, while Susan may have entered into a civil union, she had not gotten married.

The court went on to hold, however, that even if "Vermont had purported to legalize same-sex marriages, such would not be recognized in Georgia"\(^\text{214}\) because Georgia law expressly excluded same-sex couples from the scope of marriage.\(^\text{215}\) Moreover, under the federal DOMA, Georgia was not "required to give full faith and credit to same-sex marriages of other states."\(^\text{216}\) The court did not consider DOMA's constitutionality.

A few months later, in July 2002, a similar challenge was brought against a
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Connecticut statute. In *Rosengarten v. Downes*, Glen Rosengarten and Peter Downes had entered into a civil union in Vermont. 217 Rosengarten, a Connecticut resident, filed a motion in Connecticut Superior Court to have the union dissolved, but the court dismissed his claim for lack of subject matter jurisdiction. 218 Rosengarten appealed, claiming the dismissal was improper.

The Connecticut appellate court, like the Georgia Court of Appeals in *Reed*, noted that Vermont law specifically declared that civil unions were not marriages; thus, the statute giving Connecticut courts jurisdiction over dissolutions of marriages did not apply to Rosengarten’s case. 219 Rosengarten claimed, however, that the court could assert jurisdiction over the case under a different statutory provision that gave the court jurisdiction over “family relations matters,” including “all such matters . . . concerning children or family relations as may be determined by the judges of said court.” 220 Rejecting this claim, the court held that since “Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve.” 221 Moreover, “the judges of the Superior Court have not enacted any rule of practice that would define foreign civil unions as a family matter either.” 222 Thus, Connecticut law did not grant the Superior Court jurisdiction over Rosengarten’s case.

Unlike the *Reed* court, the Connecticut Court of Appeals explicitly considered the Full Faith and Credit issue. It began by noting that “the Vermont legislature cannot legislate for the people of Connecticut. . . . [and] that the statutes of Vermont do not have extraterritorial effect.” 223 It went on to explain that conflicts between the laws of two states are “to be resolved, not by giving automatic effect to the full faith and credit clause and thus compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly.” 224 After a thorough discussion of various Connecticut statutes related to homosexual rights, as well as the legislative histories behind some of them, the court rejected the claim “that Connecticut public policy favors the recognition of civil unions and the right to dissolve them.” 225 Connecticut had the right to further its own public policy in this area rather than that of Vermont. Consequently, there was no constitutional problem in denying the Superior

218. *Id.* at 172.
219. *Id.* at 174-75.
220. *Id.* at 175 (quoting CONN. GEN. STAT. § 46b-1(17) (1993)).
221. *Id.*
222. *Id.*
223. *Id.* at 178.
224. *Id.* (emphasis in original) (citing CONG. RESEARCH SERV., LIBRARY OF CONG., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION Art. IV, § 1 at 855-56 (Johnny H. Killian & George A. Costello eds., 1996)).
225. *Id.* at 179.
Court jurisdiction to dissolve the civil union.

III. GAY AND LESBIAN ADOPTION

Last spring, media personality Rosie O'Donnell officially came out as a lesbian, in part as a show of support for the American Civil Liberties Union's challenge to a Florida statute prohibiting homosexuals from adopting. In Lofton v. Kearney, the United States District Court for the Southern District of Florida ruled that this law did not violate the Equal Protection Clause. The court subjected the statute to rational basis scrutiny, because it neither implicated fundamental rights nor created a suspect classification. Because the plaintiffs "did not object to nor disagree with Defendants' statements that married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes," they had not met their burden under the rational basis test "to negate every conceivable basis which might support [the law]." The case was appealed to the Eleventh Circuit, which has not yet issued a ruling.

Despite the attention given to the issue of gay adoption because of O'Donnell's announcement, most of the recent developments in the rights of gay parents have been in the areas of second-parent adoption, custody, and visitation. Family law is overwhelmingly state law, and few states have laws explicitly addressing the rights of gay and lesbian parents. In recent years,

227. FLA. STAT. ANN. ch. 63.042(3) (Harrison 2000) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”).
[B]ecause Plaintiffs have neither satisfied their burden of negating the reasons offered by Defendants to justify the homosexual adoption provision nor raised material issues of fact with respect to Defendants’ asserted legitimate [governmental] interest . . . the Court must find Defendants’ purported legitimate interest in excluding homosexuals from adopting, namely, placing adopted children in married homes—to be valid. Id. at 1384.
229. Id. at 1381 (“[F]oster parents and legal guardians do not possess any fundamental right to familial privacy, intimate association and family integrity. Nor is there any fundamental right to adopt, be adopted, or apply for adoption. Thus, the homosexual adoption provision does not tread upon any of the Plaintiffs’ asserted fundamental rights.”).
230. Id. at 1382 (“[O]ther circuits . . . have examined whether homosexuals should be granted this heightened level of scrutiny and have declined to do so . . . [W]hile homosexuals are protected by the Equal Protection Clause, government action classifying individuals on the basis of homosexuality or homosexual conduct must be analyzed under the rational basis test.”).
231. Id. at 1383.
233. See id. at 532. Utah effectively bars gay couples from adopting because it forbids adoption by unmarried couples. UTAH CODE ANN. § 78-30-1(3)(b) (2002) (“A child may not be adopted by a person
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courts in various parts of the country have generally applied the "best interests of the child" standard in determining the rights of homosexual claimants, but have reached widely divergent results. As part of their analyses, courts often discuss whether gays and lesbians can be fit parents. Many studies have also addressed this issue. After compiling and analyzing research in this area, the American Psychological Association concluded that:

there is no evidence to suggest that lesbians and gay men are unfit to be parents or that psychological development among children of gay men and lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.

Despite these findings, it still seems true that in family law cases involving a homosexual parent, the result "will be determined more than anything else by the state in which [the person] live[s] and the judge who hears their case."

This Part reviews recent developments concerning the rights of gay and

who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state."). In 1999, New Hampshire repealed its ban on gay adoption. N.H. REV. STAT. ANN. § 170-B:4 (2001).

In 1997, New Jersey became the first state in the country to have a written agency policy "requiring that gay, lesbian, and unmarried heterosexual couples be evaluated for joint adoption of children using the same criteria used for married couples." Chambers & Polikoff, supra note 232, at 540. A New York Department of Social Services regulation regarding standards of practice for adoption services states, "Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children." N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (2002). In contrast, Connecticut law provides:

The Commissioner of Children and Families or a child-placing agency may consider the sexual orientation of the prospective adoptive or foster parent or parents when placing a child for adoption or in foster care. Nothing in this section shall be deemed to require the Commissioner of Children and Families or a child-placing agency to place a child for adoption or in foster care with a prospective adoptive or foster parent or parents who are homosexual or bisexual.

CONN. GEN. STAT. ANN. § 45a-726a (West Supp. 2002).

State supreme court decisions in the District of Columbia, Massachusetts, and New York have all supported adoption by gay couples. See In re M.M.D., 662 A.2d 837, 862 (D.C. 1995) ("[U]nmarried couples living together in a committed personal relationship, whether of the same sex or of opposite sexes, are eligible to 'petition the court for a decree of adoption' under D.C. Code § 16-302."); Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) ("[T]he Probate Court has jurisdiction to enter a decree on a joint adoption petition brought by the two [same-sex] petitioners when the judge has found that joint adoption is in the subject child's best interests."); In the Matter of Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) ("[T]he two adoptions sought—one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother—are fully consistent with the adoption statute . . . .")


236. Chambers & Polikoff, supra note 232, at 541.
lesbian parents. Section A examines court decisions and state laws that address second-parent adoption. Though many state courts have granted same-sex second-parent adoptions in recent years, some still resist doing so. In some states where second-parent adoption is not expressly permitted by statute, certain courts have nonetheless attempted to read the applicable laws in a way that permits a same-sex partner to have a legal relationship with the child.

Section B considers decisions addressing the right of a gay, lesbian, or bisexual individual to have a continued relationship with the child of his/her ex-partner once the relationship with the former partner has ended. As is the case with second-parent adoption, there is a significant split of authority on this point. Section C considers how gay and lesbian biological parents have fared in visitation and custody determinations with a heterosexual ex-spouse. Though most courts seem to be placing less of an emphasis on a parent’s sexual orientation, it can still affect the ultimate outcome. Section D concludes by examining recent constitutional cases that may have implications for the rights of gay and lesbian parents.

A. Second-Parent Adoption

When jurisdictions do not permit gay couples to adopt, many couples choose to have one partner either legally adopt a child or conceive a child through artificial insemination. The other partner then tries to adopt the child through a process called second-parent adoption—an equivalent to stepparent adoption. One impediment to such arrangements is that, in many states, adoption of a child by a person who is not married to a child’s current parent terminates the current parent’s legal relationship to the child. Thus, the law facilitates adoption by married stepparents, but not gay partners. Consequently, the outcome of second-parent adoption cases often depends on whether the court in question chooses to read the applicable statute narrowly or interpret it broadly by analogizing a same-sex partner to a stepparent and permitting the adoption.

Applying such a law literally, the Nebraska Supreme Court held that the adoption of a child by an adult who is not the child’s stepparent automatically terminated the rights of the biological parent. In 1999, the Connecticut

237. See id. at 537-38.
238. In re Adoption of Luke, 640 N.W.2d 374, 382-83 (Neb. 2002) (“Reading the adoption statutes in their entirety, it is clear that aside from the stepparent adoption scenario, the parents’ parental rights must be terminated or the child must be relinquished in order for the child to be eligible for adoption by ‘any adult person or persons’ under § 43-101.”). The Colorado Court of Appeals and the Wisconsin Supreme Court have both denied second-parent adoptions using similar reasoning. See In the Matter of T.K.I., 931 P.2d 488, 492 (Colo. Ct. App. 1996) (“To construe these statutes to permit adoptions such as those attempted here would require that we ignore the mandatory wording of both §§ 19-5-203 and 19-5-211. This we cannot do.”); In the Interest of Angel Lace M., 516 N.W.2d 678, 683 n.8 (Wis. 1994) (“[I]t is clear from the surrounding statutes that the legislature intended to sanction stepparent adoptions...”). No neighboring statutes indicate that the legislature intended to allow any adoptions, other than
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Supreme Court similarly found second-parent adoption to be impermissible under state law in *In re Adoption of Baby Z.* The outcome of this case was effectively reversed, however, by legislation that took effect on October 1, 2000. Even in states that do not permit second-parent adoption, courts sometimes attempt to give both partners a legal relationship with the child. In a recent Ohio case involving a lesbian couple, the state supreme court acknowledged that “because second parent adoption is not available in Ohio, Shelly cannot adopt the children. Instead, if Shelly were to adopt the children herself, the effect would be to terminate Teri’s rights and responsibilities as an adoptive parent.”

While the court found that it could not award Shelly full parental rights without terminating Teri’s relationship with the children, it concluded that Shelly could nonetheless have legal custody rights. It held that even though Shelly was not a “parent” of the children, “the juvenile court has jurisdiction to determine whether a petition for shared custody is appropriate.”

In *In re Hart,* a Delaware family court approved a second-parent adoption, allowing a gay partner to adopt children without altering their father’s parental rights, despite the fact that the law did not expressly provide for second-parent adoptions by unmarried partners. The court said that the sexual orientation of the two men made no difference to its analysis, adding:

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239. *In re Adoption of Baby Z,* 724 A.2d 1035, 1057 (Conn. 1999) (rejecting the claim that “the legislative mandate that § 45a-724 be ‘liberally construed in the best interests of any child’ was intended to permit the stepparent exception of § 45a-724(a)(2) to authorize a parent to give a child in adoption to a person who is not the parent’s legal spouse”); *see also* Sharon S. v. Superior Court of San Diego County, 93 Cal. App. 4th 218, 221 (2001) (“Because the statutory language is clear that the parental rights of a parent placing her child for independent adoption terminate upon approval of the adoption, we conclude that a second parent adoption cannot be accomplished pursuant to that procedure.”), review granted, 39 P.3d 512 (Cal. 2002).

240. CONN. GEN. STAT. ANN. § 45a-724(a)(3) (West Supp. 2002) (“[A]ny parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child.”). California recently enacted legislation recognizing domestic partnerships, CAL. FAM. CODE § 297 (West Supp. 2002), which could affect the result in *Sharon S.,* 93 Cal. App. 4th at 221. In signing the legislation, California Governor Gray Davis stated, “I am signing Assembly Bill 25 which would enable domestic partners to make medical decisions for incapacitated loved ones, [and] adopt their partner’s child . . . .”

241. In *re Bonfield,* 773 N.E.2d 507, 509 (Ohio 2002); *see also In re Adoption of Jane Doe,* 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) (“[T]he trial court strictly construed [the pertinent Ohio statute] and found that an adoption by appellant would terminate the parental rights of the biological parent. The trial court reached this conclusion by finding that the unambiguous language and meaning of the statute required strict construction. We concur with this reasoning.”).


243. *In re Hart,* 806 A.2d 1179, 1182 (Del. Fam. Ct. 2001) (“Does Burke Shiri, a non-spouse, have standing to bring a petition for adoption? If so, can the child be adopted without altering Gene Hart’s parental rights? The answer to these questions is in the affirmative. . . . [I]f adoption is in the child[ren]’s best interest, to answer otherwise would be absurd . . . .”)

244. *Id.* at 1186 (“This Court’s analysis would be no different if Mr. Shiri were an unmarried male companion seeking to adopt the child of his female companion or vice versa.”); *see also id.* at 1190 (“The fact that Mr. Hart and Mr. Shiri are gay men in and of itself is of no concern to the Court.”).
Although the Delaware General Assembly may not have specifically contemplated adoption by a 'second parent' when enacting the adoption laws of this State, it is inconceivable to conclude, given the statutory mandate to read the statute in best interest of children, that our Legislature would have meant to exclude loving and nurturing two parent homes as a resource for some of the states most needy children.  

Courts in many other states have also interpreted state laws so as to permit second-parent adoptions. The Pennsylvania Supreme Court recently vacated and remanded two cases that had denied second-parent adoptions by homosexual partners. The state supreme court determined that, under Pennsylvania law, adoption of a child by someone other than the "spouse" of that child's parent terminated the existing parental relationship, unless the parties could show good cause as to why this should not happen. It held that the lower courts had erred in preventing the gay plaintiffs from demonstrating that good cause existed for allowing their partners to adopt their children without terminating their parental rights.

245. Id. at 1185.

246. Connecticut and Vermont permit second-parent adoptions by statute. See CONN. GEN. STAT. § 45a-724(a)(3) (West Supp. 2002); VT. STAT. ANN. tit. 15A, § 1-102(b) (Supp. 2002) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection."). The highest courts in the District of Columbia, Massachusetts, and New York have interpreted stepparent adoption statutes so as to permit same-sex second-parent adoptions. In re M.M.D., 662 A.2d 837, 862 (D.C. 1995) (holding that "when one of the natural parents (by birth or adoption) is living in a committed personal relationship with the prospective adoptive parent," adoption by the partner does not terminate the natural parent's rights); Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) ("When a natural parent is a party to a joint adoption petition, that parent's legal relationship to the child does not terminate on entry of the adoption decree."); In the Matter of Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (holding that "the unmarried partner of a child's biological mother, whether heterosexual, or homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption" without terminating the biological mother's parental rights).

Appellate courts in Illinois and New Jersey have also granted such adoptions. See In re Adoption of K.M., 653 N.E.2d 888, 894 (Ill. App. Ct. 1995) ("The fact that the statute provides that 'either' adopting parent may be related to the child by blood or marriage necessarily implies that unmarried couples can adopt... "); In the Matter of the Adoption of Two Children by H.N.R., 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) ("[W]e conclude that the stepparent exception to the natural parent's termination of rights should not be read literally and restrictively where to do so would defeat the best interests of the children and would produce a wholly absurd and untenable result."). Trial courts in many other states have granted second-parent adoptions. See Chambers & Polikoff, supra note 232, at 540.


248. R.B.F., 803 A.2d at 1199-1200 ("[P]ennsylvania law] provides that the Commonwealth only recognizes marriages 'between one man and one woman.' Thus, a same-sex partner cannot be the 'spouse' of the legal parent and therefore cannot attain the benefits of the spousal exception to relinquishment of parental rights necessary for a valid consent to adoption.") (quoting 23 PA. CONS. STAT. ANN. § 1704 (West 2001)).

249. The court concluded:

[T]here is no reasonable construction of the Section 2901 "cause shown" language other than to conclude that it permits a petitioner to demonstrate why, in a particular case, he or she cannot meet the statutory requirements. Upon a showing of cause, the trial court is afforded discretion to determine whether the adoption petition should, nevertheless, be granted.
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B. Legal relationships between an ex-partner and a child

Some courts that have rejected the idea of second-parent adoption nonetheless have recognized that an ex-partner of a biological or adoptive parent can have the legal right to maintain a relationship with her ex-partner’s child once the partnership has ended. For example, in Rubano v. DiCenzo, a family court in Rhode Island enforced a written agreement between a mother and her ex-partner that allowed the former partner to visit the child, concluding there was a “de facto parent” relationship between the former partner and the child.\textsuperscript{250}

In V.C. v. M.J.B., the New Jersey Supreme Court held that a former partner should not be awarded joint custody but was entitled to visitation because the relationship between the former partner and the child rose to the level of \textit{in loco parentis}.\textsuperscript{251} To make this determination, the court used a test enunciated by the Wisconsin Supreme Court in \textit{Custody of H.S.H.-K.}:

To demonstrate the existence of the petitioner’s parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation [a petitioner’s contribution to a child’s support need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.\textsuperscript{252}

The New Jersey Supreme Court declared that it would apply this standard in future cases involving de facto (“psychological”) parents.\textsuperscript{253}

\textsuperscript{250} The court held: [T]he fact that DiCenzo not only gave birth to this child but also nurtured him from infancy does not mean that she can arbitrarily terminate Rubano’s de facto parental relationship with the boy, a relationship that DiCenzo agreed to and fostered for many years. Indeed, when DiCenzo agreed to give Rubano permanent visitation rights in the order, she admitted that she did so because, among other reasons, such visitation "is in the best interests of the minor child.”

\textsuperscript{251} V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (“Nothing suggests that V.C. should be precluded from continuing to see the children on a regular basis. Indeed, it is clear that continued regular visitation is in the twins’ best interests because V.C. is their psychological parent.”), \textit{cert. denied}, 531 U.S. 926 (2000).

\textsuperscript{252} Id. at 553 (“The standards to which we have referred will govern all cases in which a third party asserts psychological parent status as a basis for a custody or visitation action regarding the child of the legal parent, with whom the third party has lived in a familial setting.”). One application of this test can be found in A.F. v. D.L.P., 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001). The plaintiff and defendant had been lesbian lovers for several years; when their relationship ended, plaintiff sought
these factors in *V.C.*, the court held, "Nothing suggests that *V.C.* should be precluded from continuing to see the children on a regular basis. Indeed, it is clear that continued regular visitation is in the twins' best interests because *V.C.* is their psychological parent." 254

The Maryland Court of Special Appeals employed the same test in *S.F. v. M.D.*, holding that a same-sex ex-partner had standing to seek visitation and was the child's "de facto parent." 255 However, because the child exhibited behavioral problems during visitation periods, the court found that the circuit court had not abused its discretion by concluding that visitation was against the child's best interests. 256

Other jurisdictions have crafted their own variation of the *H.S.H.-K.* test for determining psychological or de facto parenthood. For instance, the Massachusetts Supreme Judicial Court has defined a "de facto parent" as one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of the caretaking functions as least as great as the legal parent. 257

The court went on to hold that Massachusetts probate courts had jurisdiction to grant visitation between children and de facto parents, including ex-partners. 258

Some recent decisions, however, have failed to award visitation with a former partner's adoptive or biological child. In *Kazmierazak v. Query*, the Florida District Court of Appeals affirmed a trial court's ruling that a former partner lacked standing to seek custody of or visitation with the child of an ex-partner. 259 A California appellate court also held that a former partner was not

visitation rights with defendant's adopted child, claiming that she was a psychological parent to the child. The court rejected her claim, ruling that

plaintiff's proofs fail under three of the essential prongs of the *V.C.* test of psychological parenthood. By definition, then, no matter how happy the relationship between the plaintiff and the child once might have been, that relationship cannot rise to the level of psychological parenthood to justify court-ordered visitation imposed against the wishes of the child's mother.

*Id.* at 700.

254. *V.C.*, 748 A.2d at 555.
255. *S.F. v. M.D.*, 751 A.2d 9, 17 (Md. Ct. Spec. App. 2000) ("Appellant is a fit de facto parent and seeks visitation. It is the best interest of the child, determined by the effect of visitation on the child, that is relevant and determinative in this case.").
256. *Id.* at 18 ("The bottom line, according to Dr. Schultz, was that the child could not negotiate both relationships at the same time, and the parties had not been successful in enabling the child to do that.").

257. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999). For yet another variation, see *T.B. v. L.R.M.*, 786 A.2d 913, 916-17 (Pa. 2001) (holding that a person enjoys *in loco parentis* status if he "puts [himself] in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. . . . [A person] can not place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship").
258. *E.N.O.*, 711 N.E.2d at 888 (upholding decision to "grant visitation between a child and the child's 'de facto' parent. . . . [where] visitation was in the best interests of the child") (internal quotations omitted).
259. *Kazmierazak v. Query*, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) ("The concept of *in loco parentis* has appeared only in the context of a marital relationship, and thus, is inapplicable to the
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entitled to visitation rights as a de facto parent, declaring that California courts had not generally accorded de facto parent status to a non-parent over the objection of the biological parent.260 The Tennessee Court of Appeals, in In re Thompson employed similar reasoning, holding that a mother’s former partners were not entitled to visitation with her children.261

C. Custody and Visitation Disputes Involving a Homosexual Biological Parent

In custody and visitation disputes involving a homosexual biological parent, courts seem to be moving away from viewing homosexuality as an adequate reason, in itself, to deny a parent the right to have a relationship with his or her children. For example, in Eldridge v. Eldridge, the Tennessee Supreme Court determined that the trial court did not abuse its discretion in allowing unrestricted overnight visitation between a mother and her daughter when the mother’s same-sex partner was present, because there was no direct evidence that such circumstances would jeopardize the child’s well being.262 Other courts have not taken the parent’s homosexuality into account at all in visitation rulings.263

Courts have also been reluctant to place too much emphasis on a parent’s homosexuality in custody disputes, but homosexuality can nevertheless affect cases’ outcomes. In four cases in Mississippi, courts held that sexual orientation can be a factor in custody decisions, but that it should not be given too much emphasis.264 Courts in other states have ruled that a parent’s sexual
orientation may be a factor only if it can be shown to have had a direct effect on the child.\textsuperscript{265} One appellate court went so far as to note that the trial court whose judgment it was reviewing "generally considered plaintiff's stable relationship with her [same-sex] partner as a factor in favor of her gaining physical custody of her son during the school year."\textsuperscript{266} While these courts were unequivocal about the role that parents' homosexuality played in their decisions, other courts have not been as explicit, making it difficult to ascertain whether it was a consideration at all. In \textit{Weigand v. Houghton}, for example, a court refused to transfer custody from the mother to the homosexual biological father, even though the child witnessed his stepfather's acts of violence towards his mother.\textsuperscript{267}

While some courts have gone out of their way to emphasize that they were not treating homosexuals any differently than they would treat heterosexuals,\textsuperscript{268} other courts have viewed manifestations of a homosexual lifestyle as per se harmful to children. For instance, in \textit{Jenkins v. Jenkins}, a Texas court held that the wife could take her children and move away from her husband because he had disregarded the best interests of the children by "introducing [them] to his new [male] paramour."\textsuperscript{269} The court added, "Dr. Rila testified that Husband exhibited histrionic and narcissistic characteristics and that, in his dramatic 'coming out' process, Husband had not been protective of the children."\textsuperscript{270}

\footnotesize{\textsuperscript{265} See, e.g., \textit{Pryor v. Pryor}, 714 N.E.2d 743, 745 (Ind. Ct. App. 1999) ("[W]ithout evidence of [homosexual] behavior having an adverse effect upon [the child], we find that the trial court had no basis upon which to find [the mother] unfit as the custodial parent."); \textit{Jacoby v. Jacoby}, 763 So. 2d 410, 415 (Fla. Dist. Ct. App. 2000) ("[W]hen making this custody determination the circuit court penalized the mother for her sexual orientation without evidence that it harmed the children. Accordingly, we reverse the court's appointment of the father as primary residential parent . . . .").

\textsuperscript{266} Ulvund v. Ulvund, No. 224566, 2000 WL 33407372, at *3 (Mich. Ct. App. Aug. 22, 2000) (affirming the decision to give custody to the father in a "close case," citing the father's ability to provide religious training and his willingness to show affection for his wife in front of the child).

\textsuperscript{267} \textit{Weigand}, 730 So. 2d at 584-85.

\textsuperscript{268} In \textit{Rieder v. Rieder}, the Tennessee Court of Appeals held, "[W]e have not seen any indication that sexual preferences are linked to the love and affection a parent has for a child. . . . [S]exual activity, whether heterosexual or homosexual, may occur in inappropriate times and places and reflect on the parent's ability to serve the best interests of a child." No. M2000-02466-COA-R3-CV, 2001 WL 1173279, at *2 (Tenn. Ct. App. Oct. 5, 2001); \textit{see also} \textit{Taylor v. Taylor}, 47 S.W.3d 222, 225 (Ark. 2001) (holding that a lesbian mother could keep custody of her children but that her partner would have to move out because "[s]uch a restriction or prohibition aids in structuring the home place so as to reduce the possibilities (or opportunities) where children may be present and subjected to a single parent's sexual encounters, whether they be heterosexual or homosexual").


\textsuperscript{270} Id.
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D. Recent Constitutional Cases

In *Troxel v. Granville*, the Supreme Court was presented with a Washington state statute that permitted anyone to petition a court for visitation with a child at any time. Courts were permitted to award visitation to any person when it was found to serve the best interest of the child.\(^{271}\) The paternal grandparents had applied under the statute for visitation rights with their granddaughters, despite the fact that Granville, the children’s biological mother objected. The Court ruled that the statute unconstitutionally infringed on Granville’s fundamental parental right to make decisions regarding the care, custody, and control of her children.\(^{272}\) It found that the statutory framework “directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child”\(^{273}\) and “failed to provide any protection for Granville’s fundamental constitutional right to make decisions regarding the rearing of her own daughters.”\(^{274}\) The Court limited its ruling, however, stating that “[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter.”\(^{275}\)

In general, lower courts have not extended the constitutional rights enjoyed by biological parents—reaffirmed in *Troxel*—to homosexuals who act as parent-figures toward their partner’s children. In *Zavatsky v. Anderson*, for instance, the Connecticut Federal District Court held that a domestic partner who lacked a biological or formal legal relationship to her partner’s child did not have a constitutional due process right to a continued relationship with the child.\(^{276}\) Zavatsky found support from the Fifth Circuit’s decision in *Wooley v. City of Baton Rouge*, in which the court held that “[a]n intimate, loving relationship by itself . . . is not sufficient to create a familial expectation that our society and Constitution are prepared to recognize.”\(^{277}\) The Wooley court further opined that “our Constitution protects only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family.”\(^{278}\)

\(^{271}\) *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (citing WASH. REV. CODE ANN. § 26.10.160(3) (West 1997) (“Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.”)).

\(^{272}\) Id. at 67.

\(^{273}\) Id. at 69 (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

\(^{274}\) Id. at 70.

\(^{275}\) Id. at 73.

\(^{276}\) Zavatsky v. Anderson, 130 F. Supp. 2d 349, 355 (D. Conn. 2001) (“The relationship between Zavatsky and Terrel does not appear to be one previously recognized by courts as triggering the right to family integrity . . . . The court concludes that the link between Zavatsky and Terrel does not implicate a fundamental right within the Fourteenth Amendment’s concept of liberty and property.”).

\(^{277}\) Wooley v. City of Baton Rouge, 211 F.3d 913, 922 (5th Cir. 2000).

\(^{278}\) Id. at 921 (citing Michael H. v. Gerald D., 491 U.S. 110 (1989) and Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977)).
Lofton v. Kearney cited this part of the Wooley opinion in determining that homosexual foster parents and guardians were not entitled to the same liberty interests as biological parents.\textsuperscript{279} The court rejected their argument that, because of the emotional bond they shared with the children, they should be extended the same fundamental right to raise the children that natural parents enjoy.\textsuperscript{280} While the court acknowledged the significance of emotional ties within families, it said that “the existence of strong emotional bonds between Plaintiffs does not inherently grant them a fundamental right to family privacy, intimate association, and family integrity.”\textsuperscript{281}

In In re Bonfield, the Ohio second-parent adoption case discussed earlier,\textsuperscript{282} the mother of three biological children and two adopted children petitioned to have the court recognize both her and her partner as the children’s legal parents. The Ohio Supreme Court cited Troxel in considering her argument that “a biological or adoptive parent has the fundamental constitutional right, which may not be restricted by statute, to voluntarily enter into a court-approved shared parenting plan with a ‘psychological’ or ‘second’ parent.”\textsuperscript{283} As noted earlier, the court concluded that this right “does not embrace the right to have all [parenting] decisions recognized or approved in law. . . . [A]lthough Teri’s decision to co-parent her children with Shelly may be protected from interference by the state, Teri is not entitled to the benefit of statutes that are clearly inapplicable to such a familial arrangement.”\textsuperscript{284} Thus, although in recent years many states have accorded homosexuals expanded rights regarding child adoption, custody, and visitation, courts have not afforded constitutional protection to their relationships with non-biological, non-adoptive children.

IV. DEVELOPMENTS IN DOMESTIC VIOLENCE LAW

Recent developments in domestic violence law have had little impact in alleviating the problem; since 1976, the percentage of murdered females who were killed by an intimate has remained steady at around 30 percent.\textsuperscript{285} In spite of an increasing number of legal reforms, the single largest cause of injury to women in the United States remains battering by husbands, ex-husbands, and lovers, who collectively inflict more injury upon women than car accidents,

\begin{itemize}
  \item \textsuperscript{279} Lofton v. Kearney, 157 F. Supp. 2d 1372, 1379-80 (S.D. Fla. 2001).
  \item \textsuperscript{280} Id. at 1378.
  \item \textsuperscript{281} Id. at 1379.
  \item \textsuperscript{282} See supra Section III.A.
  \item \textsuperscript{283} In re Bonfield, 773 N.E.2d 507, 513 (Ohio 2002).
  \item \textsuperscript{284} Id. While it rejected Bonfield’s petition to have her partner recognized as a legal parent, the court held that “the juvenile court may determine whether a shared custody agreement between Teri and Shelly is in the best interests of the children.” Id. at 515.
\end{itemize}
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muggings, and rape combined. A recent U.S. Department of Justice report revealed that over 22 percent of women surveyed had been victims of intimate partner violence during their lifetime.

This Part examines some of the new approaches various states have employed to reduce these disturbing statistics. One general strategy has been to restrict the scope of government officials’ discretion in handling domestic violence situations to ensure that perpetrators are brought to justice. In this vein, Section A discusses mandatory arrest laws, and Section B explores mandatory prosecution laws. Section C analyzes a recent trend toward increased enforcement of protective orders against victims who initiate contact with their abusers.

A. Mandatory Arrest

Prior to the enactment of mandatory arrest laws, police frequently failed to arrest people who committed acts of domestic violence or violated protective orders, and courts often refused to punish police who abdicated their responsibilities in this manner. Mandatory arrest policies attempt to ameliorate this situation by recognizing and addressing many victims’ lack of autonomy and some officers’ abuse of discretion. To date, nearly half of the states have enacted such laws. Although the details of these statutes differ, they generally require police to arrest a suspect who they have probable cause

286. Angela Corsilles, Note, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?, 63 FORDHAM L. REV. 853, 854 (1994). Corsilles estimates that the American business sector annually loses $3.5 billion to absenteeism and $100 million to medical bills due to family violence. Id.


288. Hakken v. Washtenaw County, 901 F. Supp. 1245, 1254 (E.D. Mich. 1995) (“[I]t was not "clearly established" that the equal protection rights of women and victims of domestic violence was violated [sic] when the police accorded different treatment to their calls for assistance in a domestic dispute.”). But see Estate of Macias v. Idhe, 219 F.3d 1018, 1028 (9th Cir. 2000) (reversing grant of summary judgment to officers who failed to prevent the death of a domestic violence victim who repeatedly reported her husband’s multiple violations of protective orders, and holding that “[there is] a constitutional right . . . to have police services administered in a nondiscriminatory manner—a right that is violated when a state actor denies such protection to disfavored persons,” including women and domestic violence victims).

289. ALASKA STAT. § 18.65.530(a) (Michie 2000); ARIZ. REV. STAT. ANN. § 13-3601(B) (West 2001); CAL. PENAL CODE § 836(c)(1) (West Supp. 2002); COLO. REV. STAT. ANN. § 18-6-803.6(1) (West 2001); CONN. GEN. STAT. § 46b-38b(a) (2001); D.C. CODE ANN. § 16-1031(a) (2001); IOWA CODE § 236.12(3) (2002); KAN. STAT. ANN. § 22-2401(2)(2) (2000); LA. REV. STAT. ANN. § 46:2140(-1)-2 (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 4012(6)(D) (West 1998); MISS. CODE ANN. § 99-3-73(3)(a) (West 2002); MO. ANN. STAT. § 455.085(1) (West Supp. 2002); NEV. REV. STAT. ANN. § 171.137(1) (Michie 2001); N.J. STAT. ANN. § 2C:25-21(a) (West 1995); N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney Supp. 2001-02); OHIO REV. CODE ANN. § 2935.032(A)(1)(a) (Anderson 1999); OR. REV. STAT. § 133.055(2)(a) (2001); R.I. GEN. LAWS § 12-29-3(e)(1) (2000); S.C. CODE ANN. § 16-25-70(B) (Law. Co-op. 2001); S.D. CODED LAWS § 23A-3-2.1 (Michie 1998); UTAH CODE ANN. § 7-36-2.2(2)(a) (1999); VA. CODE ANN. § 19.2-81.3(B) (Michie 2000); WASH. REV. CODE ANN. § 10.31.100(2) (West Supp. 2002); WIS. STAT. ANN. § 968.075(2)(a) (West 1998).
to believe violated a domestic-violence-related restraining order or committed an act of domestic violence.

While many legislatures have passed mandatory arrest laws, there is little evidence that they actually curb domestic violence. One possible reason for this lack of efficacy is that few officers are penalized for failure to arrest since most mandatory arrest laws, in practice, still call upon the officer to exercise some degree of judgment. For example, in *Latiolais v. Guillory*, the appellate court affirmed the trial court’s ruling that the defendants—a sheriff’s department and a deputy—were not liable for two deaths following their failure to arrest an abuser under the Louisiana Protection from Family Violence Act.

Judy Guillory had obtained a protective order against her husband, Frank, but soon thereafter voluntarily reestablished contact with him. One night while Frank was visiting, Judy had a neighbor call the police. When a deputy arrived, Judy told him that she did not wish to press charges against Frank, but wanted him to leave because “she could not tolerate him hitting her anymore.” At the deputy’s request, Frank “got in his truck and sped off . . . . At no time in the deputy’s presence did Frank Guillory display any outward signs of violence or threaten Judy Guillory with bodily harm.” The deputy then went to a neighbor’s house to ask if Judy and her children could spend the night there. During this conversation, the deputy heard shots fired; he returned to Judy’s home to find her and one of her children dead. Frank was later apprehended and confessed to their murders.

Finding that the record contained no evidence that Judy had been in danger, the court ruled that “there was no breach of any duty . . . . The proximate cause of the unfortunate, unnecessary and senseless killing of [Judy and her son] was Frank Guillory, not Deputy Myron Guillory.” The court was particularly persuaded by the testimony of defendant’s “expert in the field of law enforcement training,” who pointed out that Mrs. Guillory’s telling the deputy that she had been slapped by her husband “did not make it a mandatory arrest situation.”

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290. *See* Corsilles, *supra* note 286, at 854-55 n.8 (citing arrest rates of domestic violence perpetrators of 20%, 18%, and 7% in Minneapolis, Phoenix, and New York City, respectively, despite mandatory arrest policies).


292. *Id.* at 680 (citing LA. REV. STAT. ANN. § 46:2121 (West 1999) (imposing a duty upon law enforcement officers to arrest a person who assaults a family or household member “when the officer reasonably believes there is impending danger to the physical safety of the abused person in the officer’s absence”).

293. *Id.* at 677-78.

294. *Id.* at 678.

295. *Id.* at 679.

296. *Id.*

297. *Id.* at 681. There is no mention in the court’s opinion of whether the defendant and the deputy were related.

298. *Id.* at 681-82.
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An earlier tragic case gives further reason to question the sufficiency and effectiveness of mandatory arrest provisions. In Donaldson v. Seattle,\(^{299}\) an appellate court reversed the trial court’s ruling that Seattle police had negligently caused the death of Leola Washington. On the night of her death, Leola called the police because her boyfriend Stephen had threatened to kill her for ruining his life.\(^{300}\) By the time the police arrived, Stephen had already fled. After unsuccessfully searching the immediate area for him, the police offered to take Leola to a shelter, but she declined. The next morning, Stephen returned and murdered her.\(^ {301}\)

The appellate court overturned the wrongful death verdict against the police department because, although it found this to be a mandatory arrest situation, “[t]here is a vast difference between a mandatory duty to arrest and a mandatory duty to conduct a follow-up investigation. . . . A mandatory duty to investigate . . . would be completely open ended as to priority, duration and intensity.”\(^ {302}\) Moreover, the court found that the officers’ obligations to Leola under the mandatory arrest statute ended when she declined their offer to take her to a safe place.\(^ {303}\) Thus, a mandatory arrest law is of little use if the perpetrator is not present when the police arrive; they are not obligated to look for him. This case also offers interesting insight into at least some officers’ interpretation of mandatory arrest requirements. The dissenting opinion noted that, according to an officer’s testimony, the reason the police did not look harder for Stephen was that they did not believe this to be “a mandatory arrest situation,”\(^ {304}\) despite the fact that he had threatened to kill Leola.

As Latiolais and Donaldson show, police unwillingness to treat situations of domestic violence as “mandatory arrest situations” can subvert mandatory arrest laws.\(^ {305}\) Until courts become less deferential to some officers’ overly narrow understandings of when these laws apply, mandatory arrest measures will fail to have the full effect that legislatures intended.

One recent case where officers were held liable for failing to take action against an abuser is Matthews v. Pickett County, in which the Tennessee

\(^{300}\) Id. at 1100.
\(^{301}\) Id.
\(^{302}\) Id. at 1104.
\(^{303}\) Id. at 1105 (“The officers further properly exercised their responsibility by offering to take Leola to a place of safety. . . . [T]he special relationship created by the [mandatory arrest] statute terminated when Leola declined the offer.”).
\(^{304}\) Id. at 1108 (Coleman, J., dissenting). (“Officer Burrows consistently testified that, based upon the facts known to him, he did not believe he had a mandatory duty to arrest. . . . [T]he officers’ actions were motivated based upon their belief that this was not a mandatory arrest situation.”).
\(^{305}\) Arguably, these cases are examples of the unwillingness of police to aggressively enforce laws that limit their discretion. See Dan M. Kahan, Gentle Nudges vs. Hard Shoves; Solving the Sticky Norms Problem, 67 U. Chi. L. Rev. 607, 628-31 (2000) (characterizing feminist domestic violence reforms as ineffective “hard shoves” that were too out of line with the views of police, prosecutors, judges, and juries to succeed).
District Court awarded damages against the county and two deputy sheriffs.\textsuperscript{306} Mary Matthews, the plaintiff, had divorced and obtained a protective order against Bill Winningham after he beat and raped her. When Winningham later threatened to kill her and tried to break into her home, she called the sheriff's office. Shortly thereafter, he cut the phone lines to her home and set off firecrackers under her propane gas tank.\textsuperscript{307} After nearly two-and-a-half hours, two deputies arrived at her home. They made Winningham leave, but did not arrest him.\textsuperscript{308} One of the officers later testified that, despite the protective order, he lacked the authority to arrest Winningham without a warrant unless he actually witnessed Winningham breaking the law. "Obviously," the court wryly noted, "the deputies misunderstood the scope of their authority regarding the Orders of Protection."\textsuperscript{309} The police took Mary to the courthouse to swear out a warrant against Winningham, but the court clerk informed them that the police could arrest Winningham without a warrant due to his violation of the court order. The deputies nonetheless decided to "drop[] the matter."\textsuperscript{310} They brought Mary back to her house to pack up some clothes so that she could spend the night at a friend's house. "On returning to [her] home, the deputies discovered that someone had riddled Matthews's car with bullets during their absence."\textsuperscript{311} After bringing Mary to her friend's home, the deputies left. "Later that night, [Mary's] home was burned to the ground destroying her personal possessions."\textsuperscript{312} The court found that if the deputies "had arrested Winningham on their initial contact at Matthews' residence, as required by the State Court's Order of Protection, Winningham could not have caused the fire and other damage that he inflicted later that night."\textsuperscript{313} Consequently, it concluded that "Matthews [wa]s entitled to $130,000 in damages against [the deputies] for her emotional distress suffered by her due to their negligent omissions."\textsuperscript{314} If more courts were to adopt this approach, the police would have a greater incentive to be more proactive in protecting battered women.

Beyond their questionable efficacy, mandatory arrest laws may put victims in danger of increased violence. Even when they are enforced, mandatory arrest laws may lead to "retaliation" from the batterer. Lawrence W. Sherman, who conducted the most influential study to date on mandatory arrest policies, found that in general, individuals arrested for domestic violence misdemeanors do not

\begin{footnotesize}
\textsuperscript{307} Id. at 866.
\textsuperscript{308} Id. at 867.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} Id. at 868.
\textsuperscript{313} Id. at 872.
\textsuperscript{314} Id. at 874.
\end{footnotesize}
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have lower recidivism rates than perpetrators who received only a warning. In communities with high unemployment, Sherman has found that "the net effect of an arrest policy is more violence."\footnote{315} Mandatory arrest policies can also victimize women, as officers increasingly make "dual arrests" of both husbands and wives when responding to domestic disturbance calls. This increase in the number of women arrested for domestic violence against their male partners is accompanied by credible evidence that police are also misidentifying the "primary aggressor" when enforcing mandatory arrest laws.\footnote{316} Thus, a policy originally intended to protect victims of domestic violence sometimes puts them in further danger not only from their abusers, but from the police as well.

B. Mandatory Prosecution

Police under-enforcement of the law and victim reluctance to press charges are exacerbated by what takes place procedurally following an arrest—in most cases, nothing. Even with increased arrest rates, prosecutors rarely press charges and even more rarely follow through to trial. They often cite victim non-cooperation as the primary reason for failing to pursue domestic violence charges.\footnote{317} Yet, even when victims insist on prosecuting, prosecutors sometimes decide to drop charges.\footnote{318} Mandatory prosecution laws attempt to ensure that more cases go to trial by denying the victim the choice of whether or not to press charges.\footnote{319} Unlike mandatory arrest policies, no-drop policies appear to succeed at

\footnote{315. Daniel Goldman, Do Arrests Increase the Rates of Repeated Domestic Violence?, N.Y. TIMES, Nov. 27, 1991, at C8 (discussing Sherman's findings that unemployed men who had been arrested were twelve percent more likely to have committed another act of domestic violence during the following year than those who had merely received a warning).

316. See Andrea D. Lyon, Be Careful What You Wish for: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan, 5 MICH. J. GENDER & L. 253, 298 (1999) ("[T]he high incidence of women arrested, as well as the negative response of the police to women when they have previously called the police, suggests some need for reevaluation of policy.").

317. See, e.g., Deborah Epstein, Procedural Justice: Tempering the State's Response to Domestic Violence, 43 WM. & MARY L. REV. 1843, 1857 (2002) ("District Attorneys explained that "because victims simply do not follow through in domestic violence cases, there is no need to waste precious prosecutorial resources on them." ").

318. See Corsilles, supra note 286, at 866-67 ("In the area of domestic violence cases, however, prosecutors often choose to exercise discretion by not proceeding or later dismissing charges.").

319. See, e.g., FLA. STAT. ANN. ch. 741.2901(2) (Harrison 1994) ("The filing, nonfiling, or diversion of criminal charges, and the prosecution of violations of injunctions for protection against domestic violence by the state attorney, shall be determined by these specialized prosecutors over the objection of the victim, if necessary."); MINN. STAT. ANN. § 611A.0311(2)(5) (West Supp. 2002) (requiring all county and city attorneys to develop prosecution plans for gathering evidence other than the victim's in-court testimony). In several other states, state attorneys general have officially endorsed no-drop policies. See Corsilles, supra note 286, at 864 n.80.}
their immediate goal—lowering dismissal rates. Mandatory prosecution policies can also enhance arrest rates, because police officers indicate that they are more likely to arrest when the victim is willing to press charges. The expressive benefits of no-drop policies are also significant because they signal to victims not only that police and prosecutors think that their cases are worth pursuing, but that the legislature concurs in that assessment.

"Soft" no-drop policies prevent a prosecutor from deciding on her own that a case should not be brought, but do not attempt to pressure victims into cooperating. In many soft no-drop jurisdictions, "a victim who fails to appear, refuses to testify, or recants her testimony is not sanctioned or forced to participate." Prosecutors may drop a case only if they feel that it cannot successfully be brought without the victim's cooperation; in certain jurisdictions, victims themselves can ask the court to terminate a prosecution. In jurisdictions with "hard" no-drop policies, unwilling victims are subject to subpoena and "may be prosecuted if they recant, or held in contempt if they refuse to testify."

Because prosecutors do not force domestic violence victims to testify in soft no-drop jurisdictions, they may wind up prosecuting some cases without their key witnesses. To obtain convictions in such situations, prosecutors must sometimes deftly manipulate the rules of evidence. Two relatively recent

320. In Fayette County, Kentucky, which has a no-drop policy, dismissal rates were 30% lower than in neighboring counties that lack such a policy. In Indiana’s Marion County, the introduction of no-drop policies lowered dismissal rates by 55%. See Corsilles, supra note 286, at 857 n.22.

321. See Epstein, supra note 317, at 1887 ("Officers ... report that they are encouraged to make arrests when they see that their work results in a successful prosecution.").

322. Victims in jurisdictions with no-drop policies cooperate fully with prosecutors in 65% to 95% of cases. See, e.g., Corsilles, supra note 286, at 873.

323. Cecelia M. Espenoza, No Relief for the Weary: VAWA Relief Denied for Battered Immigrants Lost in the Intersections, 83 MARQ. L. REV. 163, 187 (1999) ("[W]ith a soft no-drop policy[,] there are no adverse consequences taken against a victim who refuses to cooperate after the charges are filed. The efforts of the state remain focused on supporting and empowering the victim to follow through with the prosecution.").


325. Id. at 1863 ("In Alexandria, Virginia, for example, a victim can drop charges after appearing before a counselor or a judge to explain her refusal."); Linda G. Mills, On the Other Side of Silence: Affective Lawyering for Intimate Abuse, 81 CORNELL L. REV. 1225, 1232 n.27 ("[S]oft No-Drop policies permit the victims to drop charges under certain circumstances such as after receiving counseling and appearing in front of a judge to explain why they want to drop the charges.").

326. Espenoza, supra note 323, at 187-88; Mills, supra note 325, at 1232 n.27 ("A hard No-Drop policy does not, in any way, take into consideration the victim's preference to drop the case."); see, e.g., Commonwealth v. Kirkner, No. 119 MAP 2001, 2002 Pa. LEXIS 1768, at *7-8 (Pa. Aug. 27, 2002) (upholding a subpoena requiring a domestic violence victim to testify against her husband because "discretion ... reposes in the District Attorney, who has the obligation of determining the merits of any prosecution, and the responsibility of requiring appropriate witnesses to testify. ... [T]here is no privilege excusing this witness in this case. ...")

327. See, e.g., North Carolina v. Thibodeaux, 532 S.E.2d 797, 802-03 (N.C. 2000), cert. denied, 531 U.S. 1155 (2001), (upholding trial court's decision in a capital murder case to admit the year-old testimony of the victim, the defendant's wife, from a prior proceeding that described how the defendant repeatedly hit, kicked, and threatened her).
trends that benefit the government in domestic violence cases where a victim cannot, or does not wish to, testify are the development of domestic-violence exceptions to the hearsay rule and rules permitting testimony about an abuser’s prior acts.

1. Hearsay Exceptions

When a prosecutor lacks physical evidence of abuse and a victim refuses to testify, the prosecutor often turns to hearsay evidence of the victim’s earlier statements to 911 operators, friends and family, and arresting officers. In acknowledgement of this, California and Oregon have enacted explicit domestic violence exceptions to the hearsay rule.\(^\text{328}\)

California’s domestic violence hearsay exception allows the admission of hearsay testimony that purports to “narrate, describe, or explain the infliction or threat of physical injury upon the declarant.”\(^\text{329}\) This testimony could go to the specific physical act that is the subject of the case or to past threats or violent incidents, so long as the declarant is unavailable, as defined in the California Evidence Code.\(^\text{330}\) A witness may be considered unavailable under the Evidence Code due to privilege, disqualification, death, illness, or if “[e]xpert testimony . . . establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma.”\(^\text{331}\) California further provides that the out-of-court statement to be admitted must have been “in writing, . . . electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official . . . at or near the time of the infliction or threat of physical injury.”\(^\text{332}\)

Finally, the statute requires that the statement have been made under “circumstances that would indicate its trustworthiness.”\(^\text{333}\)

Oregon’s law is quite similar, but its definition of unavailability includes instances where the declarant “has a substantial lack of memory of the subject matter of the statement,” or “is unable to communicate about the abuse or sexual conduct because of fear . . . or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying.”\(^\text{334}\) While this exception seems broader than California’s, Oregon requires that the declarant submit to court examination “in chambers and on the record or outside the presence of jury and on the record,” unless both parties agree

\(^{328}\) CAL. EVID. CODE § 1370 (West Supp. 2002); OR. REV. STAT. § 40.460(18a)(b) (2001).


\(^{330}\) CAL. EVID. CODE § 1370(a)(2) (West Supp. 2002).

\(^{331}\) Id. § 240.

\(^{332}\) Id. §§ 1370(a)(3), (a)(5).

\(^{333}\) Id. § 1370(a)(4) (listing “circumstances relevant to the issue of trustworthiness”).

\(^{334}\) OR. REV. STAT. § 40.460(18a)(b) (2001).
otherwise, in order to allow the judge to determine whether these criteria have been met.\textsuperscript{335}

In jurisdictions that have not enacted domestic violence exceptions to the hearsay rule, expansive readings of other exceptions have enabled a victim’s voice to be heard despite her refusal to testify. As early as 1996, Vermont prosecutors have been able to pursue cases where victims claimed not to remember acts of domestic violence by admitting the victims’ earlier, tape-recorded statements to police officers as “recorded recollection[s].”\textsuperscript{336} That same year, the Hawaii Supreme Court affirmed a conviction for attempted second-degree murder, despite the fact that the victim recanted all of her earlier tape-recorded statements and testified that she had stabbed herself.\textsuperscript{337} The Hawaii Supreme Court upheld the lower court’s decision to admit into evidence the victim’s statements to the responding officer and emergency room physician concerning the defendant’s acts as excited utterances, and her tape-recorded statements to a police investigator as prior inconsistent statements.\textsuperscript{338}

The excited utterance exception has also proved useful in circumventing victims’ refusals to testify in Ohio. In \textit{City of Garfield Heights v. French},\textsuperscript{339} prosecutors brought a case against the victim’s will, admitting as excited utterances various statements that the victim (Ms. Hedjuk) made to the responding officer at the time of the incident. Ms. Hedjuk testified that she had called 911 following a dispute with her boyfriend to obtain a restraining order against him, but had not wanted to press charges (she later wrote a letter to the judge asking that the charges be dropped).\textsuperscript{340} The officer who responded to her call testified that when he arrived, Ms. Hedjuk was crying and holding her head; she told him that the defendant had grabbed her by the throat, threw her down on the couch, and banged her head against the railing.\textsuperscript{341} Acknowledging that “[i]n general, such hearsay statements are not admissible,”\textsuperscript{342} the appellate court nonetheless accepted the lower court’s admission of the statements as excited utterances. The exception was applicable because Ms. Hejduk made the statements upon the officer’s arrival and within minutes of the incident, which had “produced a state of nervous excitement in Hejduk sufficient to result in a

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\footnotetext{335}{\textit{Id.}}
\footnotetext{336}{See \textit{State v. Marcy}, 680 A.2d 76, 77 (Vt. 1996); see also \textit{State v. Todd}, 954 P.2d 1 (Kan. Ct. App. 1998) (affirming the trial court’s decision to admit, under the excited utterance hearsay exception, a victim’s statements concerning the defendant’s culpability for her injuries, made at the time they were inflicted, because she later testified that she could not remember how the injuries occurred).}
\footnotetext{337}{\textit{State v. Clark}, 926 P.2d 194, 208 (Haw. 1996).}
\footnotetext{338}{\textit{Id.} at 199-200, 202-03.}
\footnotetext{339}{\textit{No. 79503}, 2001 Ohio App. LEXIS 5386 (Ohio Ct. App. Dec. 6, 2001); see also \textit{State v. Lee}, 657 N.E.2d 604 (Ohio Misc. 1995) (upholding defendant’s domestic violence conviction because the victim’s prior taped statements to a 911 operator were admissible under the excited utterance exception).}
\footnotetext{340}{\textit{Garfield}, 2001 Ohio App. LEXIS 5386, at *3.}
\footnotetext{341}{\textit{Id.} at *6.}
\footnotetext{342}{\textit{Id.} at *4.}
\end{footnotes}
spontaneous declaration to the officers responding to her call.\textsuperscript{343}

Arguably, the most innovative efforts to prosecute batterers by introducing victims’ contemporaneous statements to police are those of San Diego and Maryland. Maryland adopted the San Diego Police Department’s Supplemental Domestic Violence Form, which lays the groundwork for admitting a victim’s statements as excited utterances by requiring officers to record, upon arrest, the victim’s emotional condition in detail. Officers are required to check any emotional conditions that apply, such as “angry,” “crying,” “hysterical,” “calm,” “irrational,” and “nervous.”\textsuperscript{344}

Both areas have experienced great success with the form. After its implementation in San Diego, prosecution of batterers reached a 90 percent success rate and domestic violence homicides dropped by 60 percent.\textsuperscript{345} Comparing a three-month period in 1994—prior to the program’s inception—to the same three months in 1995, Maryland discovered that the program resulted in a 65 percent increase in the number of guilty verdicts returned.\textsuperscript{346}

2. Prior Character Evidence

Evidence of prior misconduct is generally inadmissible to show that a defendant acted in a certain way on a particular occasion,\textsuperscript{347} but may be introduced to prove some other fact, such as intent.\textsuperscript{348} As with hearsay, courts have creatively applied this exception in domestic violence cases to allow otherwise impermissible evidence to be admitted.\textsuperscript{349} Moreover, states such as California have created a special exception to the general character evidence rule, allowing evidence of prior domestic abuse in domestic violence prosecutions.\textsuperscript{350}

California’s measure survived a constitutional due process challenge in

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\item \textsuperscript{343} Id. at *6; see also United States v. Cruz, 156 F.3d 22, 30 (1st Cir. 1998), cert. denied, 526 U.S. 1124 (1999) (allowing hearsay testimony under the excited utterance exception where a battered woman made the out-of-court statements in question four hours after the battering ceased); \textit{State v. Jones}, No. 26762-4-II, 2002 Wash. App. LEXIS 1791 (Wash. Ct. App. Jul. 26, 2002) (upholding the trial court’s admission of assault victim’s statements as excited utterances).
\item \textsuperscript{345} Id.
\item \textsuperscript{346} Id. at 446.
\item \textsuperscript{347} See, e.g., \textit{FED. R. EVID.} 404(b).
\item \textsuperscript{348} Id.
\item \textsuperscript{349} See, e.g., \textit{State v. Williams}, No. 19994, 2001 Ohio App. LEXIS 409 (Ohio Ct. App. Feb. 7, 2001) (rejecting defendant’s argument that it was reversible error to admit three of his prior convictions for domestic violence and affirming his conviction); \textit{People v. Saunders}, 620 N.Y.S.2d 356 (App. Div. 1994) (rejecting defendant’s argument that the trial court improperly allowed the prosecutor to introduce evidence of defendant’s prior acts of domestic violence against the victim, since such evidence was probative of defendant’s intent), appeal denied, 647 N.E.2d 466 (N.Y. 1994).
\item \textsuperscript{350} \textit{CAL. EvID. CODE} § 1109 (West Supp. 2002); see also \textit{COLO. REV. STAT. ANN.} § 18-6-801.5(2) (West Supp. 2002); \textit{MINN. STAT. ANN.} § 634.20 (West 2002).
\end{itemize}
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People v. Johnson.\textsuperscript{351} Appealing his convictions for spousal battery and first-degree murder, the defendant claimed that the prosecutor used his prior bad acts to illustrate his propensity to commit the acts for which he was being tried.\textsuperscript{352} While Johnson was pending, the California Supreme Court denied a due process challenge to a parallel evidentiary rule\textsuperscript{353} allowing evidence of prior bad acts in sexual abuse cases.\textsuperscript{354} By "parity of reasoning," the Johnson court similarly endorsed the constitutional validity of the domestic violence exception.\textsuperscript{355}

C. Stricter Enforcement of Protective Orders

Though protective orders are meant for the protection of the victim against ongoing abuse by her batterer, certain jurisdictions make the order applicable to both victims and offenders. In such states, even if a victim decides to initiate contact with her abuser, she cannot escape the state's "protection." Ohio, for example, allows courts to issue temporary protective orders in domestic violence cases regardless of victims' wishes;\textsuperscript{356} it also prevents victims from waiving the orders' restrictions and consenting to their partners' return.\textsuperscript{357} One Ohio woman was nearly convicted for "complicity" in her husband's violation of such an order.\textsuperscript{358}

The most troubling reforms, currently foreshadowed by the acts of various judges, may lie ahead in the fining or even jailing of victims who reestablish contact with their batterers. Kentucky Judge Megan Lake Thornton, for

\textsuperscript{352} Over the defendant's objections, the trial court allowed the following evidence:
In 1986, son George saw defendant slap Linza, pull a gun on her, grab her by the hair, and punch her in the face. In December 1988, the son saw defendant punch Linza in the stomach, upon which she collapsed and had a seizure. Defendant admitted the blow to a responding deputy sheriff. The son also saw defendant punch Linza as she was driving a car in August 1992. The son called the police on his father about seven or eight times between 1986 and 1996.
\textit{Id.} at 415.
\textsuperscript{353} CAL. EVID. CODE § 1108 (West Supp. 2002).
\textsuperscript{354} People v. Falsetta, 986 P.2d 182 (Cal. 1999), cert. denied, 529 U.S. 1089 (2000).
\textsuperscript{355} Johnson, 77 Cal. App. 4th at 417.
\textsuperscript{356} OHIO REV. CODE ANN. § 2919.26(D)(1) (Anderson 2002).
\textsuperscript{358} City of N. Olmsted v. Bullington, 744 N.E.2d 1225 (Ohio Ct. App. 1992). The Bullington court upheld a municipal court's order dismissing a criminal complaint against a battered woman for "complicity" in the violation of a temporary protection order. It ruled that a city cannot prosecute a domestic violence victim for aiding and abetting an offender in the violation of a restraining order issued against the batterer for the victim's own protection. The court concluded by pointing out the necessity for greater understanding of the different positions of domestic violence victims and their abusers:
[A]ny number of reasons may exist for a victim being in the offender's presence. Many of these reasons may not be volitional, even though they may appear on the surface to be so. Consequently, to allow the City to focus on the victim's behavior abrogates the General Assembly's historical efforts to require police officers to turn their attention from the victim's actions and place their attention squarely where it belongs, on the offender's behavior.
\textit{Id.} at 1229.
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example, fines victims who reestablish contact with their batterers despite protective orders.  

Similarly, Judge Ron Johnson of Kentucky holds women in contempt of court if they contact partners against whom they have protective orders. He explains the rationale behind his decisions as follows:

Number one, I want to protect the woman. In one case, a woman claimed her husband had held her prisoner. I issued a protective order and advised her not to see him. But she kept going back to him, so I put both of them in jail. I kept them there for about 10 days. Now they’re divorced and live in separate states—but if I hadn’t been that forceful, the situation would have gone on and on.  

Domestic violence advocates caution that such harsh treatment of victims will discourage them from seeking court aid in the future. As Lynn Rosenthal, director of the National Network to End Domestic Violence, puts it, “[T]he worst possible thing a judge can do” is to discourage victims from getting help. Nevertheless, with judges becoming increasingly convinced that making protective orders binding on both parties is an effective way to curb domestic violence, Kentucky State Representative Johnnie Turner plans to push for a bill mandating that orders and sanctions for noncompliance be mutually binding. 

Other states have found an arguably more reasonable way to ensure that victims receive the protection they need—increased police involvement after the order has been issued. For example, the Dallas Police Department has begun randomly selecting a number of domestic violence victims who were issued protective orders, to whom detectives from the Domestic Investigation and Sex Crimes units mail letters and follow up with home visits. The Department reasons that this will not only uncover batterers who are violating court orders, but also “give[] the victim a way to tell their abusers that they aren’t responsible for their arrest.” Innovative measures such as these are needed to ensure that the system does not re-victimize battered women or deter them from seeking protection from their abusers.

359. Judge Thornton recently fined two women $100 and $200, respectively, for contacting their batterers after obtaining protective orders. Thornton declared in court, “When these orders are entered, you don’t just do whatever you damn well please and ignore them.” Francis X. Clines, Judge’s Domestic Violence Ruling Creates an Outcry in Kentucky, N.Y. TIMES, Jan. 8, 2002, at A14.

360. Should Women Be Punished for Returning to the Men Who Abuse Them?, GLAMOUR, July 2002, at 134; see also Stephanie Simon, Judges Push for Abused to Follow the Law, L.A. TIMES, Jan. 22, 2002, at A1 (“In Illinois, some judges hold women in contempt for disavowing their initial complaints of abuse after reconciling with their boyfriends. In North Carolina, some judges have taken to charging women a $65 fee if they apply for a protective order and then decide to drop the matter.”).


362. Id.


364. Id.
V. CONCLUSION

Developments in both technology and social mores have led courts and legislatures to revisit family law doctrines that had previously remained virtually unquestioned. Embryos can be maintained for years through cryopreservation, compelling judges to elucidate their status as “persons,” “property,” or some intermediate category. Individuals can now conceive children after they die, giving a new dimension to the term posthumous reproduction. A woman can give birth to a baby genetically unrelated to her, forcing a reexamination of the meaning of motherhood.

As new forms of relationships for same-sex couples are officially recognized and legitimated, the traditional notion of marriage as a union between a man and a woman is being questioned. The idea of the nuclear family, undermined in recent years by increasing numbers of single-parent homes, has been even more fundamentally challenged by the increasingly accepted notion of homosexuals raising children.

Domestic violence law has undergone an equally dramatic evolution. The principle that a man could physically “discipline” his wife has been superceded by the notion that victims, including married women, can seek judicial protection from their abusers. Even this “protection principle,” however, has been re-interpreted by some courts in recent years to allow for punishment of victims who violate the very court orders that were issued for their benefit. The intractable problem of domestic violence has also caused legislatures, through the enactment of mandatory arrest and mandatory prosecution laws, to narrow the traditionally respected discretion of police and prosecutors.

Developments such as these have thrown many critical areas of family law into a dramatic state of flux. This Article has attempted to capture some of the disputes at the frontiers of this rapidly evolving field. While many courts have addressed these issues, the underlying controversies are far from definitively resolved. This snapshot of legislative and judicial developments has offered an explanation of where we are now, but the deep-rooted, emotional nature of these problems makes it difficult to predict where we will ultimately end up.