

2002

Ten Propositions about Legal Recognition of Same-Sex Partners Symposium on Same-Sex Marriages, Civil Unions, and Domestic Partnerships

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Recommended Citation

30 Cap. U. L. Rev. 343 (2002)

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TEN PROPOSITIONS ABOUT LEGAL RECOGNITION OF SAME-SEX PARTNERS

Arthur S. Leonard*

I. INTRODUCTION

In March 2001, about half a century after the formation in Los Angeles of the Mattachine Society, the first gay rights organization in the United States to have more than a fleeting existence,¹ we meet to talk about formal legal recognition of same-sex partners, something that the Mattachine founders could barely dare to think about. In April 2001, same-sex marriage, *de jure* as well as *de facto*, became a reality for the first time in a Western industrial country, the Netherlands.² Last year, Vermont became the first American state to offer something approaching *de jure* civil marriage for same-sex partners with the enactment of the Civil Union Law.³ There are also important developments elsewhere, such as in South Africa,⁴ Canada,⁵ France,⁶ the Scandinavian countries,⁷ and other U.S. states.⁸

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* B.S., Cornell University; J.D., Harvard Law School. A faculty research grant from New York Law School assisted in the preparation of this article.

¹ See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 75 (1999).

² Act on the Opening Up of Marriage, Stb. n.r.9 (2001) (Neth.) (amending Book I of the Cure Code regarding the opening up of marriage for persons of the same sex), available at <http://ruljis.leidenuinv.nl/user/cwaaldij/www>.

³ 2000 Vt. Act 6 Resolves 91 (Codified at Vt. Stat. Ann. tit. 15 § 1201 et. seq. (2000 Supp.)).

⁴ Nat'l Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, Case. No. 3988/98 (High Ct. S. Africa, Cape of Good Hope Provincial Div., Feb. 12, 1999) (South Africa's constitutional equality requirements allow same-sex partners to settle in the country on the same basis as spouses of South Africans), aff'd, Case CCT 10/99 (Const. Ct. of S. Africa, Dec. 2 1999).

⁵ Modernization of Benefits and Obligations Act, Act of June 29, 2000, ch. 12, 2000 S.C. (Can.).

⁶ Law No. 99-944, Nov. 15, 1999, (relative to the civil solidarity pact) J.D., available at <http://legifrancegouv.fr/html/frame-jo.html>.

⁷ See *infra* n. 59.

⁸ 1999 Cal. Leg. Serv. 588 (West) (Codified at CAL. FAM. CODE § 297 et. seq., CAL. GOV'T CODE § 22867 et seq., CAL. HEALTH + SAFETY CODE § 1261 (West 2000)) (Act regarding domestic partners); 39 D.C. Reg. 2861 (1992) (codified at D.C. CODE ANN. § 32-701 et. seq. (2001)) (Act regarding domestic partners); 1997 HAW. SESS. LAWS 383 (codified at HAW. REV. STAT. § 572C-1 et. seq. (2000)) (Act regarding reciprocal beneficiaries).

In other words, in various places and for various purposes, there is already a considerable amount of legal recognition for same-sex partners -- to the extent that it is plausible to debate questions like "what kind of legal recognition should we be seeking?" and "what strategies should we be taking to pursue full recognition - whatever that may be?" I propose to start today's discussion with ten propositions about this subject. These propositions are intended to spark discussion and should not be taken as conclusive, final statements.

Proposition 1. *We will not have true social and legal equality for sexual minorities until same-sex couples can have the same forms of legal recognition for their relationships that opposite-sex couples have. This means true equality requires that same-sex couples be able to marry if they desire.*

So far, the closest we have come in the United States to achieving same-sex marriage is the Vermont Civil Union Law,⁹ which, as required by the Vermont Supreme Court's decision in *Baker v. State*,¹⁰ was intended to provide same-sex couples with the same bundle of rights and responsibilities that marriage provides for opposite-sex couples, at least to the extent this can be done under state law.¹¹

Marriages and civil unions are both socially-constructed status relationships defined by tangible and intangible components. The tangible components consist of the legal rights and responsibilities associated with the relationship under federal, state, local, and even international law. Vermont civil unions do not expressly have all the legal rights and responsibilities that accrue to Vermont married couples under all these legal regimes, but only those legal rights and responsibilities provided by state law. It is possible that other jurisdictions may decide to recognize Vermont civil unions in particular factual contexts. This will especially be true if the other jurisdictions also have something in the nature of civil unions or recognized domestic partnerships and especially if some courts from outside Vermont feel compelled in particular contexts to recognize such unions based on the Full Faith and Credit Clause of the U.S. Constitution.¹² However, such

⁹ VT. STAT. ANN. tit. 15, § 1201 et. seq. (2000).

¹⁰ 744 A.2d 864 (Vt. 1999) (finding the Common Benefits Clause of Vermont Constitution requires that same-sex couples be afforded the same rights and benefits under state law that are available to opposite-sex couples).

¹¹ After signing the bill, Vermont Governor Howard Dean stated: "I believe it speaks to the notion, with the common-benefits clause that the court cited, that all people are created equal and that no one group of Vermonters will get more benefits or fewer benefits than any other group of Vermonters." Text of Statement by Gov. Howard Dean on the signing of Civil Unions Bill, AP WIRES PLUS, Apr. 26, 2000.

¹² U.S. CONST., art. IV, § 1. "Full Faith and Credit shall be given in each State to the
continue

possibilities can only be speculative at this early point. On the face of things, no federal marital rights or benefits are even arguably included, many of which are potentially important for particular same-sex couples.¹³

Although it is not certain that Vermont civil unions will have no legal effect outside of that state, the legislature's decision to implement *Baker* by adopting the Civil Union Act rather than by simply amending the marriage statute to eliminate any requirement that the parties be of the opposite sex may significantly undermine the ability of same-sex couples united in Vermont to mount effective legal challenges to the possible refusal of other jurisdictions to recognize that the same-sex partners are entitled to be treated as legal spouses of each other.¹⁴

Also, by directing same-sex couples into a "different" status relationship that is not called marriage, Vermont may have failed to afford same-sex couples rights they might have under international law principles of comity by which nations recognize marriages contracted in other nations.¹⁵ While it appears that recognition of marriages across national boundaries is largely discretionary, it is unlikely that norms of marital recognition currently indulged by most countries would apply to such unusual a structure as a "civil union."¹⁶

The marriage relationship also has intangible components, symbolic and social.¹⁷ By creating a different status relationship with a different name, Vermont has deliberately failed to confer the intangible components that accrue to the term "marriage" in our culture. Establishing a "different" status

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."

¹³ For a discussion of federal marriage rights that could be significant for same-sex couples, see generally David Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

¹⁴ The first such contest has now arisen. A lesbian mother whose visitation rights with her children are premised on the absence of any non-marital partner in her home wants a court to declare that her civil union partner's residence with her will not affect her visitation rights. See Rebecca McCarthy, *Vermont's Gay Union Law Faces Georgia Test*, ATLANTA CONSTITUTION, April 26, 2001, at A1.

¹⁵ See Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075, 1077 (2000).

¹⁶ Nicholas J. Patterson, *The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law*, 2 CHI. J. INT'L L. 301, 307 (2001) (expressing pessimism about whether other European Union member nations will feel compelled to recognize same-sex marriages performed under the new Dutch law).

¹⁷ See, e.g., David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 928 (2001) (arguing that marriage serves expressive functions deserving of First Amendment protection).

from marriage for same-sex couples was done precisely to preserve the preferred status of marriage and to avoid any interpretation equating what is available for same-sex couples with traditional marriage. This has the effect of denigrating same-sex relationships as less valuable to the partners and to society. This is the very opposite of the equality that same-sex couples were seeking by bringing the *Baker* lawsuit.¹⁸

If our goal is equality, marriage must be part of the goal.

Proposition 2. *Marriage is not necessarily the only desirable form of legal recognition for couples and coupledness is not necessarily the only desirable adult family structure.*

We need to take a hard look at marriage itself and ask whether it is right for every couple, including same-sex couples. People are voting with their feet on this issue: many opposite-sex couples do not think that marriage is the most desirable relationship for them. This conclusion is based on census figures showing continued growth in the number of couples who are living together without marrying.¹⁹ For an opposite-sex adult couple to openly and notoriously cohabit without being married used to be unthinkable, an invitation to social ostracism and in many places actually illegal. It is still technically illegal in some places, such as Virginia,²⁰ but is now commonplace almost everywhere and it is also very commonplace for married couples to separate and to divorce. It has become common for people to have several legal spouses over the course of their lives or to have a series of partners, some married and some not. The proportion of the population consisting of married opposite-sex couples has been declining for a long time so that it is inaccurate to talk about an “average” or “typical” family consisting of a husband and a wife with or without children.²¹ If

¹⁸ See generally *Baker v. State*, 744 A.2d 864 (Vt. 1999).

¹⁹ According to an Associate Press report published in the Wall Street Journal on June 14, 2001, “Nationally, unmarried partner homes, regardless of sexual orientation, rose 72%, from 3.2 million in 1990 to 5.5 million in 2000.” *Same-Sex Partner Homes Jump in Census Figures*, WALL STREET J., June 14, 2001, at A10.

²⁰ See *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986) (upholding constitutionality of Va. Code § 18.2-345 (1950), which penalized open and notorious cohabitation by opposite-sex couples).

²¹ Articles reporting on the results of the 2000 U.S. Census emphasized the increasing diversity of U.S. family structures, and the declining portion of families that fit a traditional model of husband and wife with children. See Cheryl Wetzstein, *Family Homes Less Common as More Americans Live Solo; Decisions to Delay Marriage, Childbearing Factors in Shift*, WASH. TIMES, June 29, 2001; Ana Veciana-Suarez, *Definition of Family Gets More Complicated*, DALLAS MORNING NEWS, June 8, 2001, at 6C; Andrew Trotter, *Census Shows the Changing Face of U.S. Households*, 20 Education Wk. No. 37, May 23, 2001 at 5 (May 23, 2001); Robin Fields, *U.S. Census: “Married With Children” Still Fading as a Model*, LOS ANGELES TIMES, June 14, 2001, at A1. *continue*

many opposite-sex couples are not interested in marriage despite its legal advantages, it stands to reason that marriage would not necessarily be the goal for all same-sex cohabiting couples, either.²²

But there are many legal attributes of marriage that both opposite-sex and same-sex couples may find desirable without marriage if that is possible. This suggests that there may be a range of legally-recognized relationships that would be desirable, leaving grounds for couples to choose what fits their needs. Domestic partnership, under various nomenclatures, has emerged as an increasingly available choice for both opposite-sex and same-sex couples. Municipal employers that have adopted non-discriminatory domestic partnership plans report that both opposite-sex and same-sex couples take advantage of them in order to obtain family health insurance coverage or other privileges.²³ Domestic partnership registration and recognition laws can be structured to include those rights that are most relevant for unmarried cohabitants. States and localities can serve as laboratories for trying out different forms of recognition with different bundles of rights depending upon the expressed needs of local residents.

Also, some couples have resorted to adult adoption to create legally-recognized families for particular purposes of protecting housing rights or strengthening rights of inheritance and there is some legal authority supporting this mechanism.²⁴

ANGELES TIMES, May 15, 2001, at A1; D'Vera Cohn, *Married-With-Children Still Fading; Census Finds American Living Alone in 25% of Households*, WASH. POST, May 15, 2001, at A1.

²² Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALBANY L. REV. 905, 911 (2001); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535, 1536 (1993); Charles R. P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 377 (1998).

²³ Cities such as New York, San Francisco, Denver and Tacoma Park have domestic partner laws, Daniel F. Drummond, *Catania: Give Metro Benefits to Gays*, WASH. TIMES, Oct. 13, 2000, at C1.

²⁴ See *In re the Adoption of Swanson*, 623 A.2d 1095, 1099 (Del. 1993); *Rickard v. McKesson*, 774 So. 2d 838, 841 (Fla. Dist. Ct. App., 2000) (gay adult adoption subsequently challenged in inheritance dispute between surviving adopted partner and blood relatives); *Phuong Ly, Gay Man Makes Legal Tie, Adopts His Partner*, WASH. POST, May 26, 2001, at B2 (where Montgomery County (Md) Circuit Judge DeLawrence Beard had approved a petition by a gay man to adopt his same-sex partner of 32 years in order to establish a legal family relationship, mainly for purposes of inheritance and being able to make legally enforceable decisions about each other's medical care. The attorney for the two men, who wished to remain anonymous, stated that they were a middle-aged couple, and that the younger man had adopted the older one, whose parents are deceased and thus could not object. The

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Marriage is now limited to two adults of the opposite sex. However, units of more than two adults, while not common, are not unheard of, and some people in Utah have actively resisted the requirement to limit themselves to the traditional dyad in forming their heterosexual family units.²⁵ The Old Testament contemplated a man having multiple wives.²⁶ American social history reveals that the extended family as a living unit has a long and distinguished history.²⁷ Without suggesting that some form of polygamy should be the goal of the gay rights movement, it is worth contemplating the possibility that more extended living groups of emotionally interdependent adults could merit legal recognition to provide enforcement to emotionally and economically viable methods of living. Perhaps couples should not be exalted as the only conceivable family unit without considering the possibility of other structures for those who want them.²⁸

Proposition 3. *It is unlikely legal marriage for same-sex couples in the United States will be achieved solely through litigation.*

Reviewing the history of litigation over same-sex marriage in this country, it seems that state courts of last resort are unlikely to order a state to allow same-sex couples to marry even if they think that the present exclusion from marriage raises important equal protection concerns.

Same-sex couples began litigating for the right to marry in the 1970s. Cases in at least three different states during that decade proved completely unsuccessful and efforts along those lines were abandoned for some time.²⁹

order approving the adoption requires that a new birth certificate be issued to the older man, listing the younger man as his parent.) *C.f.* *Matter of Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984) (finding that New York's adoption law was intended to imitate nature, thus precluding its use for an adopt adoption where a sexual relationship rather than a parent-and-child relationship was contemplated between the parties). This writer has heard "off the record" anecdotes about New York trial courts approving same-sex adult adoptions subsequent to the *Robert Paul P.* decision where the petitioning parties were careful to describe the proposed adoption in ways that avoided the proposition that this would be a substitute for marriage.

²⁵ See, e.g., Mike Gorrell, *Freedom Advocates March*, SALT LAKE TRIBUNE, June 17, 2001, at B4 (describing march on Utah state capital by supporters and practitioners of polygamy to protest prosecution of polygamist Tom Green).

²⁶ See, e.g., *Genesis* 29:1 – 29:35 (regarding two wives of Jacob).

²⁷ See, generally, JOHN D'EMILIO AND ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1988).

²⁸ Rona Marech, "Multiply Your Love - Polyamorists Swear the More, the Merrier When It Comes to Relationships," S.F. CHRONICLE, Feb. 9, 2001, available at <http://www.sfgate.com>.

²⁹ See e.g., *Baker v. Nelson*, 191 N.W.2d 185, 185, 187 (Minn. 1971), *appeal continue*

The court decisions were completely dismissive in evaluating the plaintiffs' equal protection and due process claims. Many of the attorneys working for the gay rights public interest litigation groups during the 1980s were actually opposed to marriage on ideological grounds and urged potential litigants to refrain from bringing such lawsuits. However, gay male couples in Washington, D.C.,³⁰ Ithaca, New York³¹, and Alaska,³² and a group of gay and lesbian couples in Hawaii,³³ insisted on forging ahead with their own legal counsel after being rebuffed by the gay rights groups. It was not until the Hawaii Supreme Court ruled in 1993 in *Baehr v. Lewin* that the plaintiffs had a potentially valid sex discrimination claim that one of the national organizations, Lambda Legal Defense and Education Fund ("Lambda"), got involved in that case. At the same time, Lambda discouraged people from filing suits in other states to avoid distracting energy, attention, and funding from the Hawaii case. *Baker v. State*³⁴ was the first marriage lawsuit that was conceived by one of the gay public interest groups, Gay and Lesbian Advocates and Defenders, a Boston-based public interest firm, in collaboration with community members and local attorneys, to be the test case litigation.

So far, there have been only three judges in the United States who have proven willing to order the state, on the merits, to let same-sex couples marry: Kevin Chang, a trial judge in Hawaii;³⁵ Peter Michalski, a trial judge in Alaska;³⁶ and Vermont Supreme Court Justice Denise Johnson, who dissented from the remedial portion of the court's opinion.³⁷ Judges on the Hawaii Supreme Court had the chance to affirm Judge Chang's order, but backed away, staying the order and sitting on the state's appeal until the

dismissed, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

³⁰ *Dean v. District of Columbia*, 653 A.2d 307, 307 (D.C. 1995), (denying petition for marriage license by male couple).

³¹ *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (Sup. Ct. 1996) (denying petition for marriage license by male couple), *aff'd on other grounds*, 666 N.Y.S.2d 835 (App. Div. 1997) (state government was indispensable party in suit for marriage license; action solely against city clerk dismissed).

³² *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 at 1 (Alaska Super. Ct. Feb. 27, 1998) (male couple entitled to marriage license as a fundamental right; result subsequently overturned by state constitutional amendment, state supreme court dismissing certiorari petition as mooted by enactment of amendment).

³³ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

³⁴ 744 A.2d 864 (Vt. 1999).

³⁵ *Baehr v. Miike*, No. Civ. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

³⁶ *Brause*, 1998 WL 88743 at *6.

³⁷ *Baker*, 744 A.2d at 897-912 (Johnson, concurring in part, dissenting as to remedy).

people of Hawaii voted on a constitutional amendment that took away from the court the power to rule in the case.³⁸ The people of Alaska amended their constitution to overturn Judge Michalski's order before a higher court could rule on an appeal.³⁹ A majority of the Vermont Supreme Court, apparently bowing to what they saw as political realities, shrank from ordering the state to let same-sex couples marry, in effect sending the case to the legislature accompanied by a broad hint that a domestic partnership law creating a facsimile of equality would suffice to meet the court's constitutional concerns.⁴⁰ If a court of last resort were actually to order a state to allow same-sex couples to marry, it seems likely in the current political climate that virtually any state legislature would try to take extraordinary steps to prevent such an order from being carried out.⁴¹

The only major Western country to legislate same-sex marriage, the Netherlands, did so without any lawsuits or court orders. This was true as well of the civil solidarity pact legislation in France and the registered partnership laws in Scandinavian countries.

Although litigation has led to various forms of legal recognition short of marriage, nowhere has the judicial branch felt sufficiently empowered to so change the social order by fiat. In short, legal recognition of same-sex partners presents the kind of political question that ultimately must be addressed in the court of public opinion and then through legislation.

Proposition 4. *In the United States, litigation for same-sex marriage is a vital component of an overall strategy to achieve access to marriage even though litigation alone is unlikely to be successful in obtaining access to marriage.*

We are a litigation-obsessed society. We sue about anything and everything even though many lawsuits lack any plausible legal theory and are unlikely to be successful on the merits.⁴² But bringing a lawsuit is an important way to put an issue on the public agenda and there is always the possibility, however remote, that a particular court confronting a sympathetic

³⁸ Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

³⁹ Brause v. State, 21 P.3d 357, 360 (Alaska 2001) (ruling on further stage of marriage case after constitutional amendment was passed).

⁴⁰ Baker, 744 A.2d at 889.

⁴¹ The best proof of this is the alacrity with which more than thirty state legislatures passed laws against recognition of same-sex marriages in response to the debate stirred up by the Hawaii and Vermont cases. ESKRIDGE, *supra* note 1, at 362-71 (App. B3 table listing, inter alia, state statutes barring performance or recognition of same-sex marriages with year of adoption).

⁴² Indeed, federal and many state courts have become so indignant about the storm of frivolous litigation that they have adopted rules, such as FED. R. CIV. P. 11, authorizing sanctions for attorneys who file such cases.

plaintiff and a strong legal argument may be willing to be adventurous and seriously entertain a proposition that many others would dismiss out of hand. Good examples of this phenomenon are the continuing attempts by gunshot victims to hold gun manufacturers liable for allowing their products to get into the hands of criminals.⁴³ There is an abundance of litigation, and even some verdicts, but ultimately major changes in the lawful distribution of firearms will only come about through a major shift in public attitudes followed by legislation because this is the kind of issue that raises important political policy questions and the law itself provides no clear basis for resolution by a neutral, presumably apolitical decision-maker. However, it cannot be doubted that the flurry of lawsuits has helped to spark a public conversation on the issue and to put force behind legislative proposals for change.

It is unlikely that any state legislature in the United States will enact a law recognizing same-sex marriages in the near future since only about one-third of the public tells opinion-surveyors that it supports same-sex marriage and a substantial portion of the public states firm opposition to the idea. On the other hand, the portion of the public that supports same-sex marriage today is undoubtedly larger than the portion that would have supported it in the 1970's when the earliest same-sex marriage lawsuits were being filed.

In the interim, the overall social progress of the gay rights movement and the intense public debate stimulated by the same-sex marriage litigation of the late 1980's and 1990's in Washington, D.C., Hawaii, Alaska and Vermont, have made it easier for members of the general public to think about lesbians and gay men forming families, such that a substantial portion of the public will respond positively to specific polling questions about whether same-sex partners should be entitled to insurance coverage or other forms of recognition short of marriage.

Some of the intense debate led to the passage of the federal Defense of Marriage Act⁴⁴ and mini-DOMA statutes in more than 30 states.⁴⁵ Such laws would not likely have been passed if the buzz around same-sex marriage had not convinced at least some law-makers that same-sex marriage was actually at hand in some other state.

Consequently, litigation has been an important part of moving the public dialogue. Certainly, the media coverage of the ultimate trial before Judge Chang in Hawaii and the Judge's sweeping conclusion that the state had totally failed to show that it had a compelling reason to exclude same-sex

⁴³ See, e.g., *City of Cincinnati v. Beretta U.S.A. Corp.*, No. C-990729, C-996814, C-990815, 2000 Ohio App. Lexis 3601, at *6-7 (Ohio Ct. App. Aug. 11, 2000).

⁴⁴ Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified as amended in scattered sections of 1 and 28 U.S.C.).

⁴⁵ ESKRIDGE, *supra* note 1, at 362-71.

couples from marrying⁴⁶ has made a positive contribution. The eloquence of the Vermont Supreme Court majority opinion in describing the right to legal recognition for same-sex couples as an aspect of our “common humanity” has also made a positive contribution to the public’s change in thinking.⁴⁷ In both states, the litigation stimulated the legislature to pass measures conferring substantial rights on same-sex couples. This justifies continuing to bring such cases to the courts when there are appropriate plaintiffs asking for marriage licenses even if it appears unlikely that any state court will ultimately issue an enforceable ruling compelling the state to grant marriage licenses to same-sex couples.

At one time, some members of the lesbian and gay legal community argued that filing same-sex marriage cases was not a good idea because they would establish negative precedents that would be used against future gay litigants. But if one accepts the proposition that it is very unlikely any state’s highest appellate court is going to order the state to allow same-sex couples to marry any time soon, it does not matter if these cases are lost, so far as precedent-setting goes. Although winning such a case would be a marvelous breakthrough, these cases should consciously be filed as part of a larger strategy to move public opinion because legislative victory will ultimately come when a majority of the public supports letting same-sex couples marry.

Proposition 5. *Any form of legal recognition for same-sex couples is valuable and worth expending political and legal effort to attain.*

In light of the foregoing, it is clear that this writer supports civil unions, reciprocal beneficiaries, family partners, domestic partners, and any other form of legal recognition for same-sex partners that may come along even though they all fall short of full equality. This does not signal an abandonment of the goal of true equality, but rather a pragmatic belief that alternatives other than legal marriage (1) may be desired by many couples, (2) may confer very valuable rights on people who really need them, and (3) will facilitate progress toward the ultimate goal of equality.

The Netherlands provides a great example of the third item above. Gay advocates in the Netherlands were eager to have the option of same sex marriages, but the public was not ready for it. As a result, gay advocates were willing to emulate the Scandinavian countries and get registered partnership as a first step. European registered partnership laws, as they evolved in the 1990s, were insultingly unequal since they did not confer any extra-territorial rights and excluded the right to adopt children jointly. But the gay community in the Netherlands built on the registered partnership to push

⁴⁶ *Baehr v. Miike*, 1996 WL 694235 at *21 (Haw. Cir. Ct. Dec. 3, 1996) (finding state failed to show compelling interest justifying denying marriage licenses to same-sex couples).

⁴⁷ *Baker*, 744 A.2d at 889.

ahead and when the public and political leaders saw that the registered partnership system posed no problems, the legislature took the next step rather quickly. The Netherlands is a very tolerant polity by comparison to the United States and we should be cautious in drawing direct lessons, but it may be that the Civil Union Act in Vermont will have a similar effect and the breakthrough to full marriage rights may come faster in Vermont than anyone now believes possible.

Some of the important progress toward legal recognition of same-sex partners has come not by seeking same-sex marriage, but by seeking such recognition in particular, limited contexts such as housing rights or claims for spousal benefits from employers where specific equity arguments could be made or appeals could be directed toward the plight of sympathetic plaintiffs.

Perhaps one of the most significant and quotable achievements along these lines came in Minnesota in the *Kowalski* case.⁴⁸ Sharon Kowalski and Karen Thompson had been a lesbian couple for several years, had exchanged rings in a ceremony, and lived together as a family unit, but they had not said anything to Kowalski's parents, who lived in a different, remote part of the state of Minnesota, about the nature of their relationship.⁴⁹ Sharon was severely injured in an automobile accident.⁵⁰ When her parents learned that the woman who was spending so much time at the hospital claimed to be Sharon's lesbian partner, they petitioned for exclusive guardianship rights and excluded Karen from contact with Sharon for many years.⁵¹ Karen's persistent litigation finally resulted in the Minnesota Court of Appeals determining that she was entitled to be appointed guardian of Sharon. The court held that a couple was the "family of affinity, which ought to be accorded respect."⁵²

In another such sympathetic case, Miguel Braschi, whose long-term partner had died from AIDS, was threatened with eviction from the apartment in which they had lived together in New York City for many years.⁵³ The apartment, governed by New York state's rent control system, was originally rented in the partner's name and Braschi's presence there as a co-resident was lawful pursuant to the state's Roommate Law⁵⁴ which authorized tenants to have unrelated roommates. However, the roommate

⁴⁸ *In re* Guardianship of Kowalski, 478 N.W.2d 790, 797 (Minn. Ct. App. 1991) (appointing lesbian partner to be guardian of severely disabled lesbian, over the protest of disabled lesbian's traditional family members).

⁴⁹ *Id.* at 791.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 797.

⁵³ Facts are taken from the New York Court of Appeals decision in *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50-52 (N.Y. 1989).

⁵⁴ N.Y. REAL PROP. LAW, § 235-f (McKinney 1989).

law stated that roommates do not gain any rights to continued occupancy of an apartment when the tenant dies or moves.⁵⁵ On the other hand, a rent control regulation provided that members of a tenant's family were entitled to take over the leasehold if a tenant died or moved.⁵⁶ Braschi claimed the right to stay under this regulation, while the landlord argued that under the Roommate Law, Braschi had to vacate upon his partner's death.⁵⁷ Reversing a lower court, the New York Court of Appeals found that it would serve the purpose of the law and appropriately recognize the social realities of New York in the 1980's to treat Braschi as a "family member" under this regulation.⁵⁸ The decision in *Braschi v. Stahl Associates* was the first appellate decision in the United States to accord legal recognition to a same-sex couple, albeit one member of the couple was deceased.⁵⁹

Achieving victories in cases such as these is clearly an important stepping stone towards equality. The first step towards full equality is necessarily partial equality which comes with legal recognition for specific, important purposes.

Proposition 6. *Achieving any official recognition of same-sex family units provides an opportunity to dispel myths, demonstrates the utility of recognizing such family units, and provides data for the on-going legislative battle.*

Progress is cumulative, especially when it comes to building societal consensus in favor of changes in old social arrangements. The idea of same-sex marriage may strike many people as startling, unnatural, grotesque -- pick an appropriate adjective. But as same-sex couples become more and more familiar, not just in the social and political discourse, but encountered in everyday life (*i.e.* as the parents of one's child's schoolmates, as the people one encounters in the supermarket, as characters one sees in movies and television programs), the idea becomes run-of-the-mill, natural, and ultimately uncontroversial. Nothing explodes mythology quite like meeting the subject-matter of the mythology again and again.⁶⁰

This is one reason why it is important for lesbians and gay men to be

55 *Id.*

56 N.Y. City Rules & Regulations, §2204.6(d).

57 *Braschi*, 543 N.E.2d at 52-53.

58 *Id.* at 54.

59 *See generally id.*

60 For example, U.S. Supreme Court Justice William O. Douglas's views on homosexuality appear to have been influenced by his close social acquaintance with a lesbian couple who were neighbors at his rural Washington state summer residence. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE* 129-32 (2001). Justice John Paul Stevens took note of this phenomenon of changed social attitudes through repeated exposure to openly-gay people in his dissenting opinion in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 700 (2000).

“out of the closet” and visible in employment and social settings and “out of the closet” needs to include being open about having a partner, not just being open as an individual. When a partner wants to skip that dreary office social event, a reminder to her that this is about breaking down stereotypes and building normality for same-sex families, not just about having a “good time” or a “boring time,” is in order. Once there are significant numbers of registered partners, civil unions, reciprocal beneficiaries, and the like, there will surely be sociologists to study them and report on their lives as well as to study the impact that these alternatives may or may not have on traditional marriage. All of this data can be helpful in arguing for the next steps.⁶¹

Proposition 7. *Developments in the private sector may ultimately have even more impact than litigation or legislation in producing the circumstances to secure recognition of same-sex partners.*

The beginning of the domestic partnership movement is frequently traced back to the agreement in 1982 by the publisher of the Village Voice, a leftist alternative weekly newspaper in New York City, to a demand by the union representing its employees for extension of health benefits to same-sex partners.⁶² Major progress in this area has come about in the private sector without resort to litigation or legislation in high tech industries and higher education. It has then spread to finance, the media, the energy business, transportation, and the auto industry.⁶³ A growing portion of the nation’s largest employers provides domestic partnership benefits to their employees and such benefits are rapidly becoming the norm in the non-profit sector as

⁶¹ During the summer of 2001, the national news media were full of stories about the startling percentage increase in the number of self-identified same-sex residential partners counted by the U.S. Census, comparing the returns from 2000 and 1990, the first year in which a relevant question was included in the Census form. This can only help to establish the utter normality of same-sex couples in the public mind. See, e.g., Jo Craven McGinty, *A Same-Sex Census: More definitive tally of gay, lesbian households*, NEWSDAY, June 27, 2001; Leonard Greene, *Same-Sex Homes Outright Soaring*, NEW YORK POST, June 27, 2001, available at <http://archives.nypost.com>, which are representative of articles published in most leading newspapers over the course of the summer as the Census Bureau released the data a few states at a time. For examples from outside of New York, see Mike Swift, *Same-Sex Households Increase, and Move Away From Cities*, HARTFORD COURANT, June 20, 2001; Grace Schneider, *Census 2000: More Gays Coming Out of the Closet; Indiana’s Same-Sex “Partners” Up Sharply Since ‘90*, LOUISVILLE COURIER-JOURNAL, June 20, 2001.

⁶² Renee M. Scire & Christopher A. Raimondi, *Employment Benefits: Will Your Significant Other Be Covered?*, 17 HOFSTRA LAB. & EMP. L. J. 357, 376 (Spring 2000).

⁶³ Arthur S. Leonard, *Employee Benefits for Domestic Partnership Families*, in PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR (S. Estreicher, ed., 1997), at 455, 459-61.

well.⁶⁴ Although some of the sharp increases in numbers in recent years may be due to decisions by city officials in San Francisco, Los Angeles, Seattle, and Portland, Maine to make provision of domestic partnership benefits a requirement for eligibility to bid on city contracts, the momentum toward expansion of these benefits was already well under way when San Francisco first considered adopting this policy.

This is important because the issue of legal recognition has a crucial intangible component relating to how such couples are treated generally in society. Legislatures usually resist getting far out front of public opinion. Legislative majorities, when not coerced by court opinions such as *Baker v. State*⁶⁵ (or, to be historical for a moment, *Brown v. Board of Education*⁶⁶), do not materialize until there is a social consensus in support of a new policy direction. Efforts invested in persuading more companies to adopt domestic partnership recognition plans will have an important pay-off in efforts to secure legal recognition if only because they will help to normalize the phenomenon of same-sex couples living openly in family arrangements that have some kind of social reinforcement. Such policies will also put more pressure on governments to move toward recognition in their own employment practices in order to remain competitive, especially in high-tech jobs. Such efforts should also include persuading businesses to recognize same-sex partners as consuming family units, entitled to the same family treatment that many businesses extend to legally married partners. Some major advertisers have already begun to recognize the commercial usefulness of marketing specifically to same-sex couples.⁶⁷

Proposition 8. *Those who support legal recognition of same-sex partners*

⁶⁴ See, e.g., Keith Bradsher, *Big Carmakers Extend Benefits to Gay Couples*, N. Y. TIMES, June 9, 2000.

⁶⁵ No. 98-03d, 1999 WL 1211709 (Vt. Dec. 20, 1999).

⁶⁶ 347 U.S. 483 (1954) (racial segregation of public school violates Equal Protection Clause of the 14th Amendment).

⁶⁷ Marketing to the lesbian and gay market by major advertisers has become so prevalent as to be the subject of numerous recent analyses in mainstream media. See, e.g., Matthew Kauffman, *Gayest TV Commercial Earns Applause; Two Gay Websites' Members Select Hyundai Automobile Ad as Runaway Winner*, HARTFORD COURANT, June 20, 2001; Lewis Lazare, *Burnett Ad Judged Gayest; Stockholm Office Made "Boy Toy" Spot for Hyundai*, CHICAGO SUN-TIMES, June 7, 2001; Mya Frazier, *U.S. Advertisers Slowly Target Gay Market; Greatest Inroads Made in Largest Cities, but Acceptance Proving to Be Uneven*, HOUSTON CHRONICLE, May 20, 2001; Bryn Nelson, *Gay Travelers Now Sought-After Market: Travel Industry*, SEATTLE TIMES, Apr. 29, 2001; Stuart Elliott, *Absolut Customizes a Campaign to Salute the Gay and Lesbian Alliance Against Defamation*, NEW YORK TIMES, Feb. 22, 2001; Adam Pertman, *In Gay Market, Ads Target Big Dollars, Not Big Change*, BOSTON GLOBE, Feb. 4, 2001.

need to do more to bring home to the public (and courts and legislators) how far the United States is falling behind major political allies and commercial partners on this issue.

Other countries have made extraordinary progress in granting legal recognition for same-sex partners. Apart from the dramatic break-through to same-sex marriage in the Netherlands,⁶⁸ soon to be followed by Belgium,⁶⁹ several Scandinavian countries⁷⁰ have registered partnerships for same-sex couples that closely approach marriage in terms of the rights and responsibilities involved. France⁷¹ has adopted the civil solidarity pact and Germany has just recently extended legal recognition to same-sex "life partnerships."⁷² Canada's Supreme Court has pushed that country's government toward ever-expanding recognition for same-sex partners⁷³ as has Israel's High Court.⁷⁴ The South African Constitutional Court,⁷⁵ having the convenience of a constitutional provision banning sexual orientation discrimination to ground its actions, has also pushed the government in this

⁶⁸ Act on the Opening Up of Marriage, Stb. n.r.9 (2001) (Neth.), *available at* <http://ruljis.leidenuniv.nl/user/cwaaldij/www>.

⁶⁹ Paul Ames, *Belgium Bill OKs Gay Unions*, SUNDAY PATRIOT-NEWS HARRISBURG, June 24, 2001 (reporting that the Belgian government has approved a bill to legalize same-sex marriages, patterned after the law passed in the Netherlands).

⁷⁰ For instance, Denmark adopted the Registered Partnership Act in 1989, Norway adopted the Bill on Registered Partnership in 1993, Iceland enacted the Law on Recognized Partnership in 1996, and Sweden adopted the Registered Partnership Act in 1994. These are available at <http://france.grd.org>, in English translation.

⁷¹ Law No. 99-944, Nov. 15, 1999 J.O., *available at* http://www.legifrance.gouv.fr/html/frame_jo.html.

⁷² *Ending Discrimination Against Same-Sex Communities: Life Partnerships*, v. 16 Feb. 2001 (B6BI I.S. 266).

⁷³ *See* M. v. H., 2 S.C.R. 3 (1999) (Can.) (Ontario law extending spousal support responsibilities only to heterosexual cohabitants violates equal protection requirement of Charter of Rights), which led to the passage of the Modernization of Benefits and Obligations Act, Act of June 29, 2000, ch. 12, 2000 S.C. (Can.) and has stimulated the passage of legislation in the provinces of New Brunswick, Nova Scotia, Ontario and Quebec.

⁷⁴ The Supreme Court of Israel decided *Danilowitz v. El Ad* on Nov. 30, 1994 (same-sex couples are entitled to be treated on equal-basis as heterosexual married couples respecting travel benefits for flight attendants of national air line), *available at* <http://www.ibilio.org/gaylaw/issue2/index.html>.

⁷⁵ *Nat'l Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, Case No. 3988/98 (High Ct. S. Africa, Cape of Good Hope Provincial Div., Feb. 12, 1999) (South Africa's constitutional equality requirements allow same-sex partners to settle in the country on the same basis as spouses of South Africans); *aff'd*, Case CCT 10/99 (Const. Ct. of S. Africa, Dec. 2 1999).

area and may eventually become the first national high court to require a government to open up access to marriage to same-sex partners if it is not done voluntarily. Various states in Australia⁷⁶ and the countries of Belgium,⁷⁷ New Zealand,⁷⁸ Spain,⁷⁹ and Switzerland⁸⁰ have all taken steps in recent years to extend some form of recognition, usually by creating a registration mechanism or assimilating same-sex couples into the same legal regime that already provides significant recognition for unmarried heterosexual cohabitants. The range of countries that now recognize same-sex partners for immigration purposes is growing.⁸¹ Even the relatively conservative law committee in England's House of Lords⁸² has taken a step in recognizing partnership claims in the housing context, basing its ruling heavily on the logic of the 1987 New York Court of Appeals decision in *Braschi v. Stahl Associates Co.*⁸³

Most Americans are oblivious to all this overseas ferment. One way to help move public opinion is to keep telling the stories of what is happening elsewhere and pushing the most important story-tellers in our society,

⁷⁶ Australian Capital Territory - Domestic Relations Act, 1994, Administration and Probate (Amendment) Act, 1996, Family Provision (Amendment) Act, 1996; New South Wales Property (Relationships) Legislation Amendment, 1999; Queensland Property Law Amendment Act, 1999; Victoria Statute Law Amendment (Relationships) Act, 2001. Each are available at <http://www.austlii.edu.au>.

⁷⁷ Law of Nov. 23 1998 (creating legal cohabitation), available at <http://mhchbv.multimania.com>.

⁷⁸ Several recent enactments extend recognition to "de facto partners" of the same sex, including the Administration Amendment Act, 2001, the Family Protection Amendment Act 2001, the Family Proceedings Act, 2001, the Property (Relationships) Amendment Act, 2001, the Housing Restructuring (Income-Related Rents), 2000. All Acts are available at <http://rangi.knowledge-basket.co.nz/gpacts/actlists.html>.

⁷⁹ Law on Urban Leasing, Nov. 24, 1993 (Articles Twelve, Sixteen and Twenty-Four address housing rights of same-sex couples.).

⁸⁰ Canton of Geneva, Law on Partnership, Feb. 15, 2001.

⁸¹ A commentary on the immigration situation published by the American Bar Association's Section on Individual Rights and Responsibilities in 2001 listed the following countries that recognize same-sex families for immigration purposes: Canada, United Kingdom, Belgium, Denmark, Sweden, Norway, Finland, Ireland, France, Netherlands, Israel, Australia, New Zealand, South Africa. Scott C. Titshaw, *U.S. Immigration Law: Denying the Value of Gay and Lesbian Families*, 28 HUMAN RIGHTS 25-26 (Winter 2001). See also, Christopher A. Duenas (Note), *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811 (2000).

⁸² *Fitzpatrick v. Sterling Housing Ass.*, available at 1999 WL 852150. (Brit. House of Lords Oct. 28 1999) (holding that surviving same-sex partner is entitled to be considered member of tenant's family for purposes of rent laws).

⁸³ 543 N.E.2d 49 (N.Y. 1989).

television and the motion picture industry, to do so as well. Another way to emphasize this is to keep on raising the laundry list of recognition developments from other jurisdictions in legal briefs and legislative testimony. American courts notoriously treat legal developments from outside the United States as generally irrelevant to the application of American law, but if the information keeps being presented, it may make some impression in the long run.

Proposition 9. *The struggle for legal recognition of same-sex families is part of a larger struggle on behalf of the rights of sexual minorities including transgendered people and intersexuals.*

As long as American law reserves family rights for opposite-sex couples, all sexual minorities are disadvantaged. At the same time, the experience of transgendered people and intersexuals helps to show how arbitrary and cruelly exclusionary the existing legal regime can be.⁸⁴ Consider the following situation: A legal spouse who has been battling with gender identity issues for many years finally reaches the conclusion that his or her discomfort is gender-defining and initiates gender reassignment. Nonetheless, the other spouse continues to love his or her partner and wants to remain married. After gender reassignment is complete and a new birth certificate and legal identity has been assigned, what remains is a same-sex marriage -- or is it? Why should it matter if the couple wants to remain a legally recognized family unit?⁸⁵ Does it make any conceivable sense to force this couple to divorce if they want to remain married or to automatically deny the continuing validity of their marriage? What business is it of the state to inquire into the genders of marital partners when it is barred from inquiring into their race⁸⁶ or, presumably, their religion or ethnicity?

To take an even more extreme example, suppose that an individual who has completed gender reassignment from male to female subsequently falls in love with and marries a man. The husband enters the marriage fully aware

⁸⁴ See generally, Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001).

⁸⁵ This is not a purely hypothetical consideration. For documentation of the reality of transgender marriage, see generally Phillis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALBANY L. REV. 1031 (2001); Natalie Brown Michalek, Note, *Littleton v. Prange: How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage*, 52 BAYLOR L. REV. 727 (2000).

⁸⁶ See generally, *Loving v. Virginia*, 388 U.S. 1 (1967) (state law criminalizing marriages between white people and persons of other races violates Due Process and Equal Protection Clauses of 14th Amendment).

of his wife's past sexual history. Subsequently, the husband dies on the operating table, under tragic circumstances, raising issues of medical malpractice and the surviving widow wants to bring a wrongful death suit against the surgeon. The surgeon's attorney, having met the plaintiff, conducts some research, discovers the plaintiff was born a man, and moves to dismiss for failure to state a claim, arguing that the marriage was void because gender is fixed at birth. These are the plaintiff's factual allegations in *Littleton v. Prange*,⁸⁷ the Texas appellate decision holding that this marriage was void ab initio and that Mrs. Littleton was never really married despite her lived experience of years of happy marriage.⁸⁸ The court's decision was decisively rejected recently by the Kansas Court of Appeals.⁸⁹

The whole notion of transgender plays havoc with stereotyped thinking about traditional gender categories as does the phenomenon of intersexuals (persons born with ambiguous genitalia),⁹⁰ the newest sexual minority group to organize in pursuit of equal rights. What the experience of transgenders and intersexuals can teach in this context is that although gender-identity is a defining component of personal identity, it should be irrelevant to ability to access basic social institutions such as marriage. Transgenders and intersexuals should be part of any effort to "open up" the social construction of marriage in order to assure that every individual's right to form intimate relationships is fully protected.

Proposition 10. *Many same-sex partner families also include children*

⁸⁷ 9 S.W.3d 223, 224-25 (Tex. App. 1999), *rev. denied*, March 2, 2000 (Tex.), *cert. denied*, 531 U.S. 872 (2000) (finding that post-operative transgender person's marriage was void due to state ban on same-sex marriage, collateral to dismissing wrongful death action brought by surviving spouse).

⁸⁸ *Id.* at 223. Interestingly, the Littleton decision has enabled some lesbian couples to obtain marriage licenses in Bexar County, Texas, upon showing that one member of the couple is a male-to-female transsexual. "Lesbian couple get marriage license," SAN ANTONIO EXPRESS-NEWS, June 12, 2001, at 2B. (three lesbian couples have obtained marriage licenses since the Littleton ruling on the grounds that they are legally opposite-sex couples despite a sex-reassignment procedure by one of them).

⁸⁹ In re Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001) (adopting a multifactorial analytical test to determine the sex of an individual at the time of marriage, rather than focusing on anatomical sex assignment at birth).

⁹⁰ Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 269-72 (1999) (intersexuals are individuals born with gender-ambiguous genitalia). Intersexuals have organized to oppose the routine surgical gender-reassignment procedures performed on newborn infants that have been standard practice in American medicine since the late 1950s. For information about the Intersex Society of North America, see the Society's webpage, available at <http://www.isna.org>, which includes historical information and bibliographical references.

and we need to consider the impact of children, their role in family life, and their best interests in developing the case for legal recognition.

Interestingly, many opponents of same-sex marriage rely upon procreation and child-raising issues as their trump card, contending that it is rational -- indeed compelling -- for the state to promote opposite-sex marriage and forbid same-sex marriage in order to ensure that children are conceived and raised in the best possible setting. When put to the test, however, as they were quite decisively in Hawaii, the opponents fell far short because there is no persuasive evidence that opposite-sex partners are categorically better parents than same-sex partners.⁹¹

There is a large body of case law involving gay parents and their relationships with their children and there have been extraordinary developments in recent years where courts have approved second-parent adoptions⁹² and visitation rights for co-parents.⁹³ There is a growing body of family and child development research showing that parental quality is an independent variable, not a dependent variable linked to the genders of the parents.⁹⁴ Although there is a need to bolster this research with larger, carefully-controlled long-term studies, there is already a body of published

⁹¹ *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996) (Hawaii's prohibition against same-sex marriages violates state constitution's equal protection clause; evidence consisted of experts on child psychology offered by both sides in the litigation).

⁹² *In re* Petition of D.L.B. and M.A.H., No. 95179001 (Ma. Cir. Ct. filed June 27, 1996); *In re* Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995); *Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App.Div. 1995); *In re* M.M.D. & B.H.M., 662 A.2d 837, 841 (D.C. 1995); *In re* Adoption Petition of K.J. and R.Z., No. 95-JA-49 (Colo. Dist. Ct. filed on July 26, 1995); *In re* Petition of K.M. and D.M., 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re* Adoption of Tammy, 619 N.E.2d 315, 316 (1993); *In re* B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993).

⁹³ *In re* J.C., 184 Misc. 2d 935, 940 (2000); *In re* LaChapelle v. Mitten, 607 N.W.2d 151, 158 (Minn. Ct. App. 2000); *Gestl v. Frederick*, 754 A.2d 1087, 1097 (Md. Ct. Spec. App. 2000); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. App. 2000); *T.B. v. L.R.M.*, 753 A.2d 873 (Pa. Super. Ct. 2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840, 843 (Conn. Super. Ct. 1999); *E.N.O. v. L.M.M.*, 711 N.E. 2d 886, 891 (1999); *Fowler v. Jones*, 949 S.W.2d 442 (Tex. App. 1997); *J.A.L. v. E.P.H.*, 602 A.2d 1314, 1319 (Pa. Super. Ct. 1996); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 437 (Wis. 1995); *cert. denied*, *Knott v. Holtzman*, 516 U.S. 975 (1995); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), *cert. denied*, 827 P.2d 837 (N.M. 1992).

⁹⁴ Judith Stacey and Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AMER. SOC. REV. 159 (April 2001) (discussing literature review showing that children raised in same-sex parent households may differ in some ways from children raised in opposite-sex parent households, but quality of parent-child relationships had more to do with successful psychological development of children than the nature of parental dyad).

research showing that children raised by same-sex partners turn out as well as children raised by opposite-sex partners (and generally better than children raised by single parents). In Hawaii's same-sex marriage case, where the entire focus of the trial testimony was on the ability of same-sex partners to raise children, Judge Chang found that children raised in same-sex partner households would be advantaged by their parents having a legally recognized relationship, both in terms of social reinforcement for the household and in terms of continuity if one parent dies and eligibility for benefits that might flow from the employment of the parents.⁹⁵ Allowing same-sex couples who are raising children to marry is good public policy.

II. CONCLUSION

One can probably think of additional propositions to make about the subject of legal recognition for same-sex partners. Summing up those offered here, the struggle for legal recognition of same-sex families needs to proceed on many fronts, to pursue multiple strategies, and to avoid dogmatic insistence on only one desired result. Of all the propositions advanced above, the most important for a legal audience to contemplate is that ultimately the battle for same-sex recognition cannot truly be won in a courtroom since it needs first to be won in the hearts and minds of the general public as necessary prelude to the kind of legislative change that has been achieved in the Netherlands: full marriage rights for same-sex partners.

⁹⁵ Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct., 1st Cir. 1996).