

**BARRIERS, HURDLES, AND DISCRIMINATION: THE
CURRENT STATUS OF LGBT INTERCOUNTRY
ADOPTION AND WHY CHANGES MUST BE MADE TO
EFFECTUATE THE BEST INTERESTS OF THE CHILD**

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I. INTRODUCTION

The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding Intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.¹

The subject of adoption by members of the Lesbian, Gay, Bisexual, and Transgender (LGBT)² community has been tackled by television

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¹ The Hague Convention on the Protection of Children and Co-Operation in Respect of Inter-Country Adoption, Preamble, May 29, 1993, 32 I.L.M. 1139, *available at* http://www.hcch.net/index_en.php?act=text.display&tid=45.

² Although the acronym LGBT will be used throughout this article, much of the data available is only for the gay and lesbian portion of the LGBT community. In addition, the term “homosexual” may be used to refer to the LGBT community. I recognize the inherent problem with this, as many bisexual and transgendered individuals do not consider themselves homosexual, and for some the term has a negative connotation as a result. However, nearly all of the literature, existing statutes, and court opinions refer to homosexual individuals or same-sex couples leaving the status of bisexual and transgender individuals unclear. While it is possible that bisexual and transgender individuals would receive different treatment under the laws, it is unlikely given the rationale provided by countries and states for prohibiting gays and lesbians from adopting. As a result, although I recognize and respect the differences between individuals in the various sub-groups, I refer to the LGBT community as a whole throughout this article.

shows and movies in recent years.³ Most recently in the series pilot for the sitcom *Modern Family*, a gay couple adopted a baby girl from Vietnam.⁴ While the series focuses on the joys, trials and tribulations, and stereotypical situations of raising a child, it leaves out the details of the arduous process and the barriers that members of the LGBT community must overcome to form families through intercountry adoption.⁵ Frequently the barriers are substantial and, in some cases, insurmountable.

What began as an international humanitarian effort to “save” children from war-torn third world countries has evolved into a viable, accepted method of family formation for many individuals and couples.⁶ However, many more orphans could receive the benefit of growing up in a family environment if categorical bans on LGBT adoptive parents were eradicated.⁷ If these barriers to adoption are permitted to continue, thousands of children will miss out on the familial experience and instead be relegated to life in institutions or foster care.⁸

Adoption is a far superior option over institutionalization or foster care,⁹ and as such, categorical bans on potential adoptive parents based on

³ See, e.g., *infra* note 4 and accompanying text.

⁴ *Modern Family: Pilot* (ABC television broadcast Sept. 23, 2009). However, as of July 28, 2010, adoptions between the United States and Vietnam have ceased pending the promulgation and implementation of new legislation and regulations by the Vietnamese government. Until such time that either Vietnam accedes to the Hague Adoption Convention or there is a new bi-lateral agreement between the United States and Vietnam regarding intercountry adoptions, adoptions between the two countries are not possible. U.S. Dep’t of State Office of Children’s Issues, *Vietnam Adoption Notice*, INTERCOUNTRY ADOPTION (July 28, 2010), <http://www.adoption.state.gov/news/vietnam.html>.

⁵ See *Modern Family*, *supra* note 4. The terms “international adoption” and “intercountry adoption” will be used interchangeably throughout this paper. Both terms refer to the adoption of children whose country of birth and citizenship differ from the adoptive parent(s)’ country of residence or citizenship, or both. Black’s Law Dictionary defines international adoption as follows: “An adoption in which parents domiciled in one nation travel to a foreign country to adopt a child there, usu[ally] in accordance with the laws of the child’s nation.” BLACK’S LAW DICTIONARY 53 (8th ed. 2004).

⁶ See *infra* Part II.

⁷ See *infra* Part VI.

⁸ See sources cited *infra* notes 272–74.

⁹ See, e.g., Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (ratified Sept. 2, 1990), available at http://www.un.org/documents/ga/res/44/a_44r025.htm (“[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment . . .”); see also *W.N. v. Dep’t of Children & Family Servs.*, 919 So. 2d (continued)

sexual orientation—a trait that has no bearing on ability to parent or provide a loving, stable home—cannot possibly be in the “best interests of the child.”¹⁰ This article focuses on the current ability of members of the LGBT community in the United States to form families through the process of intercountry adoption. Part II provides a brief history of intercountry adoption, followed by an overview of the intercountry adoption process in Part III. Part IV of the article identifies four groups of potential adoptive parents within the LGBT community as a framework by which to assess the current system of laws and regulations that determine adoptive parent eligibility. Part V identifies the obstacles faced by each group, on both an international and state level, by systematically reviewing the laws of the various jurisdictions involved in intercountry adoption by U.S. citizens. After analyzing why barriers to adoption by LGBT individuals and couples do not serve the best interests of the child, Part VI outlines several possible long-term solutions for eliminating these barriers altogether.

II. HISTORY OF INTERCOUNTRY ADOPTION

The roots of intercountry adoption are firmly planted in altruism. Foreign wars, political and social unrest, and extreme poverty were the ingredients that led to the role of the United States in intercountry adoption. Intercountry adoption first came into being after World War II

589, 592 (Fla. Dist. Ct. App. 2006) (quoting *Williams v. Dep’t of Health and Rehab. Servs.*, 648 So. 2d 841, 843 (Fla. Ct. App. 1995)) (“Without a doubt, ‘it is far better for th[is] child [] to be placed for adoption with a loving and stable family that [sic] it is to have [him] remain in foster care any longer’”); *In re Victor A.*, 852 A.2d 976, 985–86 (Md. Ct. Spec. App. 2004) (“For children in foster care, both the local social services department and the court must consider whether the individual child’s health and safety is being compromised by the long term effects of foster care. Federal and state governments have recognized that long periods of foster care may harm the very children whom the foster care system is designed to protect. . . . The overriding theme of both the federal and state legislation is that a child should have permanency in his or her life. The valid premise is that it is in a child’s best interest to be placed in a permanent home and to spend as little time as possible in foster care.” (citing *In re Adoption/Guardianship No. 10941*, 642 A.2d 201, 205 (Md. 1994))).

¹⁰ See *infra* Part VI. The best interests of the child standard is the paramount concern in cases of child custody and placement, including adoption proceedings. See, e.g., *Determining the Best Interests of the Child: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY STATE STATUTES (Dep’t of Health & Human Servs., Washington, D.C.), Mar. 2010, at 2, available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

when thousands of European and Asian children were left orphaned or abandoned.¹¹ The media coverage of the war brought attention to the plight of these children and spurred altruistic Americans and Western Europeans to “save a child” by adopting children into their homes.¹² Similar waves of orphaned children were created in the 1960s as a result of the Korean War¹³ and later, the Vietnam War.¹⁴ This desire to help, coupled with a diminishing supply of adoptable children in the United States,¹⁵ led to the introduction of intercountry adoption to this country.¹⁶

However, what began as acts of humanitarianism evolved into a viable and accepted method of creating families. U.S. families adopted an estimated 12,753 children through international adoption in 2009.¹⁷ Some

¹¹ BLACK’S LAW DICTIONARY, *supra* note 5, at 53 (“International adoptions first became popular after World War II and escalated after the Korean Conflict because of the efforts of humanitarian programs working to find homes for children left orphaned by the wars. More recently, prospective parents have turned to international adoption as the number of healthy babies domestically available for adoption has steadily declined.”).

¹² Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT’L L. REV., 283, 286 (1995).

¹³ See, e.g., *id.* (citing MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 120 (1976)) (“Although there were an extraordinary number of homeless and available children in the aftermath of World War II, it was not until the Korean War that awareness of intercountry adoption truly became global. This phenomenon occurred both because of the abundance of babies in Korea, and because of the growing shortage of babies eligible for adoption in Western Countries. The economic and social environment that persisted in Korea after the war made many orphans available for adoption.”).

¹⁴ See, e.g., Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 430–31 (2009) (discussing the various theories regarding the origin of intercountry adoption). Many scholars are of the opinion that “ICA start[ed] as a humanitarian effort to rescue orphaned or abandoned children in the aftermath of World War II, followed by the end of the Korean War and of the Vietnam War. These three post-war periods are usually described simply and unequivocally as humanitarian actions involving adults from the United States and other Western nations reaching out to children from the developing world who were in need of parents.” *Id.*

¹⁵ See Katz, *supra* note 12, at 287 (stating that in the years following World War II contraceptive use began to rise, as did acceptance of single parent homes).

¹⁶ *Id.* at 286 (discussing the development of global awareness of intercountry adoption).

¹⁷ See U.S. Dep’t of State Office of Children’s Issues, *Total Adoptions to the United States*, INTERCOUNTRY ADOPTION, http://www.adoption.state.gov/news/total_chart.html (last visited Jan. 24, 2011) [hereinafter *Total Adoptions to the United States*].

of these children were adopted into traditional families—those consisting of a mother, a father, and possibly even a sibling or two.¹⁸ Others were welcomed into non-traditional families—single parent homes, or gay or lesbian individuals or couples.¹⁹

III. OVERVIEW OF INTERCOUNTRY ADOPTION PROCESS

The intercountry adoption process for U.S. prospective parents varies depending on the state, adoption agency, and foreign country involved. In every case, prospective adoptive parents must meet the basic requirements of U.S. immigration law, and all children adopted through intercountry adoption must obtain a visa from the U.S. Citizenship and Immigration Services and the U.S. Department of State.²⁰ While the process differs slightly depending on the sending country involved, there are certain similarities for all U.S. parents going through the adoption process. Generally, the first step involves choosing an adoption service provider.²¹ Next, the prospective adoptive parent(s) must apply to be found eligible to

¹⁸ See THE WILLIAMS INSTITUTE, ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 7 (Mar. 2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf>.

¹⁹ See *id.* at 7–8. Exact figures for the number of children adopted internationally by LGBT individuals or couples are not available. However, there are an estimated 65,000 adopted children being raised by LGBT parents in the United States. *Id.*

²⁰ Deborah E. Spivack, *Intercountry Adoption Update*, in ADOPTION LAW INSTITUTE 2008, at 379, 381, 402 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. C-215, 2008).

²¹ Compare U.S. Dep't of State Office of Children's Issues, *Hague Adoption Process*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/about/how/hague.html> (last visited Jan. 24, 2011) [hereinafter *Hague Adoption Process*], with U.S. Dep't of State Office of Children's Issues, *Non-Hague Adoption Process*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/about/how/nonhague.html> (last visited Jan. 24, 2011) [hereinafter *Non-Hague Adoption Process*]. If dealing with a Hague Convention country, an accredited adoption service provider must be chosen. 42 U.S.C. § 14921(a) (2006). Use of an accredited agency is not necessary if adoption will be from a non-Hague Convention country. 8 C.F.R. § 204.3 (2010). In non-Hague Convention adoptions, the only requirement is that the adoption service provider be licensed. See U.S. Dep't of State Office of Children's Issues, *Chart Comparing Hague Convention and Non-Hague Convention Adoption Process*, http://www.adoption.state.gov/pdf/Side_by_side_comparison.pdf (last visited Jan. 24, 2011).

adopt by their country of residence.²² In addition to meeting U.S. law requirements, prospective parents must also meet the adoptive parent requirements of their home state.²³ Once determined to be eligible to adopt, the prospective adoptive parent(s) dossier is sent to the sending country to be matched with a child.²⁴ After that, the order of the remaining steps varies depending on whether one is adopting from a Hague Convention country or a non-Hague Convention country. For adoptions from Hague Convention countries, the prospective adoptive parent(s) is matched with a child, an application is filed for the child to be found eligible to immigrate to the United States, the child is adopted, and finally an Immigrant Visa is issued for the child.²⁵ For adoptions from non-Hague countries, the steps are generally the same, except the application for the child to be found eligible to immigrate to the United States is filed *after* the foreign adoption proceedings.²⁶ Whether adopting from a Hague Adoption Convention country or a non-Hague Adoption Convention country, there are numerous barriers and obstacles for members of the LGBT community who wish to adopt internationally.²⁷

IV. CATEGORIES OF POTENTIAL LGBT ADOPTIVE PARENTS

In the scheme of discussing intercountry adoption as a means of creating families for members of the LGBT community, there are four basic groups or categories into which prospective adopters fall: Individual,

²² See U.S. Dep't of State Office of Children's Issues, *Who Can Adopt?*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/about/who.html> (last visited Jan. 24, 2011) [hereinafter *Who Can Adopt?*].

²³ *Id.*

²⁴ See, e.g., *Hague Adoption Process*, *supra* note 21 ("If USCIS finds you eligible to adopt, your ASP will send your I-800A approval notice form, along with your home study, to the foreign country's central adoption authority. This notifies the other Convention country that you have been found eligible to adopt by the U.S. government, and that you would like to be matched with a child.").

²⁵ See *id.*

²⁶ See *Non-Hague Adoption Process*, *supra* note 21. One other major difference between the Hague and non-Hague Adoption process is the type of visa that is issued for the adopted child. In Hague adoptions, either an IH-3 or an IH-4 visa is issued. See U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL, 9 FAM 42.21, at N14.13-9c(1)-(2) (2009) (explaining that IH-3 classification is appropriate for a Convention adoptee who was subject to a full, final, and legal adoption abroad; and that IH-4 is appropriate for a Convention adoptee who will be adopted after being admitted to the United States). In non-Hague adoptions, IR-3 or IR-4 visas are issued. See *id.* at N13.2-9.

²⁷ See *infra* Part V.

Coupled Partner, Couple, and Married Spouses. The “Individual” category refers to an LGBT individual who is adopting as an individual. In this category, the prospective adoptive parent is not in a committed relationship and has no present intention of having a second individual adopt or otherwise parent the child. The “Coupled Partner” category is comprised of LGBT individuals who are in a committed relationship but who adopt as individuals. The prospective adoptive parent adopts with the intention of having a partner parent the child but may or may not intend to have the partner adopt the child at some later date. If the adoptive parent does want to share legal custody with a partner, this may be possible through either second-parent adoption²⁸ or domestic partner adoption,²⁹ depending on state laws.³⁰

The “Couple” category includes same sex couples that are not legally married but that desire to adopt as a couple. Note that this category differs from the previous category in that those who fall into the “Couple” category seek to adopt together *in the foreign country*, while those in the “Coupled Partner” category seek to adopt as individuals in the foreign country and then may file for a second-parent adoption *in the United States*.

²⁸ Elizabeth Zuckerman, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986) (defining second-parent adoption as the adoption of children by the same-sex non-marital partner of the legal or biological parent, without terminating the parental rights of the legal or biological parent).

²⁹ See GERALD N. HILL & KATHLEEN THOMPSON HILL, NOLO’S PLAIN-ENGLISH LAW DICTIONARY 139 (Shae Irving ed., 2009) (defining domestic partner adoption as “[a]n adoption by one registered domestic partner, usually of a child born to the other partner, in one of the states that allows domestic partner registration”); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 978 n.66.i (N.D. Cal. 2010) (discussing the legal rights afforded children of domestic partners and stating that “[the National Center for Lesbian Rights] is strongly recommending that all couples obtain a court judgment declaring both partners to be their child’s legal parents” either through an adoption or parentage judgment).

³⁰ See *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/2385.htm> (last visited Jan. 24, 2011); see also Katharine Swan, *Second Parent Adoptions (and Other Alternatives for Gay Families)*, THE RAINBOW BABIES, <http://www.therainbowbabies.com/SecondParentAdoptions.html> (last visited Jan. 24, 2011). California, Connecticut, the District of Columbia, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont permit second-parent adoption statewide. *Id.* Second parent adoptions are permitted within certain counties in eighteen additional states. *Id.* Colorado, Nebraska, Ohio, and Wisconsin prohibit second-parent adoption. *Id.*

Finally, now that several states recognize same-sex marriage,³¹ the “Married Spouses” category represents same-sex married couples who seek to adopt in the foreign country as a married couple. Although there are commonalities in the barriers to adoption for each of these groups, there are also differences.³² Some groups face additional barriers, and at least one group faces a nearly insurmountable hurdle simply by virtue of their marital status.³³

V. OBSTACLES TO LGBT INTERNATIONAL ADOPTION

One of the most difficult things about international adoption is that there are so many different laws with which a potential adoptive parent must comply. In order for a U.S. citizen to adopt a child from a foreign country, the adoption must be in compliance with the laws of three different jurisdictions: (1) U.S. federal law; (2) the laws of the sending country;³⁴ and (3) the laws of the state of residence of the prospective adoptive parent(s).³⁵ U.S. federal law defines who is eligible to adopt³⁶ and who can be adopted.³⁷ Similarly, the laws of the sending country also regulate who is eligible to adopt³⁸ and who can be adopted.³⁹ Finally, the laws of the state of residence of the potential adoptive parent(s) play a role in determining who is eligible to adopt.⁴⁰ As illustrated above, there is

³¹ *Same-Sex Marriage, Civil Unions, and Domestic Partnership*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last visited Jan. 24, 2011). Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia currently issue marriage licenses to same-sex couples. *Id.* California recognizes same-sex marriages that were performed between May 15, 2008 and November 4, 2008. *See Strauss v. Horton*, 207 P.3d 48, 119 (Cal. 2009).

³² *See infra* Part V.

³³ *See infra* Part V.E.

³⁴ As used in this article, the term “sending country” refers to the country of the child’s citizenship. The term “receiving country” refers to the country of the adopter’s citizenship and residence.

³⁵ U.S. Dep’t of State Office of Children’s Issues, *How to Adopt*, INTERCOUNTRY ADOPTION, <http://adoption.state.gov/about/how.html> (last visited Jan. 24, 2011).

³⁶ *See* 8 C.F.R. § 204.3(a)(1), 204.310 (2010); *see also Who Can Adopt?*, *supra* note 22.

³⁷ *See* 8 U.S.C. § 1101(b)(1) (Supp. II 2006); *see also* U.S. Dep’t of State Office of Children’s Issues, *Who Can Be Adopted?*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/about/how/childeligibility.html> (last visited Jan. 24, 2011) [hereinafter *Who Can Be Adopted?*].

³⁸ *Who Can Adopt?*, *supra* note 22.

³⁹ *Who Can Be Adopted?*, *supra* note 37.

⁴⁰ *Who Can Adopt?*, *supra* note 22.

significant overlap between the jurisdictions. This overlap often leads to confusion and uncertainty regarding the eligibility of adoptive parents and adoptees.⁴¹

A. U.S. Federal Law

U.S. federal law does not prohibit LGBT individuals or couples from adopting.⁴² However, as with any other potential adoptive parent(s), LGBT individuals and couples must comply with all federal laws, as well as state and sending country laws.⁴³ Federal law comes into play in two different ways during the process of international adoption. U.S. immigration law applies to all international adoptions.⁴⁴ The International Adoption Act of 2000⁴⁵ applies only to adoptions between countries that are parties to the Hague Convention.⁴⁶

1. U.S. Immigration Law

Under U.S. immigration law, both the potential adoptive parents and the adoptive child must meet certain requirements. To adopt internationally, the potential parents must: (1) be citizens of the United States; (2) be at least twenty-five years of age, if unmarried; (3) adopt jointly if married; and (4) meet other eligibility requirements including passing a criminal background check, being fingerprinted, and having a favorable home study completed.⁴⁷

⁴¹ See, e.g., Jordana P. Simov, *The Effect of Intercountry Adoptions on Biological Parents' Rights*, 22 LOY. L.A. INT'L & COMP. L. REV. 251, 275–76 (1999) (describing the confusing overlap of adoption laws “when too many laws and too many jurisdictions are involved”).

⁴² U.S. Dep't of State Office of Children's Issues, *GLBT Adoption*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/about/who/glb.html> (last visited Jan. 24, 2011).

⁴³ *Id.*

⁴⁴ See *Who Can Adopt?*, *supra* note 22.

⁴⁵ 42 U.S.C. §§ 14901–14944 (2006). The Intercountry Adoption Act of 2000 is the federal statute promulgated and enacted to implement the mechanisms and ideals embodied in the Hague Convention on the Protection of Children and Co-Operation in Respect of Inter-Country Adoption. See *id.* § 14901(a)–(b).

⁴⁶ See *id.* § 14901(a). The Hague Convention applies to the United States and all other countries that signed it. U.S. Dep't of State Office of Children's Issues, *Convention Countries*, INTERCOUNTRY ADOPTIONS, <http://www.adoption.state.gov/hague/overview/countries.html> (last visited Jan. 24, 2011). Currently, the Hague Convention has been signed by approximately seventy-eight countries. *Id.*

⁴⁷ *Who Can Adopt?*, *supra* note 22.

To be found eligible to immigrate to and reside in the United States, the potential adoptive child must meet the requirements of the United States Immigration and Nationality Act (INA).⁴⁸ The requirements for this are different depending on whether the child's country of origin—the sending country—is a party to the Hague Convention.⁴⁹

2. *Intercountry Adoption Act of 2000*

If the child's country of origin is a Hague Adoption Convention country, the Intercountry Adoption Act of 2000 (IAA) also governs.⁵⁰ The IAA provides for the implementation of the Hague Convention in the United States.⁵¹ Among its many provisions, the IAA provides for preemption of any state law that is inconsistent with the provisions of either the IAA or the Hague Convention.⁵² Seemingly, this provision could be used to preempt discriminatory state laws that categorically ban LGBT individuals and couples from adopting. However, because neither the Hague Convention⁵³ nor the IAA specifically address the issue of LGBT

⁴⁸ *Who Can Be Adopted?*, *supra* note 37.

⁴⁹ *Id.* It is outside the scope of this article to discuss the differences between the INA requirements for children emigrating from Hague Convention versus non-Hague Convention countries. Additional information on this topic can be found on the website of U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis> (last visited Jan. 24, 2011). For purposes of this article, it is sufficient to state that there are differences that exist in many aspects of the adoption procedure from a Hague Convention country and a non-Hague Convention country. When important to the focus of the article, the differences will be pointed out and discussed. When the differences are not germane to the article's topic and thesis, the differences will not be addressed.

⁵⁰ See U.S. Dep't of State Office of Children's Issues, *Laws, INTERCOUNTRY ADOPTIONS*, <http://www.adoption.state.gov/hague/laws.html> (last visited Jan. 24, 2011).

⁵¹ See Intercountry Adoption Act of 2000, Pub. L. No. 106-279, § 2(b)(1), 114 Stat. 825, 826 (codified at 42 U.S.C. § 14901) ("The purposes of this Act are to provide for implementation by the United States of the [Hague] Convention . . .").

⁵² 42 U.S.C. § 14953 (2008) ("The Convention and this chapter shall not be construed to preempt any provision of the law of any State or political subdivision thereof, or prevent a State or political subdivision thereof from enacting any provision of law with respect to the subject matter of the Convention or this chapter, except to the extent that such provision of State law is inconsistent with the Convention or this Act, and then only to the extent of the inconsistency.").

⁵³ See Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 IND. INT'L & COMP. L. REV. 113, 114 (2008). Many people, especially LGBT groups and advocates, hoped that the Hague Convention would provide some clarity

(continued)

adoption,⁵⁴ the preemption clause cannot be invoked for this purpose. As such, the IAA neither endorses nor prohibits LGBT adoption.

B. The Laws of the Sending Country

The second jurisdiction whose laws must be complied with in order to effectuate a proper intercountry adoption are those of the sending country.⁵⁵ Under the Hague Convention, the Central Authority of the receiving country determines parental eligibility,⁵⁶ but the sending country has the power to veto any adoptive parent.⁵⁷ In practice, this means that the eligibility of potential adoptive parents must be assessed using the standards of both the receiving and sending countries. For countries that are not signatories to the Hague Convention, prospective adoptive parents must also meet the legal requirements of the sending country. Complicating the process even further is the fact that each sending country has its own laws regarding who is eligible to adopt.⁵⁸

For members of the LGBT community to adopt internationally, some degree of forum shopping must occur. Many countries have outright bans on homosexual adoption.⁵⁹ Other countries have regulations that appear neutral on their face but in practice exclude LGBT adoption by banning

on the issue of LGBT adoption. *See id.* However, its silence on the topic failed to clarify anything. *See id.* It is important to note the Hague Convention was promulgated and drafted between 1988–1993. *Id.* During that time, adoption by members of the LGBT community was generally prohibited worldwide. *Id.* Even countries that permitted same-sex partnerships and marriages did not allow same-sex adoption. *See id.*

⁵⁴ *Id.* at 137–38.

⁵⁵ U.S. Dep't of State Office of Children's Issues, *Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/countryinformation.html> (last visited Jan. 24, 2011) [hereinafter *Country Information*]. For the purposes of this article, the silence of the Hague Convention on the topic of LGBT adoption means that there is no difference between the treatment of the subject by Hague Convention and non-Convention countries. Each individual country is free to promulgate and implement its own rules regarding allowance or prohibition of LGBT adoption.

⁵⁶ *See* The Hague Convention, *supra* note 1, at art. 15.

⁵⁷ *Id.* at art. 16.

⁵⁸ *See Who Can Adopt?*, *supra* note 22. For country specific information, see *Country Information*, *supra* note 55 (the specific information for each country may be found by using the drop down menu and selecting the country of interest).

⁵⁹ *Id.* Cameroon, China, Columbia, Denmark, Egypt, Eritrea, Ghana, India, Italy, Kenya, Kyrgyzstan, Lesotho, Madagascar, Marshall Islands, Panama, Paraguay, and Togo all prohibit homosexuals from adopting. *Id.*

single individuals from adopting.⁶⁰ Thus, the only countries from which LGBT individuals or couples may adopt are those countries that either expressly allow homosexual adoption,⁶¹ those that do not specify,⁶² or those that allow singles to adopt.⁶³ It is important to note a few things about those countries that permit singles to adopt. First, some of those countries also forbid homosexual adoption.⁶⁴ Second, of the countries that permit singles to adopt, some scholars have asserted that the failure to disclose one's sexual orientation amounts to fraud, which could invalidate

⁶⁰ *Id.* Burundi, Chile, China, Dominican Republic, Egypt, Equatorial Guinea, Ethiopia, Hungary, Indonesia, Italy, Jordan, Madagascar, Malaysia, Nepal, Panama, Papua New Guinea, Sri-Lanka, Syria, and Ukraine require international adoption by married couples only (and, if specified, define marriage as between one man and one woman). *See id.*

⁶¹ *Id.* Germany, Iceland, the Netherlands, South Africa, Spain, Sweden, and the United Kingdom expressly permit same-sex or homosexual adoption. *Id.*

⁶² *Id.* Japan, for example, does not have laws prohibiting same-sex adoption, but there are no known cases of it occurring. *Id.*

⁶³ *Id.* Algeria, Angola, Armenia, Australia, Austria, Bahamas, Barbados, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Canada, Costa Rica, Cyprus, Democratic Republic of Congo, Dominica, Ecuador, El Salvador, Estonia, Fiji, France, Germany, Greece, Granada, Guinea, Guyana, Haiti, Honduras, Hong Kong, Iceland, India, Ireland, Israel/West Bank/Gaza (singles may only adopt special needs children), Jamaica, Japan, Kazakhstan, Laos, Latvia, Lebanon, Liberia, Lithuania, Malawi (single men cannot adopt female children absent special circumstances), Mali (single men may not adopt; single women may adopt if other requirements met), Malta (singles must be at least twenty-eight years of age), Mauriania, Mauritius, Mexico, Micronesia, Moldova (singles cannot adopt jointly), Monaco, Mongolia, Morocco (single women only), Nauru, Nepal (single women only), Netherlands (singles cannot adopt jointly), New Zealand (singles cannot adopt jointly), Nicaragua, Nigeria (the single individual cannot be the same sex as the child to be adopted), Norway (singles cannot adopt jointly), Pakistan, Palau, Paraguay (single men cannot adopt; if joint adoption, only male-female couple), Peru, Philippines, Poland, Russia, Rwanda, Samoa, Seychelles, South Africa, Spain, Suriname, Sweden, Switzerland, Tanzania (no single men may adopt absent special circumstances), Thailand, Tonga, Trinidad and Tobago (single women only), Turkey, Tuvalu (singles permitted to adopt only in special circumstances; single men can never adopt female children), Uganda (singles may not adopt a child of the opposite sex absent special circumstances), United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Zambia (single men may not adopt absent special circumstances), and Zimbabwe (single men can only adopt family members; inter-racial adoptions must be approved by the Minister) all allow singles to adopt. *See id.*

⁶⁴ *Id.* Columbia, Denmark, Eritrea, Kyrgyzstan, Lesotho, Marshall Islands, and Togo permit singles to adopt but expressly forbid homosexuals from adopting. *Id.*

the adoption.⁶⁵ Finally, there is an underlying assumption that countries that permit singles to adopt and do not specify eligibility criteria based on sexual orientation must, by omission, intend that sexual orientation will not be a dispositive factor in deciding whether a prospective adoptive parent is eligible to adopt.

Because of the vast number of countries with which international adoption could take place, it is necessary to focus on certain sub-sections or groups of countries to facilitate a more in-depth analysis. The first group examined includes those countries that are consistently ranked in the top five sending countries year after year. The second group includes those countries that currently permit same-sex marriage. The selection of these two groups was based on the hypothesis that few, if any, of the top five sending countries would permit LGBT adoption, and many, if not all, of the countries that permit same-sex marriage would similarly permit LGBT adoption.

1. *Top Five Sending Countries*

In 2009,⁶⁶ the top five sending countries⁶⁷ were China, Ethiopia, Russia, South Korea, and Ukraine.⁶⁸ In order to determine the viability of options for LGBT individuals and couples to adopt from these countries, each country is analyzed separately.

a. *China*

Over the past five years, 26,760 Chinese children have found permanent homes through adoption into U.S. families.⁶⁹ Since 2005, however, the number of adoptions into the United States from China has steadily decreased from 7,903 in 2005 to less than half that number (3,001)

⁶⁵ See, e.g., Wardle, *supra* note 53, at 132 (stating that “disreputable international adoption practices by some gays and lesbians and their supporters in some adoption agencies and service providers have contributed to the controversy surrounding international adoptions by gays and lesbians”).

⁶⁶ Statistics are gathered by the U.S. Department of State based on the U.S. Government fiscal year. The 2009 fiscal year ran from October 1, 2008 until September 30, 2009. *Total Adoptions to the United States*, *supra* note 17.

⁶⁷ Although Vietnam and Guatemala are also often amongst the top five sending countries, the United States is not currently processing new adoption from these countries so they were not analyzed further. See *Convention Countries*, *supra* note 46.

⁶⁸ See *id.*

⁶⁹ *Total Adoptions to the United States*, *supra* note 17.

in 2009.⁷⁰ The sharpest decrease occurred between 2007 and 2008,⁷¹ likely due in part to the new, more stringent adoption policies China enacted in May 2007.⁷² The new regulations impose tight restrictions on a potential adoptive parent's age, income, health, and marital status.⁷³ Germane to this article, China's new regulations only permit adoptions by married couples, specifically defined as one man and one woman.⁷⁴ Prior to the ban on singles, China expressly prohibited adoption by homosexuals and required any unmarried potential adoptive parent to sign a sworn statement that the parent was not a homosexual.⁷⁵ While some have theorized that the decrease in adoptions from China was largely due to the inability of LGBT individuals to circumvent the system after the marriage requirement was put in place, it seems more likely that many factors have contributed to the decline.⁷⁶ These factors include the prohibition on any adoptions by single persons, regardless of sexual orientation;⁷⁷ the stringent mental and physical health restrictions for potential adoptive parents;⁷⁸ and a decrease in children available for intercountry adoption.⁷⁹ Whatever the reason for the decreased adoption rate, the one thing that is clear is that adoption from China—the single largest sending country for four of the past five years⁸⁰—is not a viable option for any category of prospective LGBT adoptive parents.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See U.S. Dep't of State Office of Children's Issues, *China Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/china.html> (last visited Jan. 24, 2011) [hereinafter *China Country Information*].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Franco Ordoñez, *For Gays, Adoption Irony*, BOSTON GLOBE, May 8, 2004, at B1, available at http://www.boston.com/news/local/articles/2004/05/08/for_gays_adoption_irony/.

⁷⁶ See, e.g., Martha Osborne, *The Future of International Adoption*, RAINBOW KIDS (Jan. 1, 2008), <http://www.rainbowkids.com/ArticleDetails.aspx?id=549>.

⁷⁷ *China Country Information*, *supra* note 72.

⁷⁸ *Id.* China's laws state that "both partners must be physically and mentally fit" and list a myriad of conditions that would make one not meet this criteria. *Id.* These conditions include blindness in either eye, hearing loss in both ears, loss of language function, non-function or dysfunction of limbs or trunk, depression, or a body mass index of forty or more. *Id.*

⁷⁹ See *Total Adoptions to the United States*, *supra* note 17 (showing a drop in adoptions from every one of the top sending countries over the past five years).

⁸⁰ *Id.*

b. Ethiopia

Ethiopia has sent 6,428 children to U.S. families through adoption in the past five years.⁸¹ Unlike China, the number of adoptions from Ethiopia has steadily increased from 442 in 2005 to 2,277 in 2009.⁸² Similar to China, however, Ethiopian law expressly forbids adoption by gay or lesbian parents,⁸³ and therefore, is not a viable country of origin for formation of families by any of the categories of adoptive parents from the LGBT community.

c. Russia

Second only to China, 14,079 Russian children have been adopted by U.S. families over the past five years.⁸⁴ Like China, the number has decreased over the five-year span,⁸⁵ but both countries continue to be significant sending countries despite the drop in numbers.⁸⁶ Russian laws do not have any express provisions regarding the ability of LGBT individuals or couples⁸⁷ to adopt.⁸⁸ In addition, Russia allows both married couples and singles to adopt,⁸⁹ thereby opening the door for, at the very least, LGBT persons to adopt as individuals from Russia. No definition of marriage is provided by the Russian government in relation to the marital status of prospective adoptive parents.⁹⁰ However, Russian law does not recognize same-sex marriages,⁹¹ so it is unlikely that same-sex married couples would be permitted to adopt from Russia. The status of unmarried same-sex couples is similarly unclear because the Russian government has

⁸¹ *Id.*

⁸² *Id.*

⁸³ U.S. Dep't of State Office of Children's Issues, *Ethiopia Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/ethiopia.html> (last visited Jan. 24, 2011).

⁸⁴ *Total Adoptions to the United States*, *supra* note 17.

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ No data could be found regarding the ability of same-sex couples to adopt from Russia as a couple, whether married or not.

⁸⁸ U.S. Dep't of State Office of Children's Issues, *Russia Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/russia.html> (last visited Jan. 24, 2011) [hereinafter *Russia Country Information*].

⁸⁹ *Id.*

⁹⁰ *See* Semeinyi Kodeks [SK] [Family Code] (Russ.) (providing no definition of marriage with respect to the marital status of prospective adoptive parents).

⁹¹ *See id.* at art. 12 (limiting the ability to enter into a marriage to a man and a woman).

not expressly stated whether joint petitions from individuals are permitted for either heterosexual or LGBT prospective adoptive parents.⁹²

While outside the immediate scope of this article, it is important to note that due to several unconscionable acts of violence, abuse, and neglect by American adoptive parents,⁹³ the future of Russian adoptions is unclear. The latest incident, where a seven-year-old boy was “returned” to Russia by his adoptive mother who purchased a one-way plane ticket for the boy,⁹⁴ sparked yet another round of discussions between the United States and Russian governments with regard to the future of intercountry adoption between the two nations.⁹⁵ As of now, there is no change in the status of adoptions from Russia.⁹⁶ However, the future of Russian adoptions is, at best, tenuous. At the present time though, Russia remains a viable option for some categories of LGBT adoptive parents—namely the “Individual” and the “Coupled Partner.” However, adoption for a “Couple” or “Married Spouses” is likely not possible.

d. South Korea

South Korea, once the most significant sending country in terms of the number of adoptions to the United States,⁹⁷ has dramatically decreased the

⁹² *Russia Country Information*, *supra* note 88.

⁹³ See, e.g., *The Russian Adopted Dead: A Review of Killers and Sentences*, SMTVIP.NET, <http://news.smtvip.net/article/auxiliary/2009-01-18/13842.html> (last visited Jan. 24, 2011). “From 1996 to March [2010], at least 15 Russian children appear to have died at the hands of their adoptive foreign parents, including 14 in the United States and one in Canada” Natalya Krainova, *Adopted Boy’s Death in U.S. Stirs Russian Anger*, THE MOSCOW TIMES (March 4, 2010), <http://www.themoscowtimes.com/news/article/adopted-boys-death-in-us-stirs-russian-anger/400923.html>.

⁹⁴ See, e.g., *Adopted Boy Returned to Russia Alone*, WASH. TIMES (Apr. 9, 2010, 11:13 AM), <http://news.smtvip.net/article/auxiliary/2009-01-18/13842.html>; see also *Boy Sent Back to Russia; Adoption Ban Urged*, MSNBC.COM (Apr. 9, 2010, 6:14 PM), <http://www.msnbc.msn.com/id/36322282/>.

⁹⁵ See, e.g., U.S. Dep’t of State Office of Children’s Issues, *Russia Adoption Notice*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/news/russia.html> (last visited Jan. 24, 2011) [hereinafter *Russia Adoption Notice*]; see also Denise Winterman, *When Adoption Breaks Down*, BBC NEWS (May 18, 2010), http://news.bbc.co.uk/2/hi/uk_news/magazine/8665576.stm.

⁹⁶ *Russia Adoption Notice*, *supra* note 95.

⁹⁷ See *International Adoption Facts*, THE EVAN B. DONALDSON ADOPTION INST., <http://www.adoptioninstitute.org/FactOverview/international.html> (last visited Jan. 24, 2011).

number of adoptions to U.S. families over the decades.⁹⁸ Despite the rapid decline in the number of adoptions, South Korea remains one of the top sending countries with 4,960 adoptions over the past five years.⁹⁹ South Korea has no express provision regarding LGBT adoptions; however, the ban is inferred through other requirements.¹⁰⁰ Specifically, South Korea only permits married couples to adopt and does not recognize same-sex marriages.¹⁰¹ Thus, South Korea is not a viable option for adoption by any of the categories of prospective LGBT adoptive parents.

e. Ukraine

Ukraine has fallen in and out of the top five sending countries over the years.¹⁰² From 2005 to 2009, 3,000 children have been adopted by U.S.

⁹⁸ See Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE: A HISTORICAL HANDBOOK AND GUIDE 66 (Lori Askeland ed., 2005) (discussing limits imposed by South Korea on the number of children released for intercountry adoptions), available at <http://www.law.harvard.edu/faculty/bartholet/pdfs/IChapter5FINAL.pdf>; see also Laura Matney Shapiro, Note, *Inferring a Right to Permanent Family Care from the United Nations Convention on the Rights of the Child, The Hague Convention on Intercountry Adoption, and Selected Scientific Literature*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 191, 222 (2008).

⁹⁹ *Total Adoptions to the United States*, *supra* note 17.

¹⁰⁰ U.S. Dep't of State Office of Children's Issues, *South Korea Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/south%20korea.html> (last visited Jan. 24, 2011).

¹⁰¹ *Id.*

¹⁰² U.S. Dep't of State Office of Children's Issues, *Ukraine Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/ukraine.html> (last visited Jan. 24, 2011) [hereinafter *Ukraine Country Information*]. Even though not currently in the top five, Ukraine is included in this section of the article because the United States is no longer allowing adoptions between our country and Cambodia or Guatemala, the other top sending countries. See U.S. Dep't of State Office of Children's Issues, *Guatemala Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/guatemala.html> (last visited Jan. 24, 2011) (stating that Guatemala's adoption system is not in compliance with the Hague Convention and, as such, no new adoptions are permitted from that country); see also U.S. Dep't of State Office of Children's Issues, *Cambodia Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/cambodia.html> (last visited Jan. 24, 2011) (stating that due to concerns regarding fraud and irregularities in adoptions from Cambodia, adoptions with that country were halted as of December 21, 2001). However, an Adoption Notice was released by the U.S. Department of State on July 24, 2009 that stated Cambodia had passed new legislation on intercountry adoption and noted that this was the first step in bringing its adoption system into
(continued)

families from Ukraine.¹⁰³ While Ukraine does not have an express prohibition forbidding LGBT adoption, it only permits married couples to adopt and does not recognize same-sex marriage.¹⁰⁴ LGBT adoption from Ukraine is, therefore, not an option for any category of prospective adoptive parents.

2. *Countries that Recognize Same-Sex Marriage*

Currently, seven countries—Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden—recognize same-sex marriage as equal to opposite-sex marriage.¹⁰⁵ Not surprisingly, each of these countries¹⁰⁶ also expressly or impliedly permit LGBT adoption in some form.¹⁰⁷ Overall, however, these countries are not viable options for LGBT adoption because careful review of the statistics reveals that they have sent less than 100 children to the United States through intercountry adoption over the past five years.¹⁰⁸ The laws of each country are examined in detail below.

a. *Belgium*

Under Belgium law, joint petitions for adoption are possible if the adoptive parents are married, legally registered as a cohabitating couple, or

compliance with the Hague Convention. U.S. Dep't of State Office of Children's Issues, *Cambodia Adoption Notice*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/news/cambodia.html> (last visited Jan. 24, 2011). Regardless, no estimate or date was given as to when adoptions would resume between the two countries. *Id.* Because both Guatemala and Cambodia are parties to the Hague Convention and must change their current procedures and regulations to be found in compliance with the Convention, it is impossible to know whether their new system will be tolerant of LGBT adoption or not.

¹⁰³ *Total Adoptions to the United States*, *supra* note 17.

¹⁰⁴ *Ukraine Country Information*, *supra* note 102.

¹⁰⁵ Ramon Johnson, *States and Countries that Allow Gay Marriage: Same-Sex Marriage by Region*, ABOUT.COM: GAY LIFE (Nov. 4, 2009), <http://gaylife.about.com/od/samesexmarriage/a/legalgaymarriag.htm>. For purposes of this paper, countries that only permit gay marriage in certain cities, counties, provinces, or states were not considered.

¹⁰⁶ The only exception to this is Canada because, with limited exceptions, it does not allow intercountry adoption. U.S. Dep't of State Office of Children's Issues, *Canada Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/canada.html> (last visited Jan. 24, 2011). For this reason, Canada's adoption policy with regard to LGBT community members will not be explored further in this article.

¹⁰⁷ *See generally Country Information*, *supra* note 55 (the specific information for each country may be found by using the drop down menu and selecting the country of interest).

¹⁰⁸ *Id.*

have continually lived together with an emotional commitment for at least three years.¹⁰⁹ While not expressly permissive, the language of the law seems to indicate that LGBT adoption is possible, both individually and jointly.¹¹⁰ While promising on its face, the prospect of adopting from Belgium is slim, as no adoptions from that country have occurred since 2005 when one child immigrated to the United States via intercountry adoption.¹¹¹ In fact, according to the U.S. Department of State, “Belgium is not considered a country of origin in intercountry adoption.”¹¹² Therefore, although theoretically permissive, in practice it is nearly impossible for anyone, including LGBT individuals or couples, to adopt from Belgium.

b. The Netherlands

Individuals, cohabitating persons, and married couples may adopt in the Netherlands.¹¹³ Only married couples may file joint petitions for adoption;¹¹⁴ cohabitating persons and persons in registered partnerships are not permitted to file jointly for an adoption.¹¹⁵ Same-sex married couples may adopt;¹¹⁶ however, under the laws of the Netherlands, adoptions by same-sex couples are considered single-parent adoptions.¹¹⁷ Thus, same-sex married couples and same-sex cohabitating partners can adopt, but only one party will be recognized as the legal parent. This means that if dual legal parentage is desired, the couple will have to file a petition for second-parent adoption upon returning to the United States.¹¹⁸ As mentioned above, and further discussed in Part V.C, this is another obstacle LGBT adoptive parents must overcome because only some states in the United States allow second-parent adoptions.

¹⁰⁹ U.S. Dep’t of State Office of Children’s Issues, *Belgium Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/belgium> (last updated Mar. 2009).

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ U.S. Dep’t of State Office of Children’s Issues, *Netherlands Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/netherlands.html> (last updated Apr. 2009) [hereinafter *Netherlands Country Information*].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See discussion infra* Part V.C.1.c.

Thus, while the laws of the Netherlands appear promising for LGBT adoptions, the reality is somewhat gloomy. Like Belgium, the Netherlands is not considered a country of origin for intercountry adoption because adoptions from that country are so uncommon.¹¹⁹

c. Norway

Norwegian law allows single persons and married couples who have been married for at least two years¹²⁰ to adopt.¹²¹ Unmarried couples are not permitted to adopt from Norway.¹²² Because Norway recognizes same-sex marriages as equal to those of heterosexual marriages, the supposition is that same-sex married couples would be permitted to adopt,¹²³ but unmarried same-sex couples could not adopt jointly, although one partner could adopt individually.¹²⁴ Norwegian adoptions are very rare, though, as exemplified by the fact that no new visas for immigration of a child for adoption have issued in the past five years.¹²⁵

d. Spain

A couple must be legally married or regarded as married under the laws of Spain to be eligible to adopt jointly.¹²⁶ Singles may also adopt.¹²⁷ Spain also permits an individual member of a married couple to petition for adoption, as long as the non-petitioning spouse consents.¹²⁸ Similar to Norway, the supposition is that a same-sex married couple may adopt

¹¹⁹ *Netherlands Country Information*, *supra* note 113.

¹²⁰ U.S. Dep't of State Office of Children's Issues, *Norway Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/norway.html> (last updated Feb. 2009) [hereinafter *Norway Country Information*]. Single persons "may qualify if they fulfill certain requirements." *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See* Johnson, *supra* note 105. Same-sex marriage was legalized in Norway in January 2009. *Id.* Because there have been no adoptions from Norway since 2005, it is impossible to definitively state what the effect of the new law will be. *Norway Country Information*, *supra* note 120.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ U.S. Dep't of State Office of Children's Issues, *Spain Country Information*, <http://www.adoption.state.gov/country/spain.html> (last updated Mar. 2009) [hereinafter *Spain Country Information*].

¹²⁷ *Id.*

¹²⁸ *Id.*

jointly,¹²⁹ one spouse in a married couple may adopt with the other spouse's consent, or a single individual may adopt. Once again, though, the reality is that adoptions from Spain are rare—none have occurred since 2004.¹³⁰

e. South Africa

South Africa only permits adoption of South African children by “citizens of countries with a working agreement between the prospective adoptive parent’s country of origin and South Africa.”¹³¹ Though no such agreement currently exists between the United States and South Africa,¹³² both nations are parties to the Hague Convention.¹³³ Assuming that the Hague Convention meets the “working agreement” requirement, the laws of South Africa are quite favorable for LGBT individuals and couples. Under South African law, both married couples and life-long partners, which include same-sex couples, can jointly adopt.¹³⁴ Single individuals may also adopt.¹³⁵ Despite the favorable laws, there are still relatively few adoptions from South Africa every year. Since 1999, ninety-nine children have been adopted into U.S. families from South Africa.¹³⁶ In the past several years, though, less than ten adoptions occurred each year.¹³⁷ As such, LGBT adoptions from South Africa are possible but unlikely.

f. Sweden

Sweden’s laws are rather complex. The first hurdle presented is that only Swedish citizens or legal residents of Sweden are permitted to

¹²⁹ *See id.* Spain legalized same-sex marriage in 2005, and there have been no intercountry adoptions from Spain since 2004; so as of today, this is speculative. *See id.*; *see also* Johnson, *supra* note 105.

¹³⁰ *Spain Country Information*, *supra* note 126.

¹³¹ U.S. Dep’t of State Office of Children’s Issues, *South Africa Country Information*, INTERCOUNTRY ADOPTION, <http://www.adoption.state.gov/country/south%20africa.html> (last updated May 2009) [hereinafter *South Africa Country Information*].

¹³² *Id.*

¹³³ *Convention Countries*, *supra* note 46.

¹³⁴ *South Africa Country Information*, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

adopt.¹³⁸ Thus, American LGBT individuals or couples are all but prohibited from adopting from Sweden unless the rare instance of dual citizenship is applicable.¹³⁹ Although outside the scope of this article due to the citizenship requirement,¹⁴⁰ the laws of Sweden are worth a brief mention as they are rather favorable regarding adoption by LGBT individuals and couples. Under Swedish law, married couples must adopt jointly.¹⁴¹ No specific mention of same-sex married couples is made;¹⁴² however, Sweden does recognize same-sex marriage as equal to heterosexual marriage,¹⁴³ so it is likely same-sex married couples would be included in the category of prospective adoptive parents. Common-law married spouses, on the other hand, are prohibited from adopting jointly.¹⁴⁴ Single individuals may adopt¹⁴⁵ and, most significantly, two same-sex individuals may jointly adopt if they cohabit and are registered partners.¹⁴⁶ So, while Sweden is not a viable option from which American LGBT individuals and couples may adopt, its laws are very friendly toward LGBT adoption in general.

3. *Other Countries*

The sheer number of countries from which children may be adopted prevents an in depth analysis of each country's laws. However, recalling the four categories of prospective adoptive parents discussed above, the laws can be summarized into several generalities. First, many countries allow single individuals to adopt.¹⁴⁷ Some of these countries employ gender limitations, such as allowing single females to adopt but not single

¹³⁸ U.S. Dep't of State Office of Children's Issues, *Sweden Country Information*, INTERCOUNTRY ADOPTIONS, <http://www.adoption.state.gov/country/sweden.html> (last updated Apr. 2009) [hereinafter *Sweden Country*].

¹³⁹ *Id.*

¹⁴⁰ This article focuses on the ability of U.S. LGBT individuals and couples to adopt internationally.

¹⁴¹ *Sweden Country Information*, *supra* note 138.

¹⁴² *See id.*

¹⁴³ *Same-Sex Marriage Around the World*, CBC NEWS, <http://cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html> (last updated Aug. 4, 2010).

¹⁴⁴ *Sweden Country Information*, *supra* note 138.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See* sources cited *supra* note 63 and accompanying text.

males.¹⁴⁸ Therefore, lesbian individuals may have a slight advantage over gay male individuals in terms of the number of countries from which they can adopt. Second, very few countries allow joint adoption petitions from same-sex, or even heterosexual, unmarried couples (the “Couple” category described in Part IV).¹⁴⁹ This barrier, coupled with the state laws discussed in Part V.C, severely limits the ability of same-sex couples to adopt jointly. Those who are not married or in registered domestic partnerships have increased opportunities to adopt because one member of the couple can adopt as a single individual, and then, depending on where the couple resides, may petition in the state of residence for a second-parent adoption.¹⁵⁰ Finally, very few countries allow same-sex married couples to adopt jointly.¹⁵¹

C. Laws of the State of Residence of the Prospective Parent(s)

The third, and in some cases most restrictive, jurisdiction whose laws must be complied with is that of the state of residence for the prospective adoptive parent(s). In the United States, the rights of LGBT individuals and couples to adopt vary greatly by state and, in some cases, even by county or other jurisdictional boundary.¹⁵² Additionally, state laws may

¹⁴⁸ *Country Information*, *supra* note 55 (the specific information for each country may be found by using the drop down menu and selecting the country of interest). The following countries do not permit single males to adopt (some do, however, allow it in exceptional circumstances): Ghana, Kenya, Malawi, Mali, Morocco, Nepal, Paraguay, Trinidad and Tobago, Tuvalu, Uganda, Zambia, Zimbabwe. *Id.*

¹⁴⁹ *Id.* Germany allows LGBT adoption but does not allow same-sex couples to adopt jointly. *Id.* South Africa, Spain, the United Kingdom permit both single and joint LGBT adoption. *Id.* Sweden allows same-sex couples to adopt jointly if they live together as domestic partners unless their country of origin prohibits same-sex adoption. *Id.* The countries that allow singles to adopt (laws are silent on whether joint adoption by singles is permitted) but not LGBT are as follows: Cameroon, Colombia, Denmark, Eritrea, Ghana (single females only), India, Kenya (single females only), Lesotho, Marshall Islands, Morocco (single females only), Paraguay, and Togo. *Id.* Countries that expressly prohibit joint adoption by singles are the following: Israel, West Bank, Gaza (only allows singles to adopt children with special needs), Kyrgyzstan (also expressly prohibits LGBT adoption), Lithuania (only permits adoption by singles in limited circumstances), Moldova, Netherlands, New Zealand, and Norway. *Id.*

¹⁵⁰ *See, e.g., id.* (showing that Germany permits adoption by single LGBT persons but not joint-adoptions by registered couples).

¹⁵¹ *See id.*

¹⁵² *See Rhonda Wasserman, Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U.L. REV. 1, 12 (2008).

affect an adoption during two distinct phases—first in becoming certified as a “suitable” adoptive parent and second in validating the foreign adoption, if required.

1. Establishing Suitability as an Adoptive Parent

Generally, adoptions fall into three categories related to the LGBT community: (1) single LGBT adoption;¹⁵³ (2) joint LGBT adoption;¹⁵⁴ and (3) second-parent adoption.¹⁵⁵

a. Single LGBT Adoption

Single LGBT adoption refers to adoption by an individual. Nearly every state in this country permits single LGBT individuals to petition for adoption.¹⁵⁶ The one exception is Florida, whose statute explicitly forbids homosexuals from adopting.¹⁵⁷ In spite of favorable state laws in most jurisdictions, LGBT individuals and couples must be cautious in selecting an adoption agency because the home study holds particular importance in being deemed an “eligible” adoptive parent.¹⁵⁸

b. Joint LGBT Adoption

Joint LGBT adoption refers to the filing of a joint petition by a same-sex couple. Due to ambiguous laws and irregular court decisions, the status of the ability of same-sex couples to file joint adoption petitions is uncertain in many states and also in portions of many other states.¹⁵⁹

¹⁵³ See discussion *infra* Part V.C.1.a.

¹⁵⁴ See discussion *infra* Part V.C.1.b.

¹⁵⁵ See discussion *infra* Part V.C.1.c.

¹⁵⁶ *Overview of State Adoption Laws*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/parenting/overview-of-state-adoption.html> (last visited Jan. 24, 2011).

¹⁵⁷ FLA. STAT. ANN. § 63.042 (West 2003) (stating that “No person eligible to adopt . . . may adopt if that person is a homosexual”). *But see* Fla. Dep’t of Child & Family Servs. v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (holding that the statute violated the equal protection rights guaranteed by the Florida Constitution and did not meet the rational basis test). Although the statute has not been changed by the Florida legislature, Florida Governor Charlie Crist has stated that the state will not enforce the ban. *Florida Appeals Court Strikes Down Gay Adoption Ban*, CNN U.S. (Sept. 22, 2010), http://articles.cnn.com/2010-09-22/us/florida.gay.adoptions_1_adoption-law-martin-gill-adoption-services?_s=PM:US.

¹⁵⁸ For a complete discussion of agency selection, see *infra* Part V.D.

¹⁵⁹ Elizabeth Burleson, *International Human Rights Law, Co-Parent Adoption, and the Recognition of Gay and Lesbian Families*, 55 LOY. L. REV. 791, 793 (2009).

Florida,¹⁶⁰ Mississippi,¹⁶¹ and Utah¹⁶² all statutorily exclude homosexual couples from adopting.¹⁶³ Conversely, thirteen states—California,¹⁶⁴ Connecticut,¹⁶⁵ Colorado,¹⁶⁶ Illinois,¹⁶⁷ Indiana,¹⁶⁸ Maine,¹⁶⁹ Massachusetts,¹⁷⁰ New Jersey,¹⁷¹ New York,¹⁷² Oregon,¹⁷³ Iowa,¹⁷⁴

¹⁶⁰ See sources cited *supra* note 157 and accompanying text.

¹⁶¹ MISS. CODE ANN. § 93-17-3 (1972) (amended 2000). The 2000 amendment provides, “Adoption by couples of the same gender is prohibited.” *Id.*

¹⁶² UTAH CODE ANN. § 78B-6-117 (West 1953) (“A child may not be adopted by a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of [Utah].”). Utah law does not recognize same-sex marriage. UTAH CONST. art. 1, § 29 (“Marriage consists only of the legal union between a man and a woman.”).

¹⁶³ Additionally, in 2008, Arkansas voters passed a ballot initiative to create a law banning cohabitating, non-married individuals from adopting or serving as foster parents. See *Arkansas Adoption Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/953.htm> (last visited Jan. 24, 2011). This law has the effect of banning same-sex couples from adopting. See *id.* Although the law has been deemed unconstitutional by a circuit court, the matter has been appealed to the Arkansas Supreme Court and the court has stayed the ruling of the lower court pending the appeal. *Id.*

¹⁶⁴ *California Adoption Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/377.htm> (last visited Jan. 24, 2011).

¹⁶⁵ See CONN. GEN. STAT. ANN. § 45a-726 (West 1993). However, the sexual orientation of a prospective adoptive parent may be considered when placing a child for adoption. *Id.*

¹⁶⁶ *Parenting Laws: Joint Adoption*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/documents/parenting_laws_maps.pdf (last visited Jan. 24, 2011).

¹⁶⁷ *In re K.M. and D.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (interpreting the Illinois Adoption Act as giving standing to unmarried persons filing a petition for adoption, regardless of sexual orientation).

¹⁶⁸ *In re Infant Girl W.*, 845 N.E.2d 229, 232 (Ind. Ct. App. 2006); see also IND. CODE § 31-19-2-2 (West 1997).

¹⁶⁹ See *Adoption of M.A.*, 930 A.2d 1088, 1098 (Me. 2007) (holding that any two unmarried persons may petition to adopt jointly); see also ME. REV. STAT. ANN. tit. 18, § 9-301 (West 1997).

¹⁷⁰ See *Adoption of Tammy*, 619 N.E.2d 315, 318 (Mass. 1993); see also MASS. GEN. LAWS ANN. ch. 210, § 1 (West 2008).

¹⁷¹ *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995); see also N.J. STAT. ANN. § 9:3-43(a) (West 2002).

¹⁷² See *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995). While this case did not directly address the issue of an unmarried couple seeking to jointly petition for the adoption of a child who is not the biological child of either partner, other lower courts have cited to this case to support the decision to allow joint petitioners to adopt from unmarried persons. See, e.g., *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227, 228 (N.Y. App. Div. 2004); *In re* (continued)

Washington,¹⁷⁵ Vermont¹⁷⁶—and the District of Columbia¹⁷⁷ permit adoption by same-sex couples statewide.¹⁷⁸ Three other states—Minnesota,¹⁷⁹ Nevada,¹⁸⁰ and New Hampshire¹⁸¹—have allowed same-sex couples to adopt in certain jurisdictions within the state.¹⁸² Although permitted in several states and selected counties within other states, the prospects for LGBT couples to jointly adopt a child from a foreign country are severely limited by the jurisdictional interplay between the laws of the prospective parents' state of residence and the laws of the sending country discussed above.¹⁸³ Thus, if an LGBT couple wishes to have two legal

Adoption of Emilio R., 293 A.D.2d 27, 28 (N.Y. App. Div. 2002); *In re* Adoption of Joseph, 684 N.Y.S.2d 760, 761 (N.Y. Sup. Ct. 1998).

¹⁷³ OR. ADMIN. R. 413-120-0200(2) (2010) (“The Department or a contracted private agency must accept applications from couples (married or unmarried) or an individual (married or unmarried).”).

¹⁷⁴ *Parenting Laws*, *supra* note 166.

¹⁷⁵ *Laws: Washington Adoption Law*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/laws_and_elections/1156.htm (last visited Jan. 24, 2011) (“According to the Washington State Department of Social and Health Services brochure, Adoption in Washington State, same-sex couples can adopt a child through DSHS.”).

¹⁷⁶ *Who Can Apply*, VERMONT DEPARTMENT FOR CHILDREN AND FAMILIES, <http://dcf.vermont.gov/projectfamily/adopting/who> (last visited Jan. 24, 2011).

¹⁷⁷ According to D.C. CODE § 16-302 (2001), “Any person may adopt.” The status of same-sex joint petitions for adoption was clarified by case law that held joint petitions for adoption by unmarried couples were not automatically precluded, and such petitions should be determined using the best interests of the child standard. *In re* M.M.D., 662 A.2d 837, 859 (D.C. 1995).

¹⁷⁸ *Parenting Laws*, *supra* note 166.

¹⁷⁹ *Id.*

¹⁸⁰ NEV. REV. STAT. ANN. § 127.030 (West 2010). Nevada law states, “Any adult person or any two persons married to each other may petition the district court of any county in this state for leave to adopt a child.” *Id.* Several local courts have permitted same-sex couples to jointly petition. *Laws: Nevada Adoption Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/1265.htm> (last visited Jan. 24, 2011). However, no appellate level court has heard a case on the matter; and thus, the rulings are not in force for the state as a whole. *Id.*

¹⁸¹ *Parenting Laws*, *supra* note 166. Several judges in various local jurisdictions have granted joint adoption petitions from same-sex couples. *Laws: New Hampshire Adoption Law*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/1322.htm> (last visited Jan. 24, 2011). *But see In re* Jason C., 533 A.2d 32, 33–34 (N.H. 1987) (holding that two unmarried adults may not file a joint petition for adoption of a child).

¹⁸² *Parenting Laws*, *supra* note 166.

¹⁸³ *See supra* Part V.B.

parents for their child, second-parent adoption may be the best, and in many cases the only, way to accomplish this.

c. Second-Parent Adoption

Second-parent adoption refers to the adoption of children by the same-sex partner of the legal or biological parent without terminating the parental rights of the legal or biological parent.¹⁸⁴ Second-parent adoptions take place once the family arrives back in the United States after the finalization of the adoption in the foreign country.¹⁸⁵ By definition, there must be a finalized adoption in the foreign country to establish one legal parent before the petition for a second-parent adoption may be filed.¹⁸⁶ Thus, second-parent adoptions are used in conjunction with single LGBT adoptions if the adoptive parent wishes to have a second, legal parent for the child. In second-parent adoptions, the biological or legal parent consents to relinquish sole custody of the child so that the partner can become a second, legal parent.¹⁸⁷ However, this does not terminate the original legal parent's rights to the child.¹⁸⁸ For second-parent adoptions to occur, a public agency, usually the state's Department of Social Services, must complete a full home study.¹⁸⁹ The process takes at least six months

¹⁸⁴ See Zuckerman, *supra* note 28, at 731.

¹⁸⁵ See Debra J. Braselton & Maxine Weiss Kunz, *Non-Traditional Families and Alternative Family Building: Securing Parental Rights for Intended Parents*, D.C.B.A. Brief, Dec. 2007, at 30, 32, available at http://www.dcba.org/brief/BRIEF_NovDec2007.pdf ("In non-traditional families, such as gay and lesbian households, it is typical for one of the partners to travel and adopt the child in the foreign country and to re-adopt the child in a second-parent adoption proceeding upon return to the U.S.").

¹⁸⁶ See Andrew C. Brown, *International Adoption Law: A Comparative Analysis*, 43 INT'L LAW. 1337, 1347 (2009) ("In these kinds of adoptions, one partner will travel to the country of origin and adopt the child, which will establish that partner as the child's legal parent. Upon return to the United States, the other partner will petition state authorities for dual-parent status.").

¹⁸⁷ See Suzanne Bryant, *Second Parent Adoption: A Model Brief*, 2 DUKE J. GENDER L. & POL'Y 233, 239 (1995) (discussing how the legal parent is the only one that is legally required to care for the child prior to a second-parent adoption).

¹⁸⁸ See *supra* note 28, for a definition of second-parent adoption.

¹⁸⁹ See Catherine Connolly, *The Voice of the Petitioner: The Experiences of Gay and Lesbian Parents in Successful Second-Parent Adoption Proceedings*, 36 LAW & SOC'Y REV. 325, 334 (2002) (demonstrating that second-parent adoptions, though more analogous to stepparent adoptions, are treated like stranger adoptions, and most second-parent adoptions require full intervention by the state).

to complete and often requires an attorney to file the paperwork.¹⁹⁰ Due to the home study requirement, the state agency wields substantial power over the adoption process.¹⁹¹ As with the original adoption in the foreign jurisdiction, the choice of agency is of vital importance for this reason.¹⁹²

Second-parent adoptions are permitted statewide in ten U.S. states¹⁹³ and the District of Columbia.¹⁹⁴ Some jurisdictions within sixteen additional states permit this form of adoption.¹⁹⁵ Only seven states—Nebraska,¹⁹⁶ Florida,¹⁹⁷ Ohio,¹⁹⁸ Wisconsin,¹⁹⁹ Arkansas,²⁰⁰ Utah,²⁰¹ and

¹⁹⁰ See Deirdre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 9–10 (2008) (discussing the issues with second-parent adoption, including difficulty in finding a knowledgeable attorney in this area and the waiting period, which typically lasts between six to eight months).

¹⁹¹ See Connolly, *supra* note 189, at 333.

¹⁹² See *infra* Part V.D.

¹⁹³ The ten states permitting second-parent adoptions include California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. CAL. FAM. CODE § 9000(b) (2010) (allowing second-parent adoptions for registered domestic partners only); Sharon S. v. Superior Court of San Diego Cnty., 73 P.3d 554, 570 (Cal. 2003) (extending second-parent adoption rights to non-registered same-sex couples); COLO. REV. STAT. §§ 19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5) (2010); CONN. GEN. STAT. § 45a-724(a)(3) (2004); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002) (codifying *In re* Adoption of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993)); *In re* K.M. & D.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1995); *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1259 (Ind. Ct. App. 2004); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270 (Ind. Ct. App. 2003); *In re* Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993); *In re* the Adoption of Two Children by H.N.R., 666 A.2d 535, 540–41 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995); *In re* Adoption of R.B.F. & R.C.F., 803 A.2d 1195, 1201–02 (Pa. 2002).

¹⁹⁴ *In re* M.M.D. v. B.H.M., 662 A.2d 837, 840 (D.C. 1995).

¹⁹⁵ National Gay and Lesbian Taskforce, *Second Parent-Adoptions in the United States*, OUTFRONT.ORG, <http://www.outfront.org/files/pg332/Secondparentadoption.pdf> (last visited Jan. 24, 2011). The sixteen states are Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Minnesota, New Hampshire, Nevada, New Mexico, Oregon, Rhode Island, Texas, Washington, and West Virginia. *Id.*

¹⁹⁶ See *In re* Adoption of Luke, 640 N.W.2d 374, 379 (Neb. 2002) (“Under Nebraska’s statutory adoption scheme, the minor child, Luke, was not eligible for adoption by A.E. because B.P. had not relinquished him . . .”).

¹⁹⁷ See sources cited *supra* note 157 and accompanying text.

¹⁹⁸ See *In re* Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) (finding that a trial court did not err when it held that a biological mother’s parental rights terminated upon adoption of a child by a non-stepparent).

Mississippi²⁰²—prohibit second-parent adoptions. The largest area of ambiguity, however, exists in the remaining states where the status of second-parent adoptions is unclear.²⁰³

Due to the vagueness of the status of second-parent adoptions in many states,²⁰⁴ it is important that LGBT individuals and couples thoroughly research the laws of the state of residence or, in some cases, the county in which they reside, prior to making the decision to adopt. This is particularly true for couples who wish to have two legal parents for their child because, as discussed above, second-parent adoption may be the only way to accomplish this due to the restrictive laws of joint petitions for adoption both in the state of residence of the adoptive parent(s) and in the child's country of origin.²⁰⁵ Also of importance is the fact that completion of a second-parent adoption may have a detrimental effect on future international adoptions because the existence and parentage of the previously adopted child(ren) must be disclosed on subsequent home study reports.²⁰⁶

2. *Domestication of Foreign Adoption*

Even if an LGBT individual or couple is able to adopt internationally and the adoption is finalized in the foreign country, an additional state-law hurdle may have to be overcome upon return to the United States.²⁰⁷ In many states if the adoption is finalized in a foreign jurisdiction and meets all of the requirements of U.S. immigration laws, the adoption decree is

¹⁹⁹ *In re Angel Lace M.*, 516 N.W.2d 678, 683 (Wis. 1994) (holding that a statutory provision, which terminates parental rights upon the approval of a petition for adoption, applies in all cases, except cases in which the adoptive parent is the spouse of the biological parent).

²⁰⁰ See sources cited *supra* note 163 and accompanying text.

²⁰¹ UTAH CODE ANN. § 78B-6-102(3) (2008).

²⁰² MISS. CODE ANN. § 93-17-3 (2004).

²⁰³ See, e.g., Burleson, *supra* note 159, at 793 (“In many states it remains uncertain whether same-sex couples can file a joint petition to adopt a child.”).

²⁰⁴ *Id.*

²⁰⁵ See *supra* Part V.C.1.b.

²⁰⁶ COURTNEY G. JOSLIN & SHANNON P. MINTER, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* 95 (2010).

²⁰⁷ See *Review of State Statutes*, ADOPTION.COM, <http://laws.adoption.com/statutes/review-of-state-statutes-regarding-international-adoptions-finalized-abroad.html> (last visited Jan. 24, 2011), for a complete listing of the requirements by state and the citations for the relevant statutory provisions.

given full recognition by the U.S. state of residence.²⁰⁸ However, several states require that the foreign adoption be “domesticated”²⁰⁹ either through a re-adoption²¹⁰ or validation²¹¹ process.²¹² Approximately six states require that the child’s adoption be validated²¹³ and four require re-adoption under at least some circumstances.²¹⁴ Even in states where domestication is not required, adoptive parents may wish to have their adoption decrees validated by the state court because this additional step is required to issue a U.S. birth certificate in many states.²¹⁵ There are also several other advantages that come with the process, namely protecting the foreign adoption from state legal challenges and ensuring the child’s inheritance rights from the adoptive parent(s).²¹⁶ Thus, even when not required by state law, the potential inability of the adoptive parents to domesticate the foreign adoption has far-reaching implications on the child’s life. Prejudicial state laws²¹⁷ may make the domestication process difficult, even impossible, for LGBT adoptive parents.

²⁰⁸ See *State Recognition of Intercountry Adoptions Finalized Abroad: Summary of State Laws*, CHILD WELFARE INFORMATION GATEWAY STATE STATUTES (Dep’t of Health & Human Servs., Washington, D.C.), Aug. 2008, at 2, http://www.childwelfare.gov/systemwide/laws_policies/statutes/intercountry.pdf. Some states require validation of adoptions finalized in a foreign jurisdiction or the processing of a re-adoption upon return to the United States. *Id.* at 4. Alaska, Arkansas, California, Delaware, Florida, Georgia, Idaho, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Vermont, and West Virginia give full recognition to foreign-issued adoption decrees. *Id.* at 2 n.5.

²⁰⁹ See JOSLIN & MINTER, *supra* note 206, at 94. The term “domesticate” can be used to describe the process of obtaining recognition of the foreign adoption in the U.S. state of residence. See *id.* (using “readoption” and “domesticate” to describe a legal process by which foreign adoptions can be recognized by various states).

²¹⁰ See *State Recognition*, *supra* note 208, at 3 (“Re-adoption is the process of adopting a child who was previously adopted in a foreign jurisdiction.”).

²¹¹ *Id.* (“Validation is the process of submitting an adopted child’s foreign adoption decree for State court approval.”).

²¹² *Id.*

²¹³ *Id.* at n.7 (listing Delaware, Kansas, Louisiana, Pennsylvania, South Carolina, and Tennessee as states that require validation).

²¹⁴ *Id.* at n.8 (listing California, Connecticut, Kentucky, and Pennsylvania as states that require re-adoption).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ For a complete discussion of state laws, see *supra* Part V.C.

D. Selection of Adoption Agency

Due to the complexity of the laws of the various jurisdictions involved in intercountry adoption,²¹⁸ selection of the right adoption agency is crucial. In states that prohibit or limit LGBT adoption, finding an LGBT-friendly agency can be especially difficult.²¹⁹ Even in states that permit LGBT adoption, prospective parents must be cautious in their choice of agency to ensure that they will not be unfairly disqualified based on their sexual orientation.²²⁰ Historically, adoption agencies “screened out” who they considered undesirable prospective adoptive parents, including members of the LGBT community.²²¹ Although the trend seems to be moving toward a more inclusive definition of “suitable parent,” members of the LGBT community still face discrimination and bias.²²² A study conducted by the Donaldson Institute found that of the 307 responding adoption agencies, 60% “accepted applications from self-identified lesbians and gays.”²²³ Further, agencies that focused on international adoption were more likely to accept homosexual applicants than agencies with a domestic focus.²²⁴ However, as promising as these numbers may seem on the surface, the fact remains that discrimination and bias at the

²¹⁸ See *supra* Parts V.A–V.C.

²¹⁹ See, e.g., Jolie du Pre, *Finding an Agency that Supports Gay and Lesbian Adoption*, LIFE 123, <http://www.life123.com/parenting/adoption/gay-adoption/finding-an-agency-that-supports-gay-and-lesbian-ad.shtml> (last visited Feb. 16, 2011). Many LGBT family support websites host lists of “gay-friendly” adoption agencies and attorneys. See, e.g., ADOPTION OPEN.COM, http://www.adoptionopen.com/gay_adoption.html (last visited Feb. 16 2011); ADOPTION.ORG, <http://www.adopting.org/adoptions/lgbt-and-gay-lesbian-friendly-adoption-resources-service-providers-agency-attorney.html> (last visited Feb. 16 2011); HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/parenting/adoptions/13364.htm> (last visited Feb. 16 2011).

²²⁰ See Jolie du Pre, *supra* note 219.

²²¹ David Brodzinsky, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitude*, 2003 EVAN B. DONALDSON ADOPTION INST. 7, available at http://www.adoptioninstitute.org/publications/Lesbian%20and%20Gay%20Adoption%20Report_final.pdf.

²²² See *id.* at 6–7.

²²³ *Id.* at 3.

²²⁴ *Id.*

agency level exists and can be detrimental to the formation of families via intercountry adoption for gay and lesbian individuals and couples.²²⁵

The basic reason for the importance of agency selection lies in the fact that the agency plays a large role in the preparation of the home study.²²⁶ A home study is required for any adoption, whether international or domestic.²²⁷ The specific requirements for the home study vary between states and in the case of intercountry adoption, between countries.²²⁸ Generally, the purpose of the home study is to ensure that the applicant is a suitable parent and the home is appropriate to raise a child.²²⁹ To accomplish these tasks, the conductor of the home study—usually a licensed social worker in the state of residence of the prospective adoptive parent(s)—conducts interviews with the prospective parent(s), investigates the family financial history, conducts an extensive criminal background check, compiles and reviews written references from friends and family, and reviews the medical history and recent medical exam reports for the prospective parent(s).²³⁰ Additionally, the preparer of the report conducts at least one home visit.²³¹ During the home visit, every member of the household must be interviewed, and the information gathered is documented in the home study report.²³² This means that if a “Coupled Partner”²³³ seeks to adopt as an individual, but lives with his or her partner, the partner is also interviewed and the living arrangement is noted in the home study report. So, although some scholars have postulated that LGBT individuals and couples have committed a fraud on the adoption system by

²²⁵ See *id.* at 10 (showing that over a third of all responding adoption agencies, including those that focus on international adoptions, do not accept applications from homosexuals).

²²⁶ See *id.* at 22–23.

²²⁷ *The Adoption Home Study Process*, CHILD WELFARE INFORMATION GATEWAY FACTSHEETS FOR FAMILIES (Dep’t of Health & Human Servs., Washington, D.C.), July 2010, at 1, available at http://www.childwelfare.gov/pubs/f_homstu.pdf.

²²⁸ *Id.* at 2.

²²⁹ Marry M. Strickert, *International Homestudy*, ADOPTION.COM, <http://international.adoption.com/foreign/international-homestudy.html> (last visited Jan. 24, 2011) (excerpted from INTERNATIONAL ADOPTION GUIDEBOOK).

²³⁰ *Id.*

²³¹ *Id.*

²³² See *id.*

²³³ For definitions of the various groups of LGBT prospective adopters, see *supra* Part IV.

deliberately concealing their sexual orientation during the home study,²³⁴ it is important to note two things: first, it is difficult, if not impossible, to hide one's sexual identity because of the magnitude and invasiveness of the home study process;²³⁵ and second, even if sexual orientation is not noted in the home study report, it may only be significant if the sending country specifically prohibits homosexuals from adopting.²³⁶ If the country's laws are silent regarding sexual orientation, the implication is that there will be no preference given to, or prohibition of, an individual's ability to adopt based on his or her sexual identity.²³⁷ The home study report for a same-sex cohabitating couple²³⁸ may be written in a variety of ways that are accurate and truthful but that do not reveal the prospective adopter's sexual orientation. The situation may be described as a single person with a roommate, a single parent with a domestic partner, or a two-parent family.²³⁹ In the context of an international adoption, however, careful attention must be paid to the laws of the sending country to be sure that the chosen classification complies with the laws of the child's country of origin.²⁴⁰ For example, if the laws of the sending country permit an

²³⁴ See generally Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 608 (2004) ("It appears that some social workers within the United States are willing to create 'home studies' of homosexual individuals and couples that portray the home simply as that of a 'single' person, thus permitting gay individuals and couples largely to escape the force of laws or customs in sending nations prohibiting or disfavoring gay adoption."); Wardle, *supra* note 53, at 132.

²³⁵ See Brodzinsky, *supra* note 221, at 22–23; *The Adoption Home Study Process*, *supra* note 227, at 4–5; Strickert, *supra* note 229.

²³⁶ See Luo & Smolin, *supra* note 234, at 607.

²³⁷ See, e.g., Luo & Smolin, *supra* note 234, at 607 (discussing how China could have implicitly authorized adoptions by LGBT individuals by not mentioning the issue in its adoption laws).

²³⁸ Note: this is only applicable to couples who are not married or registered domestic partners. Same-sex marriage or registered domestic partnerships, where permitted by law, create a legal relationship between the parties that must be disclosed during the home study and in the resulting written report. See *The Adoption Home Study Process*, *supra* note 227, at 7 (explaining that prospective adoptive parents are asked to provide copies of marriage certificates during home studies).

²³⁹ *Adopting Through an Agency*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/2381.htm> (last visited Jan. 24, 2011).

²⁴⁰ See, e.g., Luo & Smolin, *supra* note 234, at 608–09 (explaining that China, for example, prohibits adoption by homosexuals and enforces its prohibitions internationally by refusing to place future adoptees with receiving nations who disregard its policies).

individual to adopt but do not permit an unmarried couple to adopt, the report would be best received if it described the prospective adoptive parent as a single person with a roommate. Again, this is not meant to be fraudulent or deceitful, but is merely an attempt to eliminate any bias that may exist on the part of the reviewing parties in relation to sexual orientation. Certainly if a country wished to prohibit LGBT individuals or couples from adopting, merely specifying the prohibition or formulating the categories of potential adopters to systematically exclude LGBT individuals or couples from adopting would be the simplest, most straightforward way to accomplish the desired result. Without such categorical bans or other restrictive measures, the intended result must be extrapolated as a nondiscriminatory stance on LGBT adoption. Even so, the biases of individuals making the adoption decisions in the sending country, as well as the receiving country and the adopter's state of residence, come into play.²⁴¹ Thus, careful attention is required to ensure these unfair personal biases are not part of the decision-making process.

E. Relationship Status

Another barrier to LGBT adoption, possibly the most counterintuitive, is the relationship status of the prospective adoptive parent(s). As illustrated in Part V of this paper, LGBT couples, specifically married couples, have the most difficulty adopting internationally. The group that experiences the second most difficulty is unmarried same-sex couples.²⁴² In other words, those members of the LGBT community that are in stable, committed, and sometimes legally recognized relationships may actually be at a disadvantage when it comes to adopting internationally. There are many countries that allow single parents to adopt²⁴³ but only a handful that

²⁴¹ See Brodzinsky, *supra* note 221, at 7–8.

²⁴² See *supra* Part V.B.2–V.B.3.

²⁴³ *Country Information*, *supra* note 55. The countries are as follows: Algeria, Angola, Armenia, Australia, Austria, Bahamas, Barbados, Belgium, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Columbia, Costa Rica, Cyprus, Democratic Republic of Congo, Denmark, Ecuador, El Salvador, Eritrea, Estonia, Fiji, France, Germany, Ghana (single females only), Grenada, Guinea, Guyana, Haiti, Hong Kong, Iceland, India, Ireland, Israel (singles may only adopt children with special needs), Jamaica, Japan, Kazakhstan, Kenya (single females only), Kiribati, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Lithuania (allows single adoption in limited circumstances), Malawi (single men cannot adopt female children absent special circumstances), Mali (single females only), Malta (if at least twenty-eight years old), Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Morocco (single females only), Nauru, Nepal (single females only), Netherlands, (continued)

permit adoption by non-married couples²⁴⁴ and same-sex married couples.²⁴⁵ One of the arguments proffered by opponents of LGBT adoption is that a child needs a mother and father who are in a stable, loving relationship.²⁴⁶ Because many states and countries permit individuals to adopt,²⁴⁷ the obvious bias in the argument against single-parent households is negated for purposes of this article.²⁴⁸ However, the argument also fails because it assumes that the benefit of a mom-and-dad household is based on the gender of the parents rather than the fact that there are two people who are in a loving, committed, stable relationship in the lives of the child. In its landmark decision allowing second-parent adoptions, the Vermont Supreme Court stated:

Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here, this Court finds a child who has

New Zealand, Nicaragua, Nigeria (single person cannot be the same sex as the child to be adopted), Norway, Pakistan, Palau, Paraguay (single females only), Peru, Philippines, Poland, Russia, Rwanda, Samoa, Seychelles, South Africa, Spain, Suriname, Sweden, Switzerland, Taiwan (silent on single adoption requirements), Tanzania (single men cannot adopt absent special circumstances), Thailand, Togo, Tonga, Trinidad and Tobago (single females only), Turkey, Tuvalu (single adoption is permitted in special circumstances, but single men are never permitted to adopt female children), Uganda (single person cannot be the same sex as the child to be adopted absent special circumstances), United Kingdom, Uruguay, Uzbekistan, Vanuatu, and Zambia (single men cannot adopt absent special circumstances), Zimbabwe (single men can only adopt family members). *Id.*

²⁴⁴ See *Marriage and Partnership Rights for Same-Sex Partners*, ILGA EUROPE, http://www.ilgaeurope.org/home/issues/families/recognition_of_relationships/legislation_and_case_law/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Feb. 16, 2011). Only Sweden, the Netherlands, Andorra, Spain, the United Kingdom, Belgium, and Canada allow for same-sex joint adoption. *Id.*

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Ruth Butterfield Isaacson, Comment, “*Teachable Moments*”: *The Use of Child-Centered Arguments in the Same-Sex Marriage Debate*, 98 CAL. L. REV. 121, 136 (2010); *Conway v. Deane*, 932 A.2d 571, 648 (Md. 2007); *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999).

²⁴⁷ See *supra* Part V.B.–V.C.

²⁴⁸ I do not in any way intend to derogate single parents or single-parent adoptions. I am merely attempting to debunk the myth that gay and lesbians should not be permitted to adopt because they cannot offer mom-and-dad households.

all of the above benefits and *two* adults dedicated to his welfare, secure in their living partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic, or social philosophy to obstruct such a favorable situation.²⁴⁹

Though referring to second-parent adoptions, the wisdom of the Vermont Supreme Court can be applied to all LGBT adoptions by couples, married or not. Many current state and sending country laws unfairly screen out couples who have chosen to have their relationships recognized by law.²⁵⁰ In fact, in what has been described as an “ironic twist,”²⁵¹ this unforeseen consequence of legalized gay-marriage has forced many couples to choose between legal recognition of their relationship and the potential to form a family through adoption.²⁵²

VI. ELIMINATING CATEGORICAL BANS TO SERVE THE BEST INTERESTS OF THE CHILD

The basic standard by which all adoptions are evaluated is the best interests of the child.²⁵³ Although no standard definition of the term exists,²⁵⁴ it is widely accepted that “the term generally refers to the deliberation that courts undertake when deciding what types of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.”²⁵⁵ The question then becomes, what exactly is the

²⁴⁹ Adoptions of B.L.V.B & E.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (holding that the Vermont statute would allow the adoption of a child by the same-sex partner of the biological mother without the biological mother having to terminate her parental rights).

²⁵⁰ See *supra* Part V.B–V.C.

²⁵¹ Lisa Miller, *The Sins of the Fathers—Raising Kids in a Same-Sex Union*, NEWSWEEK (June 11, 2009), <http://www.newsweek.com/2009/06/10/the-sins-of-the-fathers.html> (“In an ironic twist, gay-marriage laws now make foreign adoption *more* difficult for gay couples.”).

²⁵² See, e.g., *id.*; see also Ordoñez, *supra* note 75.

²⁵³ See, e.g., *In re Adoption of S.A.*, 918 N.E.2d 736, 742 (Ind. Ct. App. 2009) (citing *Stout v. Tippecanoe Cnty. Dep’t of Pub. Welfare*, 395 N.E.2d 444, 448 (Ind. Ct. App. 1979)) (stating that the “best interest of the child is the paramount concern in any adoption case”); *In re Adoption of C.D.M.*, 39 P.3d 802, 810 (Okla. 2001) (stating that adoption must be in the best interests of the child); *In re Angel Lace M.*, 516 N.W. 2d 678, 681 (Wis. 1994) (“There is no doubt that a court must find that an adoption is in the best interests of the child before the court may grant the petition for adoption.”).

²⁵⁴ *Determining the Best Interests*, *supra* note 10, at 2.

²⁵⁵ *Id.*

best interests of the child and who should make that determination? The basic argument of opponents to LGBT adoptions is that having a gay or lesbian parent is not, and can never be, in the best interests of the child.²⁵⁶

In U.S. domestic adoptions, broad discretion is granted to the trial court in determining the criteria to be used under this standard.²⁵⁷ This has led to the imposition of personal bias on the part of the presiding judges and the incorporation of these prejudices into court decisions that forbid gays and lesbians from adopting.²⁵⁸ Fortunately, the problem has been at least partially overcome by the passage of statutes and favorable precedential case law on the subject of gay and lesbian adoption within the United States.²⁵⁹ However, past problems in this area within U.S. domestic adoption are instructive on what is likely at the root of the issue for foreign countries from whom U.S. citizens adopt. In the absence of legal guidelines on the subject, cultural biases and moral objections are permitted to govern decisions regarding prospective parent eligibility.²⁶⁰

Further compounding the problem is the fact that no definition of best interests of the child exists in any international treaty or convention that governs intercountry adoption.²⁶¹ Nor is there any list of criteria to determine whether this ambiguous standard has been met.²⁶² The European Convention on the Adoption of Children does not use the term at all; rather, it merely states that an adoption shall not be granted unless “the

²⁵⁶ See, e.g., Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 197–98 (1995) (“In determining whether a child can be adopted by a homosexual parent, some courts employ a presumption of parental unfitness.”).

²⁵⁷ See, e.g., *Johnson v. Taylor*, 665 S.E.2d 49, 53 (Ga. App. 2008); *In re Welfare of D.L.*, 486 N.W.2d 375, 380 (Minn. 1992); *In re Herd*, 537 S.W.2d 950, 952 (Tex. Civ. App. 1976).

²⁵⁸ See Shaista-Parveen Ali, Comment, *Homosexual Parenting: Child Custody and Adoption*, 22 U. C. DAVIS L. REV. 1009, 1035 (1989).

²⁵⁹ For a complete discussion of state laws, see *supra* Part V.C.

²⁶⁰ See Ali, *supra* note 258, 1035–36 (discussing barriers that remain and suggesting possible legal standards that would overcome them).

²⁶¹ UN HIGH COMMISSIONER FOR REFUGEES, UNHCR GUIDELINES ON DETERMINING THE BEST INTEREST OF THE CHILD 15 (2008), available at <http://www.unhcr.org/refworld/docid/48480c342.html>; see also European Convention on the Adoption of Children, art. 8, Apr. 26, 1967, 7 I.L.M. 211 (1967) (using, but not defining, the best interest of the child standard); The Hague Convention, *supra* note 1, at art. 4 (using, but not defining, the best interest of the child standard).

²⁶² See sources cited *supra* note 261.

adoption will be in the *interest* of the child.”²⁶³ The preamble to the Hague Adoption Convention says, “The States signatory to the present Convention . . . [are] convince[d] of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child.”²⁶⁴ Other than in the preamble, the phrase “best interests” is used in only five of the forty-eight Articles of the Convention.²⁶⁵ Nowhere, though, is there a definition or list of criteria.²⁶⁶ In fact, in the section dealing with procedural requirements for intercountry adoption, there is only one reference to the standard.²⁶⁷ This reference merely indicates that if the Central Authority of the sending state determines that the child is adoptable, the State “shall . . . determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.”²⁶⁸ However, no guidance is provided as to the required content of such reports.²⁶⁹ Thus, this provision gives the sending country unfettered discretion to decide what is in the best interests of the child when determining eligibility of prospective parents.²⁷⁰ Exercise of this discretion seems at odds with a goal of the Hague Adoption Convention that children “grow up in a family environment, in an atmosphere of happiness, love and understanding. . . .”²⁷¹ By limiting the pool of potential adoptive parents through categorical bans, the number of children who can and will be adopted, and thus grow up in a family environment, is necessarily limited as well.²⁷² Without the possibility of adoption, many children are relegated

²⁶³ European Convention on the Adoption of Children, *supra* note 261, at art. 8 (emphasis added).

²⁶⁴ The Hague Convention, *supra* note 1, at Preamble.

²⁶⁵ *Id.* at art. 1, 4, 16, 21, 24.

²⁶⁶ *See id.* at Preamble.

²⁶⁷ *Id.* at art. 16.

²⁶⁸ *Id.*

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ *Id.* at Preamble.

²⁷² See Marisa Gonzalez, Note, *If You Can't Fix It, You've Got to Stand It: Lofton v. Sec'y of Dep't of Children and Family Serv. and the Florida Adoption Statute's Discrimination Against Homosexuals and Foster Children*, 7 WHITTIER J. CHILD & FAM. ADVOC. 277, 278 (2007), for an example of how limiting the number of potential adoptive parents will naturally limit the number of children adopted.

to a life in institutions or foster care.²⁷³ One scholar has also argued that “excessive legal restrictions . . . increase[] the likelihood of children becoming victims of further human rights abuses.”²⁷⁴ Certainly being the victim of human rights violations can never be in the best interests of the child, whatever the definition of the term.

The suitability of each prospective adoptive parent should be evaluated on a case-by-case basis, regardless of sexual orientation. There is no legal or sociological basis for excluding persons from adopting based solely on their sexual orientation.²⁷⁵ Indeed, the only basis for such a draconian exclusion is prejudice and bias, neither one of which is an adequate basis in law to exclude a person from adopting. In fact, the vast majority of research in the area of child-rearing by gay and lesbian parents supports the position that children of gay parents fare as well as children of heterosexual parents.²⁷⁶ A myriad of professional organizations have recognized the results of this research and issued official statements in support of the position that sexual orientation should not be dispositive of one’s ability to adopt a child.²⁷⁷

²⁷³ See Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 187 (2008).

²⁷⁴ Elizabeth M. Ward, *Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children*, 17 Mich. St. J. Int’l L. 729, 730 (2009) (discussing the notion that adoption protects children from human rights violations, such as forced prostitution, forced labor, and poor institutional living conditions, and that current regulatory schemes should be changed to facilitate more, not fewer, adoptions).

²⁷⁵ See generally Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207 (1995); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL’Y 191 (1995); Heather J. Langemak, Comment, *The “Best Interest of the Child”; Is a Categorical Ban on Homosexual Adoption an Appropriate Means to This End?*, 83 MARQ. L. REV. 825 (2000); Felicia E. Lucious, Note, *Adoption of Tammy: Should Homosexuals Adopt Children?*, 21 S.U. L. REV. 171 (1994).

²⁷⁶ See Jeanne Howard & Madelyn Freundlich, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, 2008 EVAN B. DONALDSON ADOPTION INST. 5, available at http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf; THE WILLIAMS INSTITUTE, *supra* note 18, at 3–4 (stating that in studies of child-rearing by gay and lesbian parents the findings are “remarkably consistent” that there are no negative consequences associated with having a gay or lesbian parent); see also Elovitz, *supra* note 275, at 211, 213–14; Patterson, *supra* note 275, at 191.

²⁷⁷ See THE WILLIAMS INSTITUTE, *supra* note 18, at 4.

The very nature of the multijurisdictional web of laws that must be complied with to effectuate an intercountry adoption makes elimination of the barriers to LGBT adoption very difficult.²⁷⁸ Even if changes are made to U.S. domestic laws such that categorical bans on sexual orientation are prohibited, there is no guarantee that there will be similar changes to the laws of foreign jurisdictions. Without changes to the laws of all jurisdictions involved, there is no ultimate change in the system, and the barriers remain. Unfortunately, a massive overhaul of the entire intercountry adoption system is both unlikely and unfeasible due to jurisdictional constraints.²⁷⁹ What is possible, though, is a piecemeal approach to eliminating the barriers, or at the very least, clarifying the standards.

The domestic laws and international treaties that govern international adoptions do not contain nondiscrimination clauses for the selection of adoptive parents.²⁸⁰ While there is not much that can be done about the content of the Hague Adoption Convention or the IAA in their current form,²⁸¹ subsequent treaties, conventions, and statutes could, and *should*, contain nondiscriminatory clauses that state that no potential adoptive parent(s) can be excluded on the basis of sexual orientation. Of course, nations that disagree with this policy could choose not to sign or ratify such an agreement, but at least there would be some clarity for prospective adoptive parents regarding the position of participating countries. Domestically, individual states may fight inclusion of such a clause on the basis that state laws govern adoptions. However, at least when dealing with Hague Adoption Convention countries, the U.S. Department of State is designated as this country's Central Authority and as such is charged with carrying out the duties imposed by the Convention, one of which is determining the eligibility of prospective adoptive parents.²⁸² An argument can be made that this appears to give the Department of State, and its

²⁷⁸ See *supra* Part V.

²⁷⁹ See, e.g., Kelly M. Wittner, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 618 (2003) (discussing the difficulty of overhauling the intercountry adoption system as it applies in Cambodia).

²⁸⁰ See *supra* Part V.A.

²⁸¹ See, e.g., Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 54–55 (1994) (discussing the large amount of time and effort required to create the Hague Convention in its current form).

²⁸² See The Hague Convention, *supra* note 1, at art. 15.

designated accredited agencies, the ability to determine suitability, irrespective of individual state laws. The IAA does provide for preemption of any state law that is inconsistent with its provisions;²⁸³ so theoretically, if the IAA contained a clause that prohibited discrimination on the basis of sexual orientation, such a provision would preempt discriminatory state laws on the subject.

VII. CONCLUSION

Categorical bans on LGBT intercountry adoption are not, and can never be, in the best interests of the child. Eliminating an entire group of persons from the list of prospective adoptive parents based on a trait that has nothing to do with parenting ability destroys the possibility of adoption for many children worldwide and relegates them to a life of institutionalization or foster care.²⁸⁴ Countries that expressly or impliedly forbid LGBT individuals and couples from adopting are necessarily in violation of the ideals expressed in the Hague Adoption Convention, which unequivocally expresses a desire that children be raised in a family environment.²⁸⁵ Until the laws of all jurisdictions involved are changed to prohibit these categorical bans, the barriers to LGBT adoption will continue, and the children will continue to be the victims of prejudices and biases within the current regulatory scheme.

²⁸³ 42 U.S.C. § 14953 (2006) (“The Convention and this chapter shall not be construed to preempt any provision of the law of any State or political subdivision thereof or prevent any State or political subdivision thereof from enacting any provision of law with respect to the subject matter of the Convention or this chapter, except to the extent that such provision of State law is inconsistent with the Convention or this chapter, and then only to the extent of the inconsistency.”).

²⁸⁴ See *supra* Part VI.

²⁸⁵ See The Hague Convention, *supra* note 1, at Preamble.