Conceiving Parenthood:

parenting and the rights of lesbian, gay, bisexual, and transgender people and their children

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A report of the International Gay and Lesbian Human Rights Commission (IGLHRC)

THE INTERNATIONAL GAY AND LESBIAN
HUMAN RIGHTS COMMISSION (IGLHRC)

IGLHRC's mission is to protect and advance the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation, gender identity, or HIV status. Our constituency, therefore, includes people who are lesbian, gay, bisexual, transgender, and anyone living with HIV or AIDS. Established in 1990 as a US-based non-profit, non-governmental organization, IGLHRC responds to such human rights violations around the world through documentation, advocacy, coalition building, public education, and technical assistance.

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I. Introduction

The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

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We cannot marry, or have our partnerships legally recognised in any way. We cannot adopt the children of our partners, whom we live with and raise as our own children. We do not have inheritance rights, family visiting rights in hospital, the right to make decisions for our partners or their children in emergencies and immigration rights for our partners from other countries.

Then why are we so invisible, so quiet in demanding our equal rights in this new democratic Namibia? Where are we all?

The constant fear of discrimination, harassment, and outright violence forces most of us to live our private lives underground.[1]

what do these two statements have to do with one another?

The first is from the Universal Declaration of Human Rights, the core document underlying the modern system of human rights protections. Its claim concerning the centrality of a particular (and, both historically and cross-culturally, highly variable) social structure—"the family"—is echoed, in one form or another, by almost every major treaty or declaration articulating such rights.

The second, by Liz Frank, is from the feminist magazine *Sister Namibia*, in an article titled "Where are we all? Calling on lesbians to stand up for their rights." The substance of what it says

1. Universal Declaration of Human Rights, U.N.G.A.R. 217 A (III), 10 December 1948, Art. 16(3); *Sister Namibia*, Namibia, Vol. 8, Nos. 5 & 6 (December 1996/January 1997), pp. 12–13.

has been echoed as well, by gay men as well as lesbians, and by bisexual and transgender people, speaking out around the globe.

What are families? What relationships of support, nurturing, and care fall under the penumbra of the term, and what reasons can be adduced for the exclusion of others? Are some families "natural" and socially valuable, while others (equally supportive, equally caring) deserve no protection and require instead a sustained social effort of stigmatization, disparagment, and marginalization? The Universal Declaration's language gives no answer to the first two questions: any more, indeed, than the burgeoning diversity of human history has coalesced around a single model of solidarity, a single way for humans to institutionalize the nexus of emotional, physical, and economic connections around which their intimate lives revolve. The Declaration speaks simply, and inclusively, of "the family." It does not describe, or proscribe, its forms.

To the third question, however—are some families "natural" while some are not?—the implicit answer of the Universal Declaration is: no. The Declaration affirms that "All human beings are born free and equal in dignity and rights," that all are "endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Such phrases, however ideal their import, are meant to be acted upon and enacted in law and policy, to serve as concrete guides and not generalities. Together with the other key treaties and documents which collectively constitute a *humane* discourse of human rights, the Declaration is acutely concerned to give force and meaning to equality, to ensure that irrational distinctions will no longer provide a basis for social division or an impetus for brutality. Protections against discrimination are at the heart of its provisions. The criterion of "nature," so often used to render difference despicable and to justify systematic exclusions, ought no longer to be invoked to defend an artificial uniformity against the diversity of reality. Such repressive limitations strike at the spirit if not the explicit letter of the Declaration.

The discrimination depicted in the second passage, however, remains the rule worldwide. *No country fully or equally recognizes the relationships of love and care which gay men, lesbians, bisexuals, and transgender people are capable of forming.* If the "we" in the quotation referred to virtually any other identity or group, its members would be described as suffering a form of civil death: excluded from precisely those "fundamental" relations on which international standards assure us society itself rests, they endure in the world's eyes an amputation of the capacity for affiliation, as if arms to reach out and hands to hold were legally denied them. Yet even in societies such as Namibia, which have made proud and remarkable progress toward democratization, this marginalization—indeed, mutilation—of the emotional lives of a whole segment of the population is widely seen as compatible with "freedom." The ordinary aspirations of human beings toward togetherness, the hope to nurture nascent life, are dismissed as "unnatural" or "perverse."

There is, therefore, an agonizing divide between the promise of equality, enshrined in internationally accepted protections, and the reality of discrimination, enforced by national and local instruments. Nowhere is this gap more apparent, or more painful, than in the realm of parenthood.

Most cultures, as well as international covenants and treaties, accord the parent-child relationship particular respect. States often repeat pieties about the sacrosanct character of that connection. Through parental relationships, life is renewed and (even more importantly, in the eyes of many governments) preferred social values can be transmitted and reinforced. Yet this centrality gives states a particular investment in monitoring parenthood, and in controlling it.

States' involvement in parenting and family life, however, does not translate into unrestricted authority. The modern system of human rights works as a check on, and a critique of, states and the ways they use their powers in any field. States' active interventions and their lapses into dangerous indifference can both

be held accountable to human rights norms. The discourse and practice of international human rights have already, in a significant body of jurisprudence, acknowledged "sexual orientation" as a category protected from discrimination. Simultaneously but separately, that discourse and practice have also recognized the urgency of applying rights language to family situations. Human rights approaches can constructively engage families in a number of different ways, most notably in defending families against unjustified state intervention, and in protecting families as units against discriminatory treatment. Human rights instruments, however, can also address violations and inequities perpetrated within family structures themselves—and the ways in which states perpetuate them.

On all these levels, addressing the elements of parenthood remains of paramount importance. Those elements do not merely include the rights of and responsibilities of particular, legally recognized adults: more broadly they entail the whole question of the responsibilities of the social world toward the child. Human rights has only begun to take on this vast question. In the last decade, an international treaty—the Convention on the Rights of the Child—has been ratified by almost every nation in the world. Its language puts children at the center of debates about their welfare and disposition. The concrete application of its provisions is only beginning to be decided. Its broad and clear goal, though, is ensure that all children are raised in readiness to participate in a free and tolerant world.

The International Gay and Lesbian Human Rights Commission (IGLHRC) shares this goal, and offers this report as a contribution toward the same end. The report is founded on a *reality* which can no longer be ignored: in every country, lesbian, gay, bisexual, and transgender people are parenting and caring for children; they are likely to do so as competently and lovingly as their heterosexual and non-transgender counterparts. The report is also predicated on an *expectation:* that the affirmations of equality and dignity which international covenants contain will

be rendered real and substantive, that they apply to all human beings and are relevant to all their relationships. Finally, the report is built on a *belief:* that children cannot be raised ready for tolerance if intolerance is allowed to determine the circumstances of their raising; that the experience of seeing dignity respected, and equality enjoyed, is always in the best interests of the child. To call this statement a belief is not, however, to imply that it can be reduced to a mere matter of personal preference. It is rather, we contend, part of the credo of democratic activists everywhere. It is hard to imagine a fully free society in which such a belief is not transformed into law and policy, and daily acted upon.

a. the reality of lesbian, gay, bisexual, and transgender parenting

In *Les Enfants du PACS—Réalités de l'Homoparentalité* (Children of the PACS-Realities of Homoparenting),[2] French attorney Flora Leroy-Forgeot notes that

> in France, the present state of the law tends to give credence to the idea that, even if the sexual life of the parents [as a matter of their private lives] should not interfere with the parent-child relationship, the homosexual orientation of a parent is in itself a danger for the children.
>
> The reasonings of judges and politicians on the parental rights of gays and lesbians are generally founded on two false premises:

2. The PACS (also written as PaCS) is the French "Pact for Civil Solidarity," a type of recognized partnership approved by the French government and signed into law in late 1999. Text of the PACS (in French) is available at www.justice.gouv.fr/justicef/pacs2.htm. "*Homoparentalité*" is a word created in 1997 by French activists to describe gay/lesbian parenting, with an emphasis not simply on the state or fact of being a parent, but on the quality or function of parenting. "Homoparenting" is my own translation to try to express the "activity" of parenting as a homosexual.—LM

A) There are not currently any same-sex couples with children;

B) It is sufficient to avoid legislating on gays' and lesbians' right to adoption to prevent them from having children.[3]

Leroy-Forgeot's discussion characterizes broad assumptions in the laws and policies of many nations: that (with perhaps a handful of exceptions) lesbian, gay, bisexual, and transgender (LGBT) people are not already raising children (whether in couples or as individuals); and that the state both should and *can* prevent them from doing so.

These assumptions ignore the fact that millions of children around the world are currently being raised by or have LGBT parents (with whom, for example, they might not always reside). Estimates in the US alone range from three to fourteen million children, according to the US-based Children of Lesbians and Gays Everywhere (COLAGE).[4] Eric Dubreuil, President of the *Association des Parents et Futurs Parents Gays et Lesbiens* (APGL) in France estimates that hundreds of thousands of people in France (where a 1997 survey indicated that 7% of gay men and 11% of lesbians were already parents) and millions of people in Europe are both homosexual and parents.[5] A report published by the

3. Flora Leroy-Forgeot, *Les Enfants du PACS: Réalités de l'homoparentalité*, L'Atelier de l'Archer, 1999, p. 10; translated by Leslie Minot. Jenni Millbanks, in "If Australian Law Opened its Eyes to Lesbian and Gay Families, What Would it See?" *Australian Journal of Family Law* 12 (1998), p. 102, similarly notes that "The handful of reported and unreported cases concerning lesbian and gay families are often treated as oddities, either by the courts or by subsequent press and legal commentators. It is important to note that these issues are oddities only in as much as they are *litigated*, not in their occurrence—Wendy and Grace were the first to go to court over child support, but there must be very many other lesbian couples who resolved the issue amicably (or left it unresolved on the assumption that they had no legal remedies.)"

4. COLAGE's web site, www.colage.org, provides a variety of useful information on children of LGBT parents.

5. "Homoparental Families in France 1998: Reality and Discriminations," a presentation to the European Parliament on 17 June 1998; available on the APGL web site, http://apgl.asso.fr.

Senate of Berlin estimates that there are approximately a million homosexual parents in Germany.[6] A Canadian legal article notes that approximately one-third of lesbians and one-tenth of gay men there are parents.[7] As this report will show, even for countries and regions where statistical documentation or estimates are lacking, there is much evidence of the presence (sometimes open, sometimes more discreet) of LGBT parents.

The state's capacity to prevent LGBT people from becoming parents—while prohibitive and effective in many instances—is also not absolute in practice, since LGBT people become parents in a variety of ways. They may have children in the context of heterosexual relationships (before coming out or making a gender transition). Lesbians sometimes engage in heterosexual sexual relations for the sole purpose of becoming pregnant. A lesbian and a gay man may decide to have and raise a child together, whether through heterosexual sexual relations, self-insemination, or accessing official reproductive technology sites as a "couple." Where single individuals are eligible to adopt or access reproductive technology, LGBT people may seek adoption, donor insemination, or surrogacy while keeping their sexual orientation/gender identity secret from official agencies. LGBT people may also take in children in unofficial/extra-legal "adoptions."

Families with LGBT parents often bear a particular burden and suffer particular hardship due to the failure of existing family law and government institutions to recognize the relationships that have been established and to adequately protect the children in these families through securing these relationships on par with other families (for example, those headed by heterosexual married or *de facto* couples).

While it is possible, in some cases, to evade explicit or im-

6. Lela Lähnemann, *Lesben und Schwule mit Kindern—Kinder homosexueller Eltern*. Dokumente lesbisch-schwuler Emanzipation des Fachbereichs für gleichgeschlechtliche Lebensweisen, Nr. 16, Berlin 1997.

7. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, p. 23.

plicit state denial of or prohibitions on LGBT parenting, it is also increasingly possible to question the state's rationale for imposing such prohibitions—and for ignoring these families—particularly as a number of countries have begun to provide such relationships some legal recognition. To ask these questions is important in light of the very real problems or disadvantages caused to children, parents, and would-be parents by both state denial of the existence of such families, and state efforts to dismantle such families or prevent them from existing. This report is designed, in part, to highlight such problems and disadvantages in a range of countries.

This report is also designed to provide a point of reference for both human rights practitioners and LGBT activists in considering the productive intersection of their work, and to further discussions that have only recently begun about LGBT parenting and human rights. The questions of policy and practice raised by the fact of families headed by LGBT people and the desire of LGBT people to become parents can contribute significantly to the evolution of discussions within the human rights community: for example, to current debates on "the family in all its forms" (to use the formulation arrived at during the UN Fourth World Conference on Women in Beijing in 1995) and on the uses of human rights mechanisms to address abuses or power imbalances within the family (particularly in the context of the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child). At the same time, the human rights framework and human rights approaches also have a significant contribution to make to discussions of (and struggles around) the needs of LGBT parents and their children.

Indeed, numerous national legislatures and judicial bodies, as well as international human rights bodies such as the European Commission and Court of Human Rights and the Inter-American Court, have been called upon increasingly in recent years to address issues relating to same-sex couples; to marriages involv-

ing transgender people; and to the parental rights and responsibilities of LGBT people.

Moreover, the development of new forms of reproductive technology has also placed new pressures on governments and international bodies to address issues related to the desire of individuals (and couples) to have children; to the circulation of human genetic material; and to the relationship of legal and biological filiation.

A primary role of the human rights framework and the work of human rights practitioners is to bridge the gap between state practice and the complex realities of people's lived experiences and aspirations, where the inherent dignity of the human person and ideals of tolerance, justice, and equality are at stake. The intimate caring relationships of LGBT adults throughout the world fall overwhelmingly into this gap between law and lived experience, as do the legal and social situations of LGBT parents and their children in many countries, and the hopes of LGBT people in many countries who desire to be parents.

b. rationale and method of this report

This report is meant to be a first step toward closing that gap. It was conceived as a means of opening a dialogue between—on the one hand—a growing body of human rights work on the family in general, and—on the other—the particular situations and needs of families with lesbian, gay, bisexual, or transgender parents. It is also meant to pose certain questions about how the human rights framework can be useful in thinking about the complex issues facing these families. As an international report, it provides an array of general recommendations, recognizing that in every country, local activists will have a far better sense of the specific approaches that their legal system and culture or cultures will best sustain for advocating on behalf of LGBT people and their children, as well as the specific ways in which the discourses of human rights can be brought to their assistance.

In order both to inform human rights workers who must increasingly adjudicate such issues and to assist activists in countries where these issues are emerging, IGLHRC has endeavored to provide a broad sketch of issues that have arisen for LGBT parents and their children in a variety of countries, mostly in the course of the past 10 years (with reference also to a few earlier cases). Rather than commenting in detail on specific cases and specific national family law systems, we have furnished an overview of the variety and complexity of family issues facing LGBT people and their children, as well as of some general strategies that have been successful. We hope that this report will provide a window on the diversity of responses to these situations, and a stepping-stone toward more detailed research and locally appropriate action in areas important to individual readers.

Our primary means for compiling this information has been contact with activists and consultation of reports published by activists in various countries and regions. Where legal articles have been consulted, they have been recommended as accurate and up-to-date by activists and/or attorneys in the country or region in question. Particular obstacles to research included the desire of many families for privacy (including fear of being "out") and the difficulty, in some countries, faced by ordinary citizens in gathering straightforward information about the law.

While this method of research has limitations, it also enables us to have a stronger sense of local priorities and concerns, and local framing of issues. If the preliminary body of information produced has been partial, sometimes fragmentary, and from a diversity of types of sources (legal cases, newspaper articles, individual statements), one of its strengths is in reflecting the diversity and complexity of levels at which the difficulties and barriers facing LGBT people and their children are played out—within the family, within the local community, in healthcare systems, in the schools, in the courts, in the media, and at the level of government commissions and legislation.

Any study, however explicitly preliminary, which sets such

ambitions for itself will inevitably raise more questions than it can answer; this one is no exception. We anticipate it will inaugurate discussions, not foreclose them. Its intervention in ongoing debates is in no way meant to be conclusive. We hope, however, that it will provide activists and others concerned with a view of how diverse national precedents, as well as international human-rights approaches, can be used to advocate against discrimination in parental rights.

One question that will inevitably, and immediately, be raised, involves terminology, and is entailed in the very title of this report. Who *are* lesbian, gay, bisexual, and transgender people? Any group identity is subject to contest and continual redefinition; yet arguments, whether external or internal to the group, about the meanings of key terms in no way mitigate the reality of hatred or the ubiquity of unequal treatment. Racism is no less dangerous because the meaning of "race" has been questioned or reconfigured by scientific or political discourses. Anti-Semitism does not abate because Jews and anti-Semites alike may argue the definition of a Jew. That a name, label, affiliation is despised and discriminated against may give people every incentive to evade it; this does not make discrimination less real. The fluidity of identity neither constrains prejudice, nor palliates it.

Many key terms involved in this report—"gay," "lesbian," "bisexual," "transgender," as well as "sexual orientation" and "gender identity" themselves—are of relatively recent coinage (as is "race" itself, in its modern meaning). These terms have not acquired the same meaning in all cultures; in many cultures they, or equivalent terms, do not appear; they may not be used as labels by all people who are discriminated against because of acts or behaviors which (in English) are associated with those terms. We continue to apply these terms to a range of selfhoods and associated acts, conscious that they might not always be used, or might not be seen as fully applicable, by the individuals concerned. We do not do so solely for simplicity's sake, or wholly out of an imperial arrogation of the power to name. We do so,

rather, in the knowledge that the terms and their equivalents continue to be widely used by those who enforce discrimination and who advocate unequal treatment. The terms thus can be employed to understand—and to combat—prejudice, if not always to define its victims.

In this report we use "sexual orientation" to refer to the way in which a person's capacity for emotional and physical attraction is directed; the term is gender-based, and is defined by whether that capacity is directed primarily toward the same or the opposite gender, or toward both. In the sense in which it has been employed by both IGLHRC and Human Rights Watch, the term describes "an intricate complex of factors which determine the objects of one's sexual and emotional desires"; it is defined—and any definition must be loose rather than absolute—not only in terms of those desires but through practices and relations, "experienced not just inwardly but through acts, gestures, and expressions, through assertions of similarity or dissimilarity from others, through hands held or touches exchanged, through conversational allusions to a partner, husband, or wife."[8] We use "lesbian" and "gay" to describe, respectively, women and men who experience such emotional and physical attraction to the same sex. We use "bisexual" to describe persons who experience such attraction to both sexes.

In this report, we use "gender identity" to refer to the experience of self as gendered, or in relation to the codes of gender. "Gender" in turn refers to the social and cultural codes and constructs used to distinguish between male and female and/or masculine and feminine, while "sex" refers to the biological classification of bodies as male or female (which can be based on a number of factors including external sex organs, internal sexual and reproductive organs, hormones, and chromosomes). In this report, the adjective "transgender" is used to describe individuals

8. Human Rights Watch and IGLHRC, *Public Scandals: Sexual Orientation and Criminal Law in Romania*, 1997, p. 2.

whose gender identity does not correspond to the one attributed to them on the basis of biological "sex."

Gender attribution (designating individuals from outside as male or female) functions as a fundamental structuring element in societies throughout the world, and as such has ubiquitous practical and legal effects. Transgender individuals thus experience significant barriers to self-determination when they seek to express their own gender identities through a range of possible practices, including adopting cultural codes (*e.g.*, clothing) appropriate to their gender identity (rather than their initially attributed gender) and altering their bodies chemically or surgically. (In this report, the adjective "transsexual" refers specifically to individuals who have undergone sex reassignment surgery.) Many jurisdictions do not allow sex reassignment surgery; some which do, do not recognize the results as constituting a legal change of gender identity. Access for transgender people to sex/gender-based institutions such as marriage also differs widely. Partners of transgender people, even if they are not transgender, also find themselves affected by these barriers to legally recognized family life.

c. scope

While this report is international in scope, it was never intended to be comprehensive. The information it contains has tended to be weighted toward certain regions and countries, for a variety of reasons. In some cases it reflects the strength of IGLHRC's relationships with activists in particular countries. More often, it reflects the role of parenting and family issues in LGBT movements within these countries, the existence of published information on these issues, and the degree to which activists themselves have systematically collected information in these areas, have access to the kind of information that would be useful in preparing such a report, and believe that it is safe or strategic to express their interest in and approaches toward these issues. It

may also reflect the comfort level of LGBT parents in maintaining contact with organized support or political groups. As the report indicates, for example, lesbian mothers facing custody battles in many countries fear being "outed" and LGBT activism has in some cases been held against parents in custody battles. Finally, it may reflect particularities in the development of family law in a country or region. In some countries, cases may not reach court because potential plaintiffs or defendants fear the probability of an unfavorable decision. In some countries, indeed, extralegal mechanisms—including family or kinship-connected decision-making bodies—may intervene before a case ever reaches a court or other public forum.

It should be no surprise that a predominance of known cases come from countries in Europe and North America. The combination of active and visible lesbian, gay, and transgender movements on the one hand, and on the other a generally instilled tendency to see the legal system (or, in some cases, the media) as a natural if not inevitable recourse in situations of injustice, would be enough to ensure that a disproportionate number of cases in such countries will come to public attention. The absence of public visibility, however, does not mean the absence of discrimination. Instead, it may only point to the severity of prejudice and fear. And the absence of a country from this report does not indicate that there are no LGBT parents there. Nor should it suggest that there is no discussion of these issues. For example, while allies we consulted in India were unable to provide specific case information or examples, *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India* (India Centre for Human Rights and Law: 1999) includes a brief discussion of parenting issues in the context of access to marriage or domestic partnership, noting:

> In the absence of equal marriage rights, lesbian and gay couples are excluded from the automatic rights, privileges and benefits society attaches to a marriage contract—no joint custody and adoption rights; no health insurance

> coverage or other employment benefits usually extended to spouses; not joint tax returns; no survivor benefits . . .[9]

In Nicaragua, *Humanas* magazine recently published a "Conversation among four lesbians of diverse backgrounds," which included three women discussing their experiences as parents.[10] In another instance, activists in one country shared specific case information with IGLHRC but asked us not to publish it at this time.

These are just a few examples of material that, while it did not fit the particular structure and needs of this report, indicates the breadth of communities where these issues are being discussed.

If the report is not comprehensive internationally, neither does it seek to provide comprehensive information on LGBT families in the specific countries included. Rather, we have chosen specific cases that illustrate issues arising in relation to the four main areas examined in the report:

- Custody and access;
- Adoption and fostering;
- Access to reproductive technology;
- Parenting rights of partners.

These areas are nodal points where state regulation intersects with LGBT family relationships, in ways that tellingly reveal the former's nature and the latter's needs.

d. organization

The report is divided into ten chapters organized in four broad sections. These sections address, respectively, the relationship between parenting, the state, and the law; societal attitudes affecting parenting by LGBT people; concrete documentation of the

9. Bina Fernandez, ed., *Humjinsi: A Resource Book on Lesbian, Gay & Bisexual Rights in India*, Mumbai: India Centre for Human Rights and Law, 1999, p. 74.

10. *Humanas*, Nicaragua, 1999, pp. 4–8.

situations of LGBT parents; and recommendations grounded in international human rights law.

The *first* section addresses how states actually regulate parenting and family life, including the issues that come into play in determining what a "family" and "family member" are under various legal systems. This section explains how and why states' approaches to family life are often capricious, arbitrary, and incoherent. It also suggests how certain broad human rights principles can help create order amid this arbitrariness, giving consistent cues and standards to states' interventions. The United Nations Convention on the Rights of the Child is central to IGLHRC's approach, reflecting our conviction that discrimination again LGBT parents and would-be parents has its most serious effects on children—on children of LGBT parents, and on children awaiting adoption or fostering, where potential caring parents are summarily excluded from the possibility of making a home.

The *second* section sketches popular and social discourses which portray LGBT people as threats to children, and vilify LGBT parents as threats to families in general. It also briefly examines ways in which a rhetoric of "threat" is used to prevent open discussion of homosexuality, or to discourage openly homosexual people from participating in key institutions serving families and children—such as schools. This section questions, for example, "loopholes" built into employment laws prohibiting discrimination on the basis of sexual orientation—*except* where it involves working with or caring for children. These exceptions provide a precedent for discrimination, and produce agencies and institutions designed to be less open to the needs of children with LGBT parents.

The *third* broad section consists of five chapters which together provide *detailed documentation of issues and cases relating to LGBT parenting*, from a range of countries. The situations described here involve court decisions, legislation, and the behavior of non-state actors. Many of the problems arise because LGBT parents and their relationships are simply not recognized

within existing family law systems as they have evolved. Many others result from direct, intentional, and painful legal or institutional exclusion.

These chapters address:

- Custody of children on the breakdown of heterosexual relationships;
- Adoption and fostering;
- Access to reproductive technologies;
- Parental rights for same-sex and transgender partners of legal parents;
- Ensuring legal protection from discrimination for the children of LGBT parents.

Key issues discussed with regard to custody include:

- Fear of discrimination or threats from heterosexual spouses that cause LGBT parents to settle out of court rather than be "outed";
- Bias in courts that makes the homosexuality/gender identity of the parent, rather than the "best interests of the child," the central issue in determining custody;
- The imposition of special conditions on custody or access for LGBT parents.

Common arguments against awarding custody to LGBT parents are indicated, and relevant counter-arguments from court decisions awarding custody to LGBT parents, as well as a selection of available social science research, are noted. This material addressing the "fitness" of LGBT parents is particularly relevant for subsequent sections of the report.

With regard to adoption, the report discusses:

- Laws that explicitly prohibit LGBT couples from adopting;
- Laws that restrict adoption on the basis of marital status (excluding all single people as well as lesbian and gay couples);

- Institutional practices that prioritize adoptive parents on the basis of marital status;
- Discrimination based on sexual orientation in institutional practice;
- Foster care, its difference from adoption, and restrictions imposed on it by states.

The chapter addressing reproductive technology seeks to outline rhetorics ("treatment" of infertility, "buying babies") that affect the way publics and institutions (including governments) understand these new ways of bringing children into the world. It then examines laws and regulations excluding same-sex couples and/or single people from these means, as well as discrimination practiced in clinics. Governments around the world regulate reproductive technology very differently. Some control it closely and prohibit medical/clinical involvement in certain practices; others have no overarching policies but resolve individual problems through the courts. While use of these technologies has become common in some countries, they remain far less accessible in others. Where access to reproductive technology for lesbians is limited, there is often popular information-sharing about the practice of "self-insemination." This practice has been important and empowering for lesbians seeking to become mothers, but the report also notes some of the legal and health risks involved. This section further documents specific issues that arise for lesbian mothers in accessing safe and appropriate health care. It also condemns draconian requirements on sterilization which are meant to put the possibility of biological parenthood technologically beyond the reach of transgender people.

Beyond the issues of retaining custody of or access to one's children and establishing a family through adoption or reproductive technology, LGBT partners of parents also face particular barriers with regard to obtaining parental rights. Same-sex couples are nowhere allowed to marry legally, and only a few

countries have begun to recognize the status of these unmarried, same-sex co-parents raising children. Transgender people also often face barriers to legal marriage. Since marriage is a crucial means in many legal systems for conferring parental rights and responsibilities, children of LGBT parents are often denied the economic and legal security that recognition of these rights and responsibilities entails. These chapters of the report offer examples of countries which have laws and mechanisms to provide some protection for these children, and discusses countries and situations in which these protections are lacking or imperfect.

Finally, in the *fourth* section, the report returns to key principles in international human rights law. These principles should and must protect the rights of all parents to equity and respect, and of all children to care. Human rights standards are built upon the central principle of non-discrimination. They also require that states be consistent rather than arbitrary in applying law and policy. The latter obligation calls for clear understanding of, among other standards, the "best interests of the child." The report suggests how the Convention on the Rights of the Child, and other documents, guide states toward understanding those interests in the light of inclusiveness, respect, equality and other values of a free society.

At its close, the report provides *recommendations for state action*. These recommendations are detailed and specific. Many of them, however, can be summed up in three general requirements:

- States should work toward definitions of "family," as well as "parenthood" and parental rights and responsibilities, which inclusively represent different forms of the family and different environments of care, so as to treat them on a basis of equality throughout all levels of family law and state policy.
- States should enact comprehensive anti-discrimination legislation prohibiting unequal treatment based on sexual orientation and gender identity, applying to all areas of

life including the family. States should also review and revise both laws and policies which may embody such bias in subtler form, or which permit or mandate other forms of invidious treatment, including discrimination on the basis of marital status.

- States should revise laws on child care and family policy in order to comply with the standards and provisions of the Convention on the Rights of the Child, as well as other relevant international standards. State regulation of parent-child relationships should be rendered predictable and uniform, operating according to principles embodied in law (and consistent with other legislation including anti-discrimination legislation), and directed at and proportionate to the aims of a democratic society.

II. The Home and the World: Parenthood, Policy, and Law

As has often been repeated, the family should not be defined in a formalistic, nuclear construction as a husband, wife, and children. The family is the place where individuals learn to care, to trust, and to nurture each other. The law should protect and privilege that kind of family and no other.

—Radhika Coomaraswamy[11]

a. the family and the state: evolving approaches

that law should involve families seems, from a modern vantage, a given. In the European world of a thousand years ago (and in many other "traditional" societies), however, the notion of "family law" would have seemed either redundant, or a contradiction in terms. In most of their doings and dealings, families *were* the law; questions of inheritance, of fathers' power over sons or daughters, or of husbands' power over wives, were determined almost wholly within the family structure. Marriages between families were often negotiated more or less as treaties between independent powers. The church, recognizing marriage as a sacrament, claimed the right to regulate these relations and

11. Radhika Coomaraswamy, "To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights" in Rebecca J. Cook, ed., *Human Rights of Women* (1994), p. 56.

in some cases adjudicate issues. States as such hardly existed; they would hardly have presumed to interfere.[12]

As modern European states developed (establishing for better or for worse models of both government and nation), they defined themselves by their relation to that vast uncolonized sphere of existence in which human reproduction and much of human life still took place. The history of the growth of the modern state—a narrative usually written in political, military, and economic terms—is in large part the history of its problematic involvement with "family" and "private" life. States vigorously promoted particular family forms; yet in the process, they lent added moral sanctity to the family, as an area the state should putatively leave alone. Women began to gain some legal recourse against the economic and legal authority of the household (as vested in its head); yet such regulation of "privacy" also helped consolidate patriarchal authority in centers of governmental, class, and colonial power. The history of state and family, then, is one of mixed models and mixed messages, in which ideal descriptions and ideological schemas have seldom meshed with actual practice.

To recall this history is important to us principally in recognizing its persistent effects. Contradictory and incommensurate models for the state's relationship to family life continue to be registered, like the seismic traces of a deep-buried fault, in many of the interactions between them. One of the most important is the disparity between the rhetoric of "privacy"—the virtual political compulsion placed upon liberal states to define a range of activities as private—and the reality of states' regulation of intimate lives.

In most modern human rights instruments, "family" and "pri-

12. See Petrus Cornelis Spierenburg, *The Broken Spell: A Cultural and Anthropological History of Premodern Europe,* New Brunswick: Rutgers, 1991; and Philippe Aries, ed., *A History of Private Life,* especially vol. II, *Revelations of the Middle Ages,* ed. Georges Duby, and vol. III, *Passions of the Renaissance*, ed. Roger Chartier, both trans. Arthur Goldhammer, Cambridge: Harvard, 1988 and 1989.

vacy" appear as linked. The family is noted mainly as a zone with which the state has only limited powers to interfere: its "protection by society and the state" is largely identified with a hands-off policy. Thus the International Covenant on Civil and Political Rights (ICCPR) affirms that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence."[13] Other covenants comparably stress the protection of the family unit from undue state interference.[14]

The emphasis laid upon privacy reflects the legacy of a liberal conception of civil society, in which the family comprised the core of those human relationships opposed to, and outside the sphere of, state control. That families are "private," however, has never been more than a half-truth: and if anything, the fraction has diminished radically over time. From the beginnings of the nation-state, governments have anxiously attended to the family—and particularly parenthood, as the zone in which reproduction (both physical birth, and the reproduction of the state's own beliefs and values) generally takes place. Such regulation has taken multiple forms. They included the transformation of marriage from a contractual relationship between families, or a sacrament controlled by religious authorities, to a civil relationship registered by the state. They included increasing state control over childbirth (by, for example, replacing midwives with maternity wards in some countries), as well as institutionalizing the principle of ultimate state responsibility for parentless, or inadequately parented, children. They included codifying sophisticated systems of family law, to adjudicate extensive issues within the family. They included as well the creation of a range of educational, social, and therapeutic means for extrajudicial state intervention in families—particularly "problematic" families.

13. International Covenant on Civil and Political Rights, U.N.G.A.R. 2200 A (XXI), December 16, 1966, Art. 17(1).

14. *UDHR*, art. 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." The *Convention on the Rights of the Child (CRC)* also guarantees this right specifically to children (article 16).

Most of these interventions have become customary in modern societies. Their effects have been felt, too, in the way that international human rights discourses increasingly recognize some forms of direct state involvement in family life as a positive obligation. The family comes to appear not as a special zone isolated from the rest of society, but as an integral part of it, and possibly a microcosm of its inequities and injustices. The Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, for example, emphasize the the state's duty to guard vulnerable individuals within the power-structures of the family, and note the state's obligations to women and children specifically. The legitimate rights of states to intervene in family matters lie imperfectly balanced between a principle of non-interference, and a recognition of special protection needed to ensure individuals' broader rights within what is often a situation of power imbalances—particularly on the basis of gender and age—within existing family forms. Thus, states are compelled or empowered under human rights law, for example, to take action in cases of domestic violence (including spousal abuse and child abuse); to prohibit child marriages; to address property issues on the dissolution of marriages and other relationship of cohabitation; and to act in the "best interest of the child" in cases where a child's parents are deceased or cannot agree about the care of the child in cases when the relationship dissolves.

A core question framing this report is, then: *when and where do states in fact intervene in parental lives and rights?*

One quality of the state's interventions that can contribute to the gap between state practice and families' lived experience is that *legislation and judicial decisions that intervene in the functioning of the family tend to do so only at specific junctures in the family's development*, such as marriages, births, adoptions, dissolutions of marriage/cohabitation, or custody battles. More regular agents of state interaction with the family, such as educational institutions and social or medical services (whatever their day-to-day power

over individuals and resources), may be neither in a position to reflect on nor enact legal or policy changes. This may either restrict their functioning unconscionably, or conversely may release them from meaningful external control.

The advocate involved in family issues is often faced, then, with a no-win choice between judicially bound institutions which interfere in family life with specific and restricted mandates—but do so at irregular intervals and only at particular, charged junctures; and institutions which interfere regularly and systematically, but with profoundly undemocratic mandates and (in some cases) without effective legal oversight.

A theme that will run through this report, then, is the arbitrariness of state interventions in family life. Not only do different states intervene in radically different ways—as though this were the one sphere in which universal standards of human rights fragment into mere pointillistic, microscopic shards of standards; but, within the same state, regulation of different aspects of, or points in, family life—marriage and adoption, for instance—may be governed by altogether incompatible principles. Regulation may vary between different jurisdictions within the same state, involving different laws or policies from city to city—or even from hospital to hospital. And regulation is additionally parcelled among a myriad of separate agencies with different responsibilities, different models of operation (answering, for example, to *plaintiffs* demanding rights, or to *clients* requesting services), and different degrees of responsiveness to those outside.

The remainder of this report will document these diverse, often random-seeming incursions. What must be stressed is that inconsistency is itself a form of inequity: states have a responsibility to reduce arbitrariness and to render their interventions proportionate and predictable wherever possible. *In accordance with human rights principles, state interventions or "interference" in the family should be "regular" rather than arbitrary—that is, embodied in law, predictable and uniform, and in accordance with the ends and means of a democratic society.*

At the same time, and beyond the direct role of the state, religious bodies, members of the extended family, and other community groups are non-state actors that frequently engage in the social "policing" of family forms, and often have the opportunity to do so on a more day-to-day basis than the state. As this report will document, LGBT families can be subject to such "policing"—sometimes to the point of violence. The state is also obligated under international human rights standards to protect against interference by "non-state actors" in the enjoyment of family life as well as other human rights.

b. but are *we* family? defining the family in law and practice

> The odd thing about the evolution of our law in this area is that we have proceeded in this incremental fashion without really tackling the issue. We have recognized the individual human rights of gays and lesbians, and the rights of same sex couples as spouses for various purposes. Each time we do this, we base our conclusion on the fact that gay and lesbian partners are financially and emotionally interdependent, and enjoy committed, enduring relationships bonded by love and trust. And yet throughout the piece, there is still an assumption, which manifests itself in dominant notions of family and hence our family law, that the "family" is comprised of opposite sex spouses and the children resulting from sexual intercourse. Gay and lesbian families are only exceptionally granted recognition in family law. We've been hedging around the issue, without really getting to the heart of the matter.
>
> —Martha McCarthy and Joanna Radbord[15]

Human rights has a great deal to say about states, but somewhat less about families. Its has no simple answer to the question of

15. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, p. 10.

how, and to what extent, the state can legislate the form of the family—can determine what is seen as a family and who is recognized as having "family relations." States certainly must and do find ways of determining, through law and judicial practice, to whom family law applies and who may obtain "parental rights and responsibilities" over any given child: but the principles which guide these choices may fit uneasily with other human rights principles. These "definitions" of the family often emerge from an intricate and unexamined web of traditions and normative ideals (whether or not those ideals now constitute, or ever constituted, majority practice); responses to new opportunities such as reproductive technologies; and the heterogeneous development of law and social behavior over time. States may work with different definitions in different spheres of activity. One definition of "family" may be fixed in written law or accumulated in common-law precedent, and serve as a basis for judicial decisions; an altogether different definition, or set of terms, may guide the work of social-welfare agencies.

Countries—and institutions within countries—thus differ significantly in the ways in which they determine how and whether a "parent-child" relationship or a family relationship exists. New reproductive technologies and the emergence, or increasing visibility, of new family forms (step-families, blended families, single parents by choice, or same-sex couples) have made solving such issues within traditional frameworks still more complex.

Below are some examples of issues which arise in determining the legal "definition" of family, particularly between adult and child, and ways in which different cultures and legal systems respond to these issues.

I. "Family" relationships can be constituted between an adult and a child by "blood" (genetic or biological) ties:

- However, sperm and egg donors can be excluded from being legal "parents" in countries where use of third-party genetic material is allowed for assisted reproductive technologies; a

genetic tie alone is not enough to produce a "family" relationship if proper administrative and/or medical protocols are followed.[16]

- Also, in the case of surrogacy, a woman who carries a child intended to be raised by another may have a legal claim on the child even if she is not genetically related (if both sperm and egg [oocyte] are donated)—through the "biological tie" of being the "gestational" or "birth" mother. A lesbian in California (United States) was recently recognized as the biological mother of a child conceived through in-vitro fertilization using an egg donated by her same-sex partner (also recognized as the biological mother of the child) and sperm from an anonymous donor.[17]
- Moreover, despite some improvements in the uses of medical technology for determining paternity, the acknowledgment of the parenthood of unmarried fathers varies significantly from country to country. In some cases, no father's name need be given in registering a child's birth (as in Russia)[18]; in others (the United Kingdom and Sweden, for example) information on unmarried fathers can be solicited (under threat of reduction in government support) from mothers receiving government assistance so that the father can be made to contribute to the child's support.[19]

16. The United Kingdom and parts of the United States are two among many countries in which an anonymous sperm donor, for example, is not considered a "parent" if the insemination is performed in accordance with appropriate protocols. Lisa Saffron, *Challenging Conceptions—Planning a Family by Self-Insemination*, 1998, p. 92. National Center for Lesbian Rights (USA), "Lesbians Choosing Motherhood: Legal Implications of Alternative Insemination and Reproductive Technologies," 1996, pp. 4–9.

17. "Moms are Parents from Conception," *Washington Blade*, April 23, 1999, p. 1.

18. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 185.

19. UK—Lynne Harne and Rights of Women (ROW), *Valued Families: The Lesbian Mothers' Legal Handbook*, London: The Women's Press, 1997, pp. 114–116; Sweden—Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 208.

II. "Family" relationships can be constituted in relation to a non-biological child by virtue of marriage/partnership/cohabitation with an adult who is the parent of the child.

- For example, in many countries, the husband of the mother at the time of birth or a certain period before birth automatically becomes the legal father of the child.[20]
- In many countries, the husband of a woman having a child by donor insemination is recorded as "father" of that child, and frequently must give consent for the insemination. In contrast, for example, a transgender man cannot be recognized as the father of his partner's children by insemination in the United Kingdom.[21]
- In many countries, heterosexual step-parents can easily gain significant parental rights with regard to a spouse's child.
- In a recent legal decision (*M v H)* in the province of Ontario (Canada), the definition of "spouse" for *de facto* (cohabiting) couples in Ontario law was ruled to include not only opposite-sex but also same-sex cohabiting partners.[22]

III. "Family" relationships can be constituted between an adult and a child by adoption.

- Adoption can have a variety of forms, including "stranger"

20. For example, in Russia, if a woman is married ten months before the birth of a child, her husband at that time is considered to be the child's father. Kate Griffen and Lisa A. Mulholland, eds., *Lesbian Motherhood in Europe*, London: Cassell, 1997, p. 185.

21. See discussion of this issue for transgender partners of birth mothers in the UK on pp. 140–141 and 169ff.

22. M. v. H. (1999), 171 D.L.R. (4th) 577 (S.C.C.). Following this case, Ontario government *passed* The Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H., 1999. This amends 67 statutes not by recognizing both same-sex and opposite-sex de facto partners as included in the term "spouse" but by creating a separate category of "same-sex partner." M has decided to return to the Supreme Court to seek a decision on whether this legislation complies with the ruling in *M v H* (McMillan Binch release, November 25, 1999). For more details on the original case and its developing aftermath, see the web site of the firm McMillan Binch, www.mcbinch.com.

adoption, which terminates the rights of the biological parents and "second-parent" or other forms of adoption used by step-parents, which do not terminate the rights of the biological parent and which often exist where parental rights are not automatically granted to step-parents. These may be more or less common or restrictive. For example, in Norway, step-parent adoptions are available for heterosexual couples, but are practiced very restrictively, and not before the child has reached the age of 12.[23]

- States sometimes limit adoption to married or cohabiting couples only. Consent of a spouse is often necessary for a married individual to adopt.[24]
- States often limit the number and type of people who can be adoptive parents of a child at the same time, sometimes preventing same-sex partners from adopting together or from sharing parental rights on the basis that a child can have only one "mother" or "father."[25]
- States whose family law is based on Islamic law may not permit adoption (the "erasure" of the biological heritage of the child) although fostering takes place in practice and is recognized by law in Islamic jurisprudence.[26]

Two earlier examples from the European Court of Human Rights also illustrate the difficulties posed for LGBT people in

23. Urs Christen, Board Member, Homofile og Barn (GLBT parenting group), Norway, in e-mail to author June 17, 1999.

24. Ireland, Italy, and Serbia are among countries which do not generally permit single people to adopt. See p. 119 of this report.

25. For example, the Israeli coparenting case discussed in this report on pp. 166–167 is partly a question of whether a child can, under Israeli law, be said to have two mothers. The Canadian case *Buist v. Greaves* (1997) mentioned on pp. 176–177 also turns on this issue.

26. Serour, Gamal I. et al, "Bioethics in Medically Assisted Conception in the Muslim World" *Journal of Assisted Reproduction and Genetics* Vol 12, No. 9, 1995 notes that adoption is not allowed (p. 562). See also, for example, Francois-Paul Blanc and Rabha Zeidguy, *Moudawana / Code de Statut Personnel et des Successions*, Sochepresse Universite, Morocco, 1996 (article 83 at 3), and 92 Am. Soc'y Int'l L. Proc. 232.

claiming the legal status and protections accorded to "the family" for their own relationships of intimacy and care.

In the case of *Kerkhoven v. Netherlands* (1992), the court found that two women living together and raising one partner's child did not constitute a family. That is, they did not enjoy the protection accorded to "the enjoyment of family life" under Article 8 of the *European Convention*. As a same-sex couple, the women did not have a "family" relationship, and the woman who was not the legal mother of the child—although she lived with the child and was helping to raise the child—did not have a "family" relationship to the child. Only the already-established mother-child relationship constituted a family relationship.[27] This decision hinged in large measure on the "margin of appreciation"—that is, the degree of discretion (a concept particularly relevant to the European Convention)—accorded to the state in determining what constitutes a family.

In the case of *X, Y, & Z v. United Kingdom* (1997), while the ultimate decision (which will be discussed elsewhere in this report) was not in favor of the applicants, the court made a significant decision about the "family" life of a female-to-male transgender person, the woman with whom he cohabited, and the child they had agreed to have by donor insemination. The United Kingdom, which does not legally recognize sex changes by allowing a change of sex on an individual's birth certificate, argued that X and Y could not be said to enjoy "family life" that should be protected since they were still, legally, two women living together, and that X and Z could not be said to enjoy "family life" that should be protected since they were not related by blood, marriage, or adoption. The court disagreed with the presumption that there was no "enjoyment of family life" to protect, and the unanimous recognition that Article 8 was appli-

27. *Kerkhoven v. The Netherlands* (No. 15666/89) (May 19, 1992), unpublished; this case is discussed in Catherine-Anne Meyer's "L'homosexualité dans la jurisprudence de la Cour et de la Commission européenes des droits de l'homme," in Daniel Borrillo, ed., *Homosexualités et droit: De la tolérance sociale à la reconnaissance juridique*. Presses Universitaires de France, 1998, pp. 153–179.

cable to the case was a significant victory achieved for transgender parents.[28]

The most recent case decided by the European Court was *Salgueiro da Silva Mouta v. Portugal*, decided in December 1999. This case involved a gay father who had been denied custody of his child because he provided a less traditional family environment than the mother. The court found unanimously in favor of the father's contention that the Portuguese court had violated his rights under Article 8 in combination with Article 14 of the European Convention, since the only new considerations of the court in overturning an earlier ruling which had awarded custody to the father were arguments dealing specifically with his sexual orientation.[29] This ruling sends a strong message about discrimination on the basis of sexual orientation in custody cases. It will be discussed in more detail elsewhere in the report.[30]

c. parental rights and responsibilities

Recognition in law as a family is linked to, but also different from, the critical question of whether, for example, both same-sex partners raising a child together have full parental rights and responsibilities with regard to that child, or whether a transgender parent has full parental rights with regard to a child of her

28. *X, Y, and Z v The United Kingdom* (75/1995/581/667)

29. *Salgueiro da Silva Mouta v. Portugal*, (no. 33290/96), December 21, 1999. Note: Under Article 43 of the Convention, this ruling does not become definitive until three months from the date it is issued, and until then either party can request that the case be heard before the full rather than preliminary chamber of the Court.

30. The Court may have another opportunity to revisit questions of LGBT parenting in *Frette* v. *France* (No. 36515/97), which involves the refusal to approve an openly gay man as a potential adoptive parent. This case was communicated to the French Government by the ECHR in March 1999, and has not yet been declared admissible. This case will also be discussed in some detail elsewhere in this report. Information note No. 1 on the caselaw of the Court, European Court of Human Rights, November–December 1998; www.dhcour.coe.fr/hudoc.

or his partner. While a variety of people may be recognized as being part of a child's "family," being recognized as a parent—obtaining parental rights and responsibilities—gives an adult a privileged status in decision-making in a child's interest, and establishes the child's right to make certain claims on the parent.

Although they vary somewhat from country to country, and can be enumerated throughout an array of different aspects of the law, parental rights and responsibilities may involve both *guardianship* (the power to make significant legal and other decisions regarding the child) and *custody* (responsibility for day-to-day decisionmaking, and care). These elements (and others identified in different legal systems) may be united in one person, or divided among several. Powers entailed in parenthood may include:

- Choosing where the child will live, and assuming responsibility for his or her daily care;
- Making medical decisions on a child's behalf, authorizing treatment, and being consulted and/or informed about treatment;
- Taking responsibility for the child's education and other aspects of its welfare, including communicating officially with school personnel and other state personnel about or on behalf of the child;
- Picking up the child from school, day care, etc.;
- Making decisions with regard to the child's property or financial assets;
- Possible responsibility for support of the child during (and/or upon termination of) any relationship between parents;
- Recognized possibility to apply for custody or access on the dissolution of a relationship with another parent;
- Presumption of custody on the death of the other parent;
- Receiving government tax credits, exemptions, or other monies provided for adults responsible for raising children;
- Access to particular vacations or leaves of absence from work for the purposes of caring for children;

- Taking the child out of the country legally;
- Legally changing the child's name.

When a parent-child relationship has been established in law, the child may also obtain certain rights vis-a-vis the parent, such as:

- Access to the parent, unless a competent court finds this not to be in the best interest of the child;
- Financial support;
- Presumption of inheritance from the parent, for example in the absence of a will;
- Sometimes the possibility of suing in the event of wrongful death of a parent.

Some of the above rights and responsibilities are not solely dependent on the establishment of a legally recognized parent-child relationship, but can be applied through other legal means. However, individuals recognized as legal parents tend to have, automatically, a broad array of intertwined rights and responsibilities that are difficult or impossible to duplicate by contractual arrangement—particularly since some depend on the relationship of the government to the family unit or to the parents as parents.

Most legal regimes make it difficult to separate parental rights from the core means which the state has developed for the legal regulation of family relationship—civil marriage. Having a recognized "family relationship" or "parental rights" thus depends upon being able to situate and define oneself in terms of the institution of marriage (or, in some cases, other legally-recognized couple relationships patterned upon marriage). That is to say, such recognition depends not only on the relationship between the adult and the child, but also on the relationship (present or past) of that particular adult to other adults who also have a claim to be "parents." The fact that same-sex marriage is nowhere legally recognized (although same-sex couples, in a limited number of countries, may obtain recognition for other types of partnership) excludes same-sex couples from key ways of being

recognized as parents. The fact that some countries do not recognize sex reassignment on birth certificates, preventing transsexuals from contracting a legal marriage, tends to result in the exclusion of transsexual people from certain key ways of being recognized as parents. Where sex reassignment is recognized for the purpose of marriage, transgender people who cannot or choose not to undergo surgery also remain excluded from marriage. They are thus cut off as well from the access it provides to other forms of being recognized as family.

d. grounds for state interest in family relationships

States use eclectic and collectively incoherent means to define family and regulate parenthood. Central to this report is the question of whether human rights approaches—in their incarnation as a critique of systems of existing law—can work to promote coherence amid this multiplicity.

IGLHRC contends that existing human rights standards offer two guiding principles in approaching state regulation of parenthood. These principles should direct interventions, ensuring that they are coordinated toward a common aim and offering at least the beginnings of stable criteria for determining proportionality and need.

Putting Children at the Center: Renewing the "Best Interest" Principle

The United Nations Convention on the Rights of the Child—ratified by virtually every nation in the world—specifies that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration."

This language has become central to the idea of child protection. It is astonishing, then, to realize how recent its interna-

tional appearance is. The notion of "best interest" was put forward in the 1959 Declaration of the Rights of the Child, Article 2 of which reads:

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[31]

Serving "the best interests of the child" is, of course, similarly recognized by many national family law systems as the primary goal and justification of judicial intervention in the lives of children. Determining the "best interests of the child" is a complicated task, undertaken differently within different legal systems and different cultures. One distinction that can be made among different approaches is a distinction between

- systems in which the "best interests" are determined structurally—for example, systems in which child custody is determined on the basis of the child's age or sex, or by an invariable preference for a particular family form;
- systems in which the "best interests" are determined situationally—for example, through a judge or mediator weighing the particular situations of different parties seeking custody on the basis of a wide range of factors, including the quality of the emotional relationships with the child, the child's wishes, etc.

State discretion in discovering these "best interests" cannot be unbounded. Generalities and guesses must be disallowed. Some authorities have proposed standards, such as a "nexus test," requiring specific evidence of actual or potential harm to the child

31. Declaration of the Rights of the Child, U. N. G.A.R. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

as a condition for state intervention. Such tests would also restrain vague speculation in decisions about (for example) custody. Certainly the state's role in protection must employ consistently applied standards and motives, must be carried out through consistent and legally defined procedures, and must be consonant with the aims of a free society. Beyond these restrictive principles, however, the state should see its involvement with children as part of an active effort to promote the aims and values of a free society—not only by locating children in loving environments, but by exemplifying, in its own actions, how those values may be applied.

While the "best interests of the child" are not explicitly defined in the Convention on the Rights of the Child, we can look to the CRC for a sense of where they might lie under international human rights law. The CRC's preamble notes that children should be raised in "an atmosphere of happiness, love and understanding" and that the family should be an environment which provides for the "growth" and "well-being" of *all* its members—suggesting that children thrive in an environment in which other family members are also able to thrive. It considers that "the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity."[32]

Elsewhere, the Convention further elaborates the idea that the child's "best interests" are best served by an environment of tolerance and care, in which her capacities can "evolve" toward their employment in democratic citizenship. Article 5 reads:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community provided for by local custom, legal guardians or other persons legally responsible

32. The "best interest" principle will be discussed in more detail on pp. 68–71 and 197–201.

> for the child, to provide, in a manner consistent with the evolving capacities of the child, *appropriate direction and guidance in the exercise by the child of the rights legally recognized in the present Convention*. [italics added]

And Article 29 (although dealing with education rather than the family context *per se)* affirms the centrality of democratic values in asserting that "the education of the child shall be directed to . . . [t]he preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin."

The United Nations Committee on the Rights of the Child has gone on to develop these ideas in a number of contexts. "The civil rights of the child begin within the family," the Committee has stated.[33] And it has gone on to declare: "The family becomes . . . the ideal framework for the first stage of the democratic experience for each and all of its individual members, including children."[34] States' interventions in families should consider the best interests of children in this light: finding a framework of care which will ideally not swaddle the child in permanent, infantile seclusion from the complex realities of modern life, but will rather prepare the child for full participation in a free and open society.

The Desire for Children and Human Rights

This report addresses both the situation of existing LGBT parents and their children, and the situation of LGBT people who wish to raise children but encounter a variety of barriers in pursuing adoption, fostering, or the use of reproductive technology to this end.

While human rights instruments speak of "the right to found

33. Committee on the Rights of the Child, Report on the Fifth Session, January 1994, CRC/C/24, Annex V, p. 63.

34. Committee on the Rights of the Child, Report on the Seventh Session, September–October 1994, CRC/C/34, para. 183.

a family," governments denying access to various modes of parenting to LGBT people often note specifically that there is no such thing as the "right to a child." Certainly, respect for the dignity and the rights of the child mitigates against any interpretation of the "right to found a family" in which the child functions as a property or commodity that LGBT people are prevented from "acquiring." Rather, the desire for children—whether on the part of LGBT people or others—is an expression of values common to many individuals and societies that it is good for people to live in relationships of caring, nurture, and intimacy. The social (and frequently economic) structure of the majority of societies, predicated as it is in large part on the construction and lived experience of family relationships, further mandates that this impulse to care be expressed within the structure of such relationships. LGBT people often experience discrimination by and exclusion from their families of origin. Excluding them from establishing families of choice—through the failure of existing law to recognize their relationships and their desire to parent—effectively denies and denigrates their capacity to participate fully in society and the community, and to assume their full status as citizens (as "marriage," "partnership," and "parenting" are also forms of civil status). But beyond such civil concerns it denigrates and damages their capacity to care, as an intrinsic aspect of their humanity. And in doing so, it is equally harmful to the status of the children in these families.

The formulation of "the right to found a family" speaks specifically to a common human aspiration to care: an aspiration fulfilled in part by bringing children into the world and raising them, building an enduring relationship of nurturance and guidance.

This desire for children is something that LGBT parents and would-be parents—like other parents—discuss, reflect on, make sacrifices for. Susana, a lesbian adoptive mother in Guatemala, shared with IGLHRC the following story about her determination to have a child:

I am a forty-three year old Guatemalan woman, a single mother and gay. I have had a partner for thirteen years and after five pregnancies—and the death of my only child at the age of eleven months—I decided to pursue adoption. Thank God, I have now a little boy named Camilo. He was given to me when he was barely nine days old. The entire process was legal, and due to the biological mother's cooperation and the time she put in, the legal papers came out in forty days.

I encountered no problems for being a single mother, that is, a woman without a man. The issue of being gay was no problem, and in fact no one asked and I never mentioned it. I suppose that had it been officially known there would have been obstacles to the adoption, given the *machista* mentality of Guatemalans. Had I been asked, I think I would have had to deny it.

I am glad to be able to contribute my painful and joyful experiences in order to help other gay or non-gay women who wholeheartedly wish to be mothers.

I do not consider your questions indiscreet at all. Whatever happened to me happened for a reason, I had to learn bit by bit in order to become what I am today. I am today a woman, a mother with an adorable little boy and with a stable partner. The majority of Guatemalans who know me, including my family, know also about my sexual orientation. I am in no way ashamed, indeed, in my forty-three years of life I have had to carve out a path for myself and endure the glances and comments of many people. That, however, has never bothered me and I have always held my head up.

Of the five pregnancies I mentioned earlier, three were conceived with a (married) friend. Our relationship was purely sexual rather than romantic.

He was interested in having someone for sexual pleasure, but I on the other hand, and without his knowledge, wanted only to get pregnant. Each time I'd get pregnant, I would make up a story about a new official boyfriend in

my life; he would accept it, and we would leave each other. This friend never talked to me about my sexual preference. With Guatemala being as small as it is, everyone knows that I'm gay, they just don't bring it up. If they don't ask me, I don't talk about it.

It is not that I was happy to go to bed with him. I used to do it only in the days I thought I'd be the most fertile, and he did not know what was going on. We never went out on the street or anything of the sort, we just met to have sex. . . . Up to this day I do not know whether he knows that Giancarlo, my son who died, was also his. In reality he does not need to know, no one other than me knows who was the donor with whom I used to get pregnant.

The fourth and fifth pregnancies were done through artificial insemination. For these pregnancies, Vicky (my partner) and I spoke with a gynecologist who doesn't reject gay people. He knew that we were a couple; he is open-minded, a fertility specialist, Guatemalan. . . . We embarked with him on this adventure. He agreed to help us with the pregnancy and gave us tremendous motivation.

The doctor even explained to Vicky how to inject the sperm, so that she, too, would somehow take part in the pregnancy. He always took her into account, and we did everything together. He never asked about us either, but it was obvious that we were a couple, and he knew that well.

We tried many times, but for some unknown reason it wasn't happening.

When we decided to adopt, I asked various gynecologist friends to let me know if they knew of any woman who wanted to give away or give for adoption a baby. In 1997, I received a call from one of the gynecologists who had also been my doctor. He told me that there was a . . . boy, 9 days old, and if I wanted him I had to hurry and call a woman—she was an intermediary, the one who had looked after Camilo's biological mother during her pregnancy.

The biological mother had already decided that she couldn't support another child, because she already has one 5 years older than Camilo. So, she entered this program, where they look after the mothers and keep them on a care program under doctors' supervision to ensure their wellbeing and that of the babies. They feed them and the only requirement is that they be single mothers. There are no mothers with husbands or boyfriends in this program. It is a program that is not controlled by the government. Basically, it's run by people who take an interest in the mothers, and instead of making them abort, they look after them and then give the babies for adoption if the mother really wishes so. Everything is legal because the biological mother signs an agreement to give up the baby in the presence of a social worker representing the government and the law. In my case, the biological mother cooperated a lot. The fees for this program are around $500 to cover the food, care and medical exams, as well as the exams they do for the newborns. The biological mother doesn't know to whom the baby is given, at least it was so in my case. The one who did meet me was the woman in charge of the program. But she had no idea of where I come from nor my sexual preference. To her, essentially, I was a woman who wanted to adopt a baby and who could pay—so there!

As soon as they gave me Camilo I spoke to the doctor who had facilitated the contact just to make sure the baby was healthy and that the previous exams were accurate. I also wanted to make sure that he wasn't a stolen baby or anything like that. I also contacted the family lawyer to ask if I had to do anything right then, but there was nothing to do until later (I mean in terms of the legal process). Afterwards, I contacted a lawyer who had helped a friend with the adoption of her daughter.[35]

35. E-mail communications with author May 9, 1999; May 18, 1999; July 2, 1999; July 5, 1999; translated by Susana Ackerman and Sydney Levy.

Daniel, a gay man in France who was waiting for the birth of his child to an American surrogate mother, said in an interview published in 1998,

> For me, having a child is a natural desire that I think every human being feels. This desire includes the wish to give life to a child, to see it grow, to transmit your knowledge and what you like. That said, like many other gays, the desire to have a child raises a lot of questions for me. And that led me to consider other desires, reasons, and motives hidden behind the simple natural desire.
>
> There are, among others, the fear of death, the wish to reproduce, the fact of having a child that is flesh of my flesh. There is also probably the means of detaching myself from the familial imprint, to be completely and definitively autonomous vis-à-vis my family [of origin].
>
> But I affirm that in addition, having a child is a militant act. Many people will be shocked that I can include the fact that it is a militant act in my desire for a child. I maintain what I say, however, making it clear that it is the *act* that is militant, not the will or the desire. For example, living my homosexuality in an open way in my family or at work, that comes first of all from the desire not to have trouble and to be clear in my relations with other people. Even if it is true that that is, in fact, a militant act, that wasn't my goal at the beginning. In the same way, the desire to have a child is something natural, but realizing that desire today is a militant act.[36]

In the same volume of interviews with French lesbian and gay parents, Paula, who has adult children from a previous marriage and lives with Lea, who adopted two children, notes:

> When, as a gay man or a lesbian, you begin taking steps to bring your desire for a child to fruition, you are brought to the point of really thinking about the consequences,

36. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, pp. 268–269; translated by L. Minot.

> weighing the pros and cons. Whereas among heteros, it's easy enough to have a child that you don't ask questions.[37]

While there may be no "specific right to a child," human rights reflections on the "right to found a family" and the dignity and equality of all people can provide a framework in which to ask what ends are served by state prohibitions upon the desire of LGBT people to become parents.

37. Éric Dubreuil, ed., *Des Parents de Même Sexe*, Paris: Editions Odile Jacob, 1998, p. 220; translated by L. Minot.