Child Advocacy Program

Professor Elizabeth Bartholet
Child Advocacy Program Faculty Director

Crisanne Hazen
Child Advocacy Program Assistant Director

READING PACKET for Session #6
March 2, 2017

LGBT Youth Rights: Reflecting on Progress and Outlining the Work Ahead

Douglas NeJaime, Professor of Law, UCLA School of Law; Faculty Director, The Williams Institute; Visiting Professor at Harvard Law School, Spring 2017

Dan Zhou, S.J.D. Candidate, Harvard Law School and LGBT Activist in China
Session #6
March 2, 2017

Speaker Biographies

Session Description

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Douglas NeJaime:

- In re: Brooke S.B. v. Elizabeth A.C.C., New York, 2016 1-14

Dan Zhou:


• Vanessa Piao, “Transgender Man Was Unfairly Fired, but Bias Not Proved, Chinese Court Says,” NY Times, Jan. 2, 2017 63-65
Speaker Biographies

Douglas NeJaime is Visiting Professor of Law at Harvard Law School for Spring 2017. He was the Martin R. Flug Visiting Professor of Law at Yale Law School in Fall 2016. He is also Professor of Law at UCLA School of Law, where he serves as Faculty Director of the Williams Institute, a research institute on sexual orientation and gender identity law and policy. He teaches in the areas of family law, legal ethics, law and sexuality, and constitutional law. Prior to his time at UCLA, he taught at UC Irvine School of Law and Loyola Law School in Los Angeles. NeJaime is the co-author of *Cases and Materials on Sexuality, Gender Identity, and the Law* (with Carlos Ball, Jane Schacter, and William Rubenstein). His recent scholarship includes The Nature of Parenthood, 126 *Yale Law Journal* (forthcoming 2017); Marriage Equality and the New Parenthood, 129 *Harvard Law Review* 1185 (2016); Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 *Yale Law Journal* 2516 (2015), with Reva Siegel; and Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage, 102 *California Law Review* 87 (2014). NeJaime has twice received the Dukeminier Award, which recognizes the best sexual orientation legal scholarship published in the previous year, and has also been the recipient of UCI Law’s Professor of the Year Award and Loyola Law School’s Excellence in Teaching Award.

Dan Zhou is an S.J.D. candidate at Harvard Law School. He has completed the requirements of the LL.M. at Harvard Law School, and holds a master’s degree from Renmin University of China.

He is one of the very few Chinese lawyers who have ever come out to local, national and international media about his sexual orientation, personal experiences and legal advocacy. After he had worked on commercial law matters for 8 years, he founded a public interest legal advocacy organization in Shanghai in 2005, focusing on lesbian, gay, bisexual and transgender issues and rights of people with HIV/AIDS. Also, in 2009, he published one of the first Chinese-language academic books dealing with legal treatment of same-sex intimacy in modern China. In addition, he has cooperated with the China Law Center of Yale Law School over the past decade on comparative antidiscrimination law related to sexual orientation and gender identity as well as HIV/AIDS. He was a visiting scholar at Yale’s China Law Center in 2004 and in 2015.

His S.J.D. project is designed to explore the topic of public interest lawyering in China. He will examine the nature, place of, and possibilities for public interest advocacy at the margins in Chinese society. One of his areas of interest germane to his project is women’s rights and children’s welfare. Professor Elizabeth Bartholet is one of his field supervisors for his doctoral research project.
Session #6  
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Session Description  

LGBT activists have made dramatic progress in the U.S. in recent years. This progress has important implications for young people, and young people have also been importantly involved in the advocacy efforts. UCLA Professor and HLS Visiting Professor Doug NeJaime will discuss the progress made in the U.S., focusing on the important work that remains. HLS S.J.D. candidate Dan Zhou will discuss the battle for LGBT rights in China, where the movement is just getting off the ground, and where it faces very different challenges given the nature of the government and the judicial system. He will talk about his experience as a gay youth growing up in China, his work there on behalf of LGBT youth, and his current examination of U.S. models for change that may have relevance for China.
2016 N.Y. Slip Op. 05903

2016 WL 4507780

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

In the Matter of BROOKE S.B., Respondent,
v.
ELIZABETH A. C.C., Respondent.
R. Thomas Rankin, Esq.,
Attorney for the Child, Appellant.
In the Matter of Estrellita A., Respondent,
v.
Jennifer L.D., Appellant.


Synopsis

Background: In first case, same-sex former partner of child's mother brought action seeking joint custody of and visitation with child. The Family Court, Chautauqua County, Judith S. Claire, J., dismissed former partner's petition for lack of standing. Attorney for child appealed. The Supreme Court, Appellate Division, 129 A.D.3d 1578, 10 N.Y.S.3d 380, affirmed. In second case, after female same-sex registered domestic partners ended their relationship, during which child was born to one partner through artificial insemination, non-birth-mother partner petitioned for visitation, alleging that she was an adjudicated parent, based on order requiring her to pay child support. The Family Court, Suffolk County, Theresa Whelan, J., 963 N.Y.S.2d 843, 40 Misc.3d 219, denied birth-mother partner's motion to dismiss, and later granted visitation. Birth-mother partner appealed. The Supreme Court, Appellate Division, 123 A.D.3d 1023, 999 N.Y.S.2d 504, affirmed. Leave to appeal was granted in each case.

[ Holding: ] The Court of Appeals, Abdus–Salaam, J., held that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody, overruling Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586, and abrogating Debra H. v. Janice R., 14 N.Y.3d 576, 930 N.E.2d 184, 904 N.Y.S.2d 263.

Appellate Division reversed in first case, and remitted; Appellate Division affirmed in second case.

Pigott, J., filed a concurring opinion.

West Headnotes (7)

[1] Child Custody
   ➔ Parties; Intervention

   ➔ Number of Parents

[3] Courts
   ➔ Decisions of Same Court or Co-Ordinate Court
Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue.

Cases that cite this headnote

☞ Previous Decisions as Controlling or as Precedents
The doctrine of stare decisis promotes predictability in the law, engenders reliance on judicial decisions, encourages judicial restraint, and reassures the public that judicial decisions arise from a continuum of legal principle rather than the personal caprice of the members of the court.

Cases that cite this headnote

[5] Courts
☞ Decisions of Same Court or Co-Ordinate Court
In the rarest of cases, the appellate court may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of the prior decision.

Cases that cite this headnote

[6] Constitutional Law
☞ Parent and Child Relationship
Biological or adoptive parents have a substantial and fundamental right under the Due Process Clause to control the upbringing of their children. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] Constitutional Law
☞ Children and Minors in General
While parents and families have fundamental due-process liberty interests in preserving intimate family-like bonds, so, too, do children have these interests. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

Eric I. Wrubel, for appellant child.
Susan L. Sommer, for respondent Brooke S. B.
Sherry Bjork, for respondent Elizabeth A. C.C.
Christopher J. Chimeri, for appellant.
Andrew J. Estes, for respondent.
John B. Belmonte, for the child.
National Association of Social Workers et al., National Center for Lesbian Rights et al., Association of the Bar of the City of New York, Lawyers for Children et al., amici curiae.

Opinion

ABDUS-SALAAM, J.

[1] These two cases call upon us to assess the continued vitality of the rule promulgated in Matter of Alison D. v. Virginia M. (77 N.Y.2d 651 [1991] )—namely that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child’s “parent” for purposes of standing to seek custody or visitation under Domestic Relations Law § 70(a), notwithstanding their “established relationship with the child” (77 N.Y.2d at 655, 569 N.Y.S.2d 586, 572 N.E.2d 27). Petitioners in these cases, who similarly lack any biological or adoptive connection to the subject children, argue that they should have standing to seek custody and visitation pursuant to Domestic Relations Law § 70(a). We agree that, in
light of more recently delineated legal principles, the definition of "parent" established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we overrule *Alison D.* and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

I.

*Brooke B. v. Elizabeth C.C.*

Petitioner and respondent entered into a relationship in 2006 and, one year later, announced their engagement. 1 At the time, however, this was a purely symbolic gesture; same-sex couples could not legally marry in New York. Petitioner and respondent lacked the resources to travel to another jurisdiction to enter into a legal arrangement comparable to marriage, and it was then unclear whether New York would recognize an out-of-state same-sex union.

Shortly thereafter, the couple jointly decided to have a child and agreed that respondent would carry the child. In 2008, respondent became pregnant through artificial insemination. During respondent's pregnancy, petitioner regularly attended prenatal doctor's appointments, remained involved in respondent's care, and joined respondent in the emergency room when she had a complication during the pregnancy. Respondent went into labor in June 2009. Petitioner stayed by her side and, when the subject child, a baby boy, was born, petitioner cut the umbilical cord. The couple gave the child petitioner's last name.

The parties continued to live together with the child and raised him jointly, sharing in all major parental responsibilities. Petitioner stayed at home with the child for a year while respondent returned to work. The child referred to petitioner as “Mama B.”

In 2010, the parties ended their relationship. Initially, respondent permitted petitioner regular visits with the child. In late 2012, however, petitioner's relationship with respondent deteriorated and, in or about July 2013, respondent effectively terminated petitioner's contact with the child.

Subsequently, petitioner commenced this proceeding seeking joint custody of the child and regular visitation. Family Court appointed an attorney for the child. That attorney determined that the child's best interests would be served by allowing regular visitation with petitioner.

Respondent moved to dismiss the petition, asserting that petitioner lacked standing to seek visitation or custody under Domestic Relations Law § 70 as interpreted in *Alison D.* because, in the absence of a biological or adoptive connection to the child, petitioner was not a “parent” within the meaning of the statute. Petitioner and the attorney for the child opposed the motion, contending that, in light of the Legislature's enactment of the Marriage Equality Act (see L 2011, ch 95; Domestic Relations Law § 10–a) and other changes in the law, *Alison D.* should no longer be followed. They further argued that petitioner's longstanding parental relationship with the child conferred standing to seek custody and visitation under principles of equitable estoppel.

After hearing argument on the motion, Family Court dismissed the petition. While commenting on the “heartbreaking” nature of the case, Family Court noted that petitioner did not adopt the child and therefore granted respondent's motion to dismiss on constraint of *Alison D.* The attorney for the child appealed. 2

The Appellate Division unanimously affirmed (see 129 A.D.3d 1578, 1578–1579, 10 N.Y.S.3d 380 [4th Dept 2015]). The court concluded that, because petitioner had not married respondent, had not adopted the child, and had no biological relationship to the child, *Alison D.* prohibited Family Court from ruling that petitioner had standing to seek custody or visitation (see id. at 1579, 569 N.Y.S.2d 586, 572 N.E.2d 27). We granted the attorney for the child leave to appeal (see 26 N.Y.3d 901 [2015]).
Estrellita A. v. Jennifer D.

Petitioner and respondent entered into a relationship in 2003 and moved in together later that year. In 2007, petitioner and respondent registered as domestic partners, and thereafter, they agreed to have a child. The couple jointly decided that respondent would bear the child and that the donor should share petitioner's ethnicity.

In February 2008, respondent became pregnant through artificial insemination. During the pregnancy, petitioner attended medical appointments with respondent. In November 2008, respondent gave birth to a baby girl. Petitioner cut the umbilical cord. The couple agreed that the child should call respondent “Mommy” and petitioner “Mama.”

The child resided with the couple in their home and, over the next three years, the parties shared a complete range of parental responsibilities. However, in May 2012, petitioner and respondent ended their relationship, and petitioner moved out in September 2012. Afterward, petitioner continued to have contact with the child.

In October 2012, respondent commenced a proceeding in Family Court seeking child support from petitioner. Petitioner denied liability. While the support case was pending, petitioner filed a petition in Family Court that, as later amended, sought visitation with the child. The court appointed an attorney for the child.

After a hearing, Family Court granted respondent's child support petition and remanded the matter to a support magistrate to determine petitioner's support obligation. The court held that “the uncontroverted facts establish[ed]” that petitioner was “a parent” to the child and, as such, “chargeable with the support of the child.” Petitioner then amended her visitation petition to indicate that she “ha[d] been adjudicated the parent” of the child and therefore was a legal parent for visitation purposes.

Thereafter, respondent moved to dismiss the visitation petition on the ground that petitioner did not have standing to seek custody or visitation. Petitioner also opposed respondent's motion to dismiss, asserting that Alison D. and our decision in Debra H. v. Janice R. (14 N.Y.3d 576 [2010] ) did not foreclose a finding of standing based on judicial estoppel, as the prior judgment in the support proceeding determined that petitioner was a legal parent to the subject child. Respondent asserted that the prerequisites for judicial estoppel had not been met.

Family Court denied respondent's motion to dismiss the visitation petition (see 40 Misc.3d 219, 219–225, 963 N.Y.S.2d 843 [Family Ct Suffolk Co 2013] ). Citing Alison D. and Debra H., the court acknowledged that petitioner did not have standing to petition for visitation based on equitable estoppel or her general status as a de facto parent (see id. at 225, 904 N.Y.S.2d 263, 930 N.E.2d 184). However, given respondent's successful support petition, the court concluded that the doctrine of judicial estoppel conferred standing on petitioner to request visitation with the child (see id. at 225, 904 N.Y.S.2d 263, 930 N.E.2d 184). The court distinguished Alison D. and Debra H., reasoning that, in those cases, the Court “did not address the situation ... where one party has asserted inconsistent positions” (id.). Here, in light of respondent's initial claim that petitioner was the child's legal parent in the support proceeding, the court “ma[de] a finding that respondent [wa]s judicially estopped from asserting that petitioner [wa]s not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different” (id.). Respondent filed an interlocutory appeal, which was dismissed by the Appellate Division.

Subsequently, Family Court held a hearing on the petition. The court found that petitioner's regular visitation and consultation on matters of import with respect to the child would serve the child's best interests. Respondent appealed.

Family Court's order was unanimously affirmed (see 123 AD3d 1023, 1023–1027 [2d Dept 2014] ). The Appellate Division determined that, while Domestic Relations Law § 70, as interpreted in Alison D., confers standing to seek custody or visitation only on a biological or adoptive parent, Alison D. does not preclude recognition of standing based upon the doctrine of judicial estoppel. Under that doctrine, the court found, “a party who
assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed” (id. at 1026, 569 N.Y.S.2d 586, 572 N.E.2d 27 [internal quotation marks and citations omitted] ). The Appellate Division agreed with Family Court that the requirements of judicial estoppel had been met: respondent's position in the support proceeding was inconsistent with her position in the visitation proceeding; respondent had won a favorable judgment based on her earlier position; and allowing respondent to maintain an inconsistent position in the visitation proceeding would prejudice petitioner (see id. at 1026–1027, 569 N.Y.S.2d 586, 572 N.E.2d 27). Accordingly, the Appellate Division concluded that respondent was judicially estopped from denying petitioner's standing as a “parent” of the child within the meaning of Domestic Relations Law § 70 (see id. at 1026–1027, 569 N.Y.S.2d 586, 572 N.E.2d 27). We granted respondent leave to appeal (see 26 NY3d 901 [2015]).

II.

Domestic Relations Law § 70 provides:

“Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly” (Domestic Relations Law § 70[a] [emphases added] ). Only a “parent” may petition for custody or visitation under Domestic Relations Law § 70, yet the statute does not define that critical term, leaving it to be defined by the courts.

In Alison D. (77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27), we supplied a definition. In that case, Alison D. and Virginia M. were in a long-term relationship and decided to have a child (see Alison D., 77 N.Y.2d at 655, 569 N.Y.S.2d 586, 572 N.E.2d 27). They agreed that Virginia M. would carry the baby and that they would jointly raise the child, sharing parenting responsibilities (see id.). After the child was born, Alison D. acted as a parent in all major respects, providing financial, emotional and practical support (see id.). Even after the couple ended their relationship and moved out of their shared home, Alison D. continued to regularly visit the child until he was about six years old, at which point Virginia M. terminated contact between them (see id.).

Alison D. petitioned for visitation pursuant to Domestic Relations Law § 70 (see id. at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27). In support of the petition, Alison D. argued that, although Virginia M. was conceded a fit parent, Alison D. nonetheless had standing to seek visitation with the child (see id.). The lower courts dismissed Alison D.’s petition for lack of standing, ruling that only a biological parent—and not a de facto parent—is a legal “parent” with standing to seek visitation under Domestic Relations Law § 70 (see id.; see also Alison D. v. Virginia M., 155 A.D.2d 11, 13–16, 552 N.Y.S.2d 321 [2d Dept 1990] ).

We affirmed the lower courts’ dismissal of Alison D.’s petition for lack of standing (see Alison D., 77 N.Y.2d at 655, 657, 569 N.Y.S.2d 586, 572 N.E.2d 27). We decided that the word “parent” in Domestic Relations Law § 70 should be interpreted to preclude standing for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child’s parent for visitation purposes (see id. at 656–657, 569 N.Y.S.2d 586, 572 N.E.2d 27). Specifically, we held that “a biological stranger to a child who is properly in the custody of his biological mother” has no “standing to seek visitation
with the child under Domestic Relations Law § 70” (id. at 654–655, 569 N.Y.S.2d 586, 572 N.E.2d 27).

We rested our determination principally on the need to preserve the rights of biological parents (see id. at 656–657, 569 N.Y.S.2d 586, 572 N.E.2d 27). Specifically, we reasoned that, “[t]raditionally, in this State it is the child’s mother and father who, assuming fitness, have the right to the care and custody of their child” (id. at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27). We therefore determined that the statute should not be read to permit a de facto parent to seek visitation of a child in a manner that “would necessarily impair the parents’ right to custody and control” (id. at 657, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Additionally, we suggested that, because the Legislature expressly allowed certain non-parents—namely, grandparents and siblings—to seek custody or visitation (see Domestic Relations Law §§ 71–72), it must have intended to exclude de facto parents or parents by estoppel (see Alison D., 77 N.Y.2d at 657, 569 N.Y.S.2d 586, 572 N.E.2d 27). And so, because Alison D. had no biological or adoptive connection to the subject child, she had no standing to seek visitation and “no right to petition the court to displace the choice made by this fit parent in deciding what is in the child’s best interests” (id.).

Judge Kaye dissented on the ground that a person who “stands in loco parentis” should have standing to seek visitation under Domestic Relations Law § 70 (see id. at 657–662, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] ). Observing that the Court’s decision would “fall hardest” on the millions of children raised in nontraditional families—including families headed by same-sex couples, unmarried opposite-sex couples, and stepparents—the dissent argued that the majority had “turn[ed] its back on a tradition of reading section 70 so as to promote the welfare of the children” (id. at 658–660, 569 N.Y.S.2d 586, 572 N.E.2d 27). The dissent asserted that, because Domestic Relations Law § 70 did not define “parent”—and because the statute made express reference to the “best interest of the child”—the Court was free to craft a definition that accommodated the welfare of the child (id.). According to the dissent, well-established principles of equity—namely, “Supreme Court’s equitable powers that complement” Domestic Relations Law § 70—supplied jurisdiction to act out of “concern for the welfare of the child” (id. at 660, 569 N.Y.S.2d 586, 572 N.E.2d 27; see Matter of Bachman v. Mejias, 1 N.Y.2d 575, 581 [1956]; Finlay v. Finlay, 240 N.Y. 429, 433–434 [1925]; Langerman v. Langerman, 303 N.Y. 465, 471 [1952]).

At the same time, Judge Kaye in her dissent recognized that “there must be some limitation on who can petition for visitation. DRL § 70 specifies that the person must be the child’s ‘parent,’ and the law additionally recognizes certain rights of biological and legal parents.... It should be required that the relationship with the child came into being with the consent of the legal or biological parent” (Alison D., 77 N.Y.2d at 661–662, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] [internal citations omitted] ). The dissent also noted that a properly constituted test should likely include other factors as well, to ensure that all relevant interests are protected (see id. at 661–662, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] ). Judge Kaye further stated in the dissent that she would have remanded Alison D. so that the lower court could engage in a two-part inquiry: first, to determine whether Alison D. stood “in loco parentis” under whatever test the Court devised; and then “if so, whether it is in the child’s best interest to allow her the visitation rights she claims” (id. at 662, 569 N.Y.S.2d 586, 572 N.E.2d 27).

In 1991, same-sex partners could not marry in this State. Nor could a biological parent’s unmarried partner adopt the child. As a result, a partner in a same-sex relationship not biologically related to a child was entirely precluded from obtaining standing to seek custody or visitation of that child under our definition of “parent” supplied in Alison D.

Four years later, in Matter of Jacob (86 N.Y.2d 651 [1995] ), we had occasion to decide whether “the unmarried partner of a child’s biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child’s second parent by means of adoption” (id. at 656, 636 N.Y.S.2d 716, 660 N.E.2d 397). We held that the adoptions sought in Matter of Jacob—“one by an unmarried heterosexual couple, the other by the lesbian partner of the child’s mother”—were “fully consistent with the adoption statute” (id.). We reasoned that, while the adoption statute “must be strictly construed,” our
“primary loyalty must be to the statute's legislative purpose—the child's best interest” (id. at 658, 636 N.Y.S.2d 716, 660 N.E.2d 397). The outcome in Matter of Jacob was to confer standing to seek custody or visitation upon unmarried, non-biological partners—including a partner in a same-sex relationship—who adopted the child, even under our restrictive definition of “parent” set forth in Alison D. (id. at 659, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Thereafter, in Matter of Shondel J. v. Mark D., (7 N.Y.3d 320 [2006]), we applied a similar analysis, holding that a “man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment” (id. at 324, 820 N.Y.S.2d 199, 853 N.E.2d 610). We based our decision on “the best interests of the child,” emphasizing “[t]he potential damage to a child's psyche caused by suddenly ending established parental support” (id. at 324, 330, 820 N.Y.S.2d 199, 853 N.E.2d 610).

Despite these intervening decisions that sought a means to take into account the best interests of the child in adoption and support proceedings, we declined to revisit Alison D. when confronted with a nearly identical situation almost 20 years later. Debra H., as did Alison D., involved an unmarried same-sex couple. Petitioner alleged that they agreed to have a child, and to that end, Janice R. was artificially inseminated and bore the child. Debra H. never adopted the child. After the couple ended their relationship, Debra H. petitioned for custody and visitation (Debra H., 14 N.Y.3d at 592–593, 904 N.Y.S.2d 263, 930 N.E.2d 184). We declined to expand the definition of “parent” for purposes of Domestic Relations Law § 70, noting that “Alison D., in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups” (id. at 593, 904 N.Y.S.2d 263, 930 N.E.2d 184).

Nonetheless, in Debra H., we arrived at a different result than in Alison D. Ultimately, we invoked the common law doctrine of comity to rule that, because the couple had entered into a civil union in Vermont prior to the child's birth—and because the union afforded Debra H. parental status under Vermont law—her parental status should be recognized under New York law as well (see id. at 598–601, 904 N.Y.S.2d 263, 930 N.E.2d 184). Seeing no obstacle in New York's public policy or comity doctrine to the recognition of the non-biological mother's standing, we declared that “New York will recognize parentage created by a civil union in Vermont,” thereby granting standing to Debra H. to petition for custody and visitation of the subject child (id. at 600–601, 904 N.Y.S.2d 263, 930 N.E.2d 184).

In a separate discussion, we also “reaffirm[ed] our holding in Alison D.” (id. at 589, 904 N.Y.S.2d 263, 930 N.E.2d 184). We acknowledged the apparent tension in our decision to authorize parentage by estoppel in the support context (see Shondel J., 7 N.Y.3d 320, 820 N.Y.S.2d 199, 853 N.E.2d 610) and yet deny it in the visitation and custody context (see Alison D., 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27), but we decided that this inconsistency did not fatally undermine Alison D. (see Debra H., 14 N.Y.3d at 592–593, 904 N.Y.S.2d 263, 930 N.E.2d 184).

Chief Judge Lippman and Judge Ciparick concurred in the result, agreeing with the majority's comity analysis but asserting that Alison D. should be overruled (see id. at 606–609, 904 N.Y.S.2d 263, 930 N.E.2d 184 [Ciparick, J., concurring]). This concurrence asserted that Alison D. had indeed caused the widespread harm to children predicted by Judge Kaye's dissent (see id. at 606–607, 904 N.Y.S.2d 263, 930 N.E.2d 184). Noting the inconsistency between Alison D. and the Court's ruling in Shondel J., the concurrence concluded that “[s]upport obligations flow from parental rights; the duty to support and the rights of parentage go hand in hand and it is nonsensical to treat the two things as severable” (id. at 607, 904 N.Y.S.2d 263, 930 N.E.2d 184). According to the concurrence, Supreme Court had “inherent equity powers and authority pursuant to Domestic Relations Law § 70 to determine who is a parent and what will serve the child's best interests” (id. at 609, 904 N.Y.S.2d 263, 930 N.E.2d 184). Echoing the dissent in Alison D., and “and taking into consideration the social changes” that occurred since that decision, the concurrence called for a “flexible, multi-factored” approach to determine whether a parental relationship had been established (id. at 608, 904 N.Y.S.2d 263, 930 N.E.2d 184).
A separate concurrence by Judge Smith in that case acknowledged the same social changes and proposed that, in the interest of insuring that “each child begins life with two parents,” an appropriate test would focus on whether “the child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other” (id. at 611, 904 N.Y.S.2d 263, 930 N.E.2d 184). Judge Smith observed that “[e]ach of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced” (id.).

III.


Long before our decision in Alison D., New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child (see Finlay, 240 N.Y. at 433, 148 N.E. 624; Wilcox v. Wilcox, 14 N.Y. 575, 578–579 [1856]; see generally Guardian Loan Co. v. Early, 47 N.Y.2d 515, 520 [1979]; People ex rel. Lemon v. Supreme Court of State of New York, 245 N.Y. 24, 28 [1926]; De Coppet v. Cone, 199 N.Y. 56, 63 [1910] ). Consistent with these broad equitable powers, our courts have historically exercised their “inherent equity powers and authority” in order to determine “who is a parent and what will serve a child’s best interest” (Debra H., 14 N.Y.3d at 609, 904 N.Y.S.2d 263, 930 N.E.2d 184 [Ciparick, J., concurring]; see also N.Y. Const, art VI, § 7[a] ).

Domestic Relations Law § 70 evolved in harmony with these equitable practices. The statute expanded in scope from a law narrowly conferring standing in custody and visitation matters upon a legally separated, resident “husband and wife” pair (L 1909, ch 19) to a broader measure granting standing to “either parent” without regard to separation (L 1964, ch 564). The Legislature made many of these changes to conform to the courts’ preexisting equitable practices (see L 1964, ch 564, § 1; Mem of Joint Legis Comm on Matrimonial and Family Laws, Bill Jacket, L 1964, ch 564 at 6). Tellingly, the statute has never mentioned, much less purported to limit, the court’s equitable powers, and even after its original enactment, courts continued to employ principles of equity to grant custody, visitation or related extra-statutory relief (see People ex rel. Meredith v. Meredith, 272 A.D. 79, 82–90, 69 N.Y.S.2d 462 [2d Dept 1947], affd 297 N.Y. 692 [1947]; Matter of Rich v. Kaminisky, 254 App.Div. 6, 7–9, 3 N.Y.S.2d 689 [1st Dept 1938]; cf. Langerman, 303 N.Y. at 471–472, 104 N.E.2d 857; Finlay, 240 N.Y. at 430–434, 148 N.E. 624).

Departing from this tradition of invoking equity, in Alison D., we narrowly defined the term “parent,” thereby foreclosing “all inquiry into the child’s best interest” in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child (Alison D., 77 N.Y.2d at 659, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] ). And, in the years that followed, lower courts applying Alison D. were “forced to ... permanently sever strongly formed bonds between children and adults with whom they have parental relationships” (Debra H., 14 N.Y.3d at 606, 904 N.Y.S.2d 263, 930 N.E.2d 184 [Ciparick, J., concurring] ). By “limiting their opportunity to maintain bonds that may be crucial to their development,” the rule of Alison D. has “fall[en] hardest on the children” (Alison D., 77 N.Y.2d at 658, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] ).
As a result, in the 25 years since *Alison D.* was decided, this Court has gone to great lengths to escape the inequitable results dictated by a needlessly narrow interpretation of the term “parent.” Now, we find ourselves in a legal landscape wherein a non-biological, non-adoptive “parent” may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding (*Shondel J.*, 7 N.Y.3d 320, 820 N.Y.S.2d 199, 853 N.E.2d 610), yet denied standing to seek custody or visitation (*Alison D.*, 77 N.Y.2d at 655, 569 N.Y.S.2d 586, 572 N.E.2d 27). By creating a disparity in the support and custody contexts, *Alison D.* has created an inconsistency in the rights and obligations attendant to parenthood. Moreover, *Alison D.*’s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court’s holding in *Obergefell v. Hodges* (576 U.S. ———, 135 S.Ct. 2584 [2015] ), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.

Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child (see *Alison D.*, 77 N.Y.2d at 656, 569 N.Y.S.2d 586, 572 N.E.2d 27). By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court’s determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.

The Supreme Court has emphasized the stigma suffered by the “hundreds of thousands of children [who] are presently being raised by [same-sex] couples” (*Obergefell*, 135 S Ct at 2600–2608). By “fixing biology as the key to visitation rights” (*Alison D.*, 77 N.Y.2d at 657–658, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] ), the rule of *Alison D.* has inflicted disproportionate hardship on the growing number of nontraditional families across our State. At the time *Alison D.* was decided, estimates suggested that “more than 15.5 million children [did] not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent” (id.). Demographic changes in the past 25 years have further transformed the elusive concept of the “average American family” (*Troxel v. Granville*, 530 U.S. 57, 63–64 [2000] ); recent census statistics reflect the large number of same-sex couples residing in New York, and that many of New York’s same-sex couples are raising children who are related to only one partner by birth or adoption (see Gary J. Gates & Abigail M. Cooke, The Williams Institute, *New York Census Snapshot: 2010 at 1–3*).


[6] We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children (see *Alison D.*, 77 N.Y.2d at 656–657, 569 N.Y.S.2d 586, 572 N.E.2d 27; *Troxel v. Granville*, 530 U.S. 57, 65 [2000] ). For certainly, “the interest of parents in the care, custody and control of their children [ ] is perhaps the oldest of the fundamental liberty interests,” and any infringement on that right “comes with an obvious cost” (*Troxel*, 530 U.S. at 64–65). But here we do not consider whether to allow a third party to contest or infringe on those
rights; rather, the issue is who qualifies as a “parent” with coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical.

While “parents and families have fundamental liberty interests in preserving” intimate family-like bonds, “so, too, do children have these interests” (Troxel, 530 U.S. at 88–89 [Stevens, J., dissenting] ), which must also inform the definition of “parent,” a term so central to the life of a child. The “bright-line” rule of Alison D. promotes the laudable goals of certainty and predictability in the wake of domestic disruption (Debra H., 14 N.Y.3d at 593–94, 904 N.Y.S.2d 263, 930 N.E.2d 184). But bright lines cast a harsh light on any injustice and, as predicted by Judge Kaye, there is little doubt by whom that injustice has been most finely felt and most finely perceived (see Alison D., 77 N.Y.2d at 658, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting] ). We will no longer engage in the “deft legal maneuvering” necessary to read fairness into an overly-restrictive definition of “parent” that sets too high a bar for reaching a child's best interest and does not take into account equitable principles (see Debra H., 14 N.Y.3d at 607–08, 904 N.Y.S.2d 263, 930 N.E.2d 184 [Ciparick, J., concurring] ). Accordingly, we overrule Alison D.

Our holding that Domestic Relations Law § 70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation requires us to specify the limited circumstances in which such a person has standing as a “parent” under Domestic Relations Law § 70 (see Alison D., 77 N.Y.2d at 661, 569 N.Y.S.2d 586, 572 N.E.2d 27 [Kaye, J., dissenting]; Troxel, 530 U.S. at 67). Because of the fundamental rights to which biological and adoptive parents are undeniably entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be, as Judge Kaye acknowledged in her dissent in Alison D., appropriately narrow.

Petitioners and some of the amici urge that we endorse a functional test for standing, which has been employed in other jurisdictions that recognize parentage by estoppel in the custody and/or visitation context (see In re Custody of H.S.H–K., 193 Wis.2d 649, 694–695 [1995] [visitation only]; see also Conover v. Conover, —— Md. ———, 141 A.3d 31, 2016 WL 3633062, *14 [MD 2016] [collecting cases from other jurisdictions that have adopted the functional test in contexts of custody or visitation] ). The functional test considers a variety of factors, many of which relate to the post-birth relationship between the putative parent and the child. Amicus Sanctuary for Families proposes a different test that hinges on whether petitioner can prove, by clear and convincing evidence, that a couple “jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents” (Sanctuary for Families brief, at 39).

Although the parties and amici disagree as to what test should be applied, they generally urge us to adopt a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital “parents” who are raising children. We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered.

Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proven by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.

Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that, where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner
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has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and if so, what factors a petitioner must establish to achieve standing based on equitable estoppel is a matter left for another day, upon a different record.

Additionally, we stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.

V.

We conclude that a person who is not a biological or adoptive parent may obtain standing to petition for custody or visitation under Domestic Relations Law § 70(a) in accordance with the test outlined above.

In Brooke B., our decision in Alison D. prevented the courts below from determining standing because the petitioner was not the biological or adoptive parent of the child. That decision no longer poses any obstacle to those courts' consideration of standing by equitable estoppel here, if Brooke B. proves by clear and convincing evidence her allegation that a pre-conception agreement existed. Accordingly, in Brooke B., the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

In Estrellita A., the courts below correctly resolved the question of standing by recognizing petitioner's standing based on judicial estoppel. In the child support proceeding, respondent obtained an order compelling petitioner to pay child support based on her successful argument that petitioner was a parent to the child. Respondent was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation. Under the circumstances presented here, Family Court properly invoked the doctrine of judicial estoppel to recognize petitioner's standing to seek visitation as a “parent” under Domestic Relations Law § 70(a). Accordingly, in Estrellita A., the order of the Appellate Division should be affirmed, without costs.

PIGOTT, J. (concurring).

While I agree with the application of judicial estoppel in Estrellita A., and that the Appellate Division's decision in Brooke B. should be reversed and the case remitted to Supreme Court for a hearing, I cannot join the majority's opinion overruling Alison D. The definition of “parent” that we applied in that case was consistent with the legislative history of Domestic Relations Law § 70 and the common law, and despite several opportunities to do so, the Legislature has never altered our conclusion. Rather than craft a new definition to achieve a result the majority perceives as more just, I would retain the rule that parental status under New York law derives from marriage, biology or adoption and decide Brooke B. on the basis of extraordinary circumstances. As we have said before, “any change in the meaning of ‘parent’ under our law should come by way of legislative enactment rather than judicial revamping of precedent” (Debra H. v. Janice R., 14 N.Y.3d 576, 596 [2010] ).

It has long been the rule in this State that, absent extraordinary circumstances, only parents have the right to seek custody or visitation of a minor child (see Domestic Relations Law § 70 (“Where a minor child is residing within this state, either parent may apply to the ... court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court ... may award the natural guardianship, charge and custody of such child to either parent”))). The Legislature has not seen the need to define that term, and in the absence of a statutory definition, our Court has consistently interpreted it in the most obvious and colloquial sense to mean a child's natural parents or parents by adoption (see e.g., People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 542 [1952] [“No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person”]; People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 470 [1953]; see also Domestic Relations Law § 110 [defining adoption as a legal act whereby an adult acquires the rights and responsibilities with respect to a minor]. Thus, in Ronald FF. v. Cindy GG., we held that a man
who lacked biological or adoptive ties to a child born out of wedlock could not interfere with a fit biological mother's right to determine who may associate with her child because he was not a “parent” within the meaning of Domestic Relations Law § 70 (70 N.Y.2d 141, 142 [1987]).

We applied the same rule to a same-sex couple in Alison D. v. Virginia M., holding that a biological stranger to a child who neither adopted the child nor married the child’s biological mother before the child’s birth lacked standing to seek visitation (77 N.Y.2d 651, 656–657 [1991] ). The petitioner in that case conceded she was not the child’s “parent” within the meaning of Domestic Relations Law § 70 but argued that her relationship with the child, as a nonparent, entitled her to seek visitation over the objection of the child’s indisputably fit biological mother. Framed in those terms, the answer was easy: the petitioner's concession that she was not a parent of the child, coupled with the statutory language in DRL § 70 “giv[ing] parents the right to bring proceedings to ensure their proper exercise of [a child’s] care, custody and control,” deprived the petitioner of standing to seek visitation (id. at 657, 569 N.Y.S.2d 586, 572 N.E.2d 27 [emphasis in original]).

Notwithstanding the fact that it may be “beneficial to a child to have continued contact with a nonparent” in some cases (id.), we declined to expand the word “parent” in section 70 to include individuals like the petitioner who were admittedly nonparents but who had developed a close relationship with the child. Our reasoning was that, where the Legislature had intended to allow other categories of persons to seek visitation, it had expressly conferred standing on those individuals and given courts the power to determine whether an award of visitation would be in the child’s best interest (see id.). Specifically, the Legislature had previously provided that “[w]here circumstances show that conditions exist which equity would see fit to intervene,” a brother, sister or grandparent of a child may petition to have such child brought before the court to “make such directions as the best interest of the child may require, for visitation rights for such brother or sister [or grandparent or grandparents] in respect to such child” (Domestic Relations Law §§ 71, 72[1]). The Legislature had also codified the common law marital presumption of legitimacy for children conceived by artificial reproduction, so that any child born to a married woman by means of artificial insemination was deemed the legitimate, birth child of both spouses (see Domestic Relations Law § 73[1]). In the absence of further legislative action defining the term “parent” or giving other nonparents the right to petition for visitation, we determined that a non-biological, non-adoptive parent who had not married the child’s biological mother lacked standing under the law (77 N.Y.2d at 657, 569 N.Y.S.2d 586, 572 N.E.2d 27).

Our Court reaffirmed Alison D.’s core holding just six years ago in Debra H. v. Janice R. (14 N.Y.3d 576 [2010] ). Confronting many of the same arguments petitioners raise in these appeals, we rejected the impulse to judicially enlarge the term “parent” beyond marriage, biology or adoption. We observed that in the nearly twenty years that had passed since our decision in Alison D., other states had legislatively expanded the class of individuals who may seek custody and/or visitation of a child (see id. at 596–597, 904 N.Y.S.2d 263, 930 N.E.2d 184, citing Ind Code Ann §§ 31–17–2–8.5, 31–9–2–35.5; Colo Rev Stat Ann § 14–10–123; Tex Fam Code Ann § 102.003[a] [9]; Minn Stat Ann § 257C.08[4]; DC Code Ann § 16–831.01[1]; Or Rev Stat Ann § 109.119[1]; Wyo Stat Ann § 20–7–102[a] ). Our State had not—and has not, to this day. In the face of such legislative silence, we refused to undertake the kind of policy analysis reserved for the elected representatives of this State, who are better positioned to “conduct hearings and solicit comments from interested parties, evaluate the voluminous social science research in this area ... weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state” (id. at 597, 904 N.Y.S.2d 263, 930 N.E.2d 184).

The takeaway from Debra H. is that Alison D. didn't break any new ground or retreat from a broader understanding of parenthood. It showed respect for the role of the Legislature in defining who a parent is, and held, based on the legislative guidance before us, that the term was intended to include a child's biological mother and father, a child's adoptive parents, and, pursuant to a statute enacted in 1974, the spouse of a woman to whom a child was born by artificial insemination. Although many have complained that this standard “is formulaic, or too rigid, or out of step with the times” (id. at 594, 904 N.Y.S.2d 263, 930 N.E.2d 184), such criticism is properly directed at the Legislature, who in the 117 years since DRL § 70 was
enacted has chosen not to amend that section or define the term “parent” to include persons who establish a loving parental bond with a child, though they lack a biological or adoptive tie.

To be sure, there was a time when our interpretation of “parent” put same-sex couples on unequal footing with their heterosexual counterparts. When Alison D. was decided, for example, it was impossible for both members of a same-sex couple to become the legal parents of a child born to one partner by artificial insemination, because same-sex couples were not permitted to marry or adopt. Our Court eventually held that the adoption statute permitted unmarried same-sex partners to obtain second-parent adoptions (see Matter of Jacob, 86 N.Y.2d 651, 656 [1995]), but it was not until 2011 that the Legislature put an end to all sex-based distinctions in the law (see Domestic Relations Law § 10–a).

The Legislature’s passage of the Marriage Equality Act granted same-sex couples the right to marry and made clear that “[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage ... shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex” (Domestic Relations Law § 10–a[2]). Having mandated gender neutrality with respect to every legal benefit and obligation arising from marriage, and eliminated every sex-based distinction in the law and common law, the Legislature has formally declared its intention that “[s]ame sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage” (L 2011, ch 95 § 2).

Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disqualified. Today, a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple’s sexual orientation (Matthew Bender, 2–22 N.Y. Civil Practice: Family Court Proceedings § 22.08[1]; Laura WW. v. Peter WW., 51 A.D.3d 211, 217–218, 856 N.Y.S.2d 258 [3d Dept 2008] [holding that a child born to a married woman is the legitimate child of both parties and that, absent evidence to the contrary, the spouse of the married woman is presumed to have consented to such status]; Matter of Kelly S. v. Farah M., 139 AD3d 90, 103–104 [2d Dept 2016] [finding that the failure to strictly comply with the requirements of Domestic Relations Law § 73 did not preclude recognition of a biological mother’s former same-sex partner as a parent to the child conceived by artificial insemination during the couple’s domestic partnership]; Wendy G–M. v. Erin G–M., 45 Misc.3d 574, 593, 985 N.Y.S.2d 845 [Sup Ct Monroe County 2014] [applying the marital presumption to a child born of a same-sex couple married in Connecticut] ). And if two individuals of the same sex choose not to marry but later conceive a child by artificial insemination, the non-biological parent may now adopt the child through a second-parent adoption.

The Marriage Equality Act and Matter of Jacob have erased any obstacles to living within the rights and duties of the Domestic Relations Law. The corollary is, absent further legislative action, an unmarried individual who lacks a biological or adoptive connection to a child conceived after 2011 does not have standing under DRL § 70, regardless of gender or sexual orientation. Unlike the majority, I would leave it to the Legislature to determine whether a broader category of persons should be permitted to seek custody or visitation under the law. I remain of the view, as I was in Debra H., that we should not “preempt our Legislature by sidestepping section 70 of the Domestic Relations Law as presently drafted and interpreted in Alison D. to create an additional category of parent ... through the exercise of our common-law and equitable powers” (14 N.Y.3d at 597, 904 N.Y.S.2d 263, 930 N.E.2d 184).

I do agree, however, with the results the majority has reached in these cases. The Marriage Equality Act did not benefit the same-sex couples before us in these appeals, who entered into committed relationships and chose to rear children before they were permitted to exercise what our Legislature and the Supreme Court of the United States have now declared a fundamental human right (see generally Obergefell v. Hodges, 135 S.Ct. 2584 [2015] ). That Brooke and Elizabeth did not have the same opportunity to marry one another before they decided to have a family means that the couple (and the child born to them through artificial insemination) did not
receive the same legal protection our laws would have provided a child born to a heterosexual couple under similar circumstances. That is, the law did not presume—as it would have for a married heterosexual couple—that any child born to one of the women during their relationship was the legitimate child of both.

In my view, this inequality and the substantial changes in the law that have occurred since our decision in Debra H. constitute extraordinary circumstances that give these petitioners standing to seek visitation (see Ronald FF., 70 N.Y.2d at 144, 517 N.Y.S.2d 932, 511 N.E.2d 75 [barring the State from interfering with a parent’s “fundamental right ... to choose with whom her child associates” unless it “shows some compelling State purpose which furthers the child's best interest”] ). Namely, each couple agreed to conceive a child by artificial insemination at a time when they were not allowed to marry in New York and intended to raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right. On the basis of these facts, I would remit the matter in Brooke B. to Supreme Court for a hearing to determine whether it would be in the child's best interest to have regular visitation with petitioner. As the majority correctly concludes, the petitioner in Estrellita A. has standing by virtue of judicial estoppel (majority op at 28).

For Case No. 91: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein.

For Case No. 92: Order affirmed, without costs.

Chief Judge DiFIORE and Judges RIVERA, STEIN and GARCIA concur.

Judge PIGOTT concurs in a separate concurring opinion.

Judge FAHEY took no part.

All Citations

Footnotes
1 The parties in both cases before us dispute the relevant facts. Given the procedural posture of these cases, our summary of the facts is derived from petitioners' allegations in court filings and relevant decisions of the courts below.
2 Petitioner appealed but, citing her financial condition, proceeded without an attorney. Her appeal was subsequently dismissed.
3 We note that by the use of the term “either,” the plain language of DRL § 70 clearly limits a child to two parents, and no more than two, at any given time.
4 Furthermore, in Matter of H.M. v. E.T. (14 N.Y.3d 521 [2010] ), for purposes of child support proceedings, we construed Family Ct Act § 413[1][a] in a manner consistent with principles of equitable estoppel by interpreting the term “parents” to include a biological parent's former same-sex partner, notwithstanding the lack of a biological or adoptive connection to the child (H.M., 14 N.Y.3d at 536–527, 904 N.Y.S.2d 285, 930 N.E.2d 206).
New York’s Highest Court Expands Definition of Parenthood

By ALAN FEUER   AUG. 30, 2016

Expanding the definition of what it means to be a parent, especially for same-sex couples, the New York State Court of Appeals ruled on Tuesday that a caretaker who is not related to, or the adoptive guardian of, a child could still be permitted to ask for custody and visitation rights.

The ruling emerged from a dispute between a gay couple from Chautauqua County, known in court papers only as Brooke S.B. and Elizabeth A. C.C.

Susan L. Sommer, Brooke’s lawyer and the national director of constitutional litigation at Lambda Legal, called the decision a “landmark in New York” and said it brought the state “into line with the mainstream in the United States in recognizing that children frequently have a second parent not related to them by blood, adoption or marriage.”

Ms. Sommer added, “The state’s highest court is recognizing the diversity of New York families and reversing a bitter precedent that has kept children from their parents.”

Brooke and Elizabeth began their relationship in 2006 and announced their engagement the following year, even though same-sex marriage was not permitted
in New York at the time and they did not have the resources to travel to a state where it was allowed.

In 2008, Elizabeth became pregnant with their child through artificial insemination. Though Brooke had no legal or biological ties to the child, a boy, she maintained a close relationship with him for years, cutting his umbilical cord at birth, giving him her last name and raising him jointly with Elizabeth.

In 2010, the couple ended their relationship, court papers said, and three years later, Elizabeth tried to cut off Brooke’s contact with the boy. Brooke sued for custody and visitation privileges, but was turned down by a lower court, which found the lawsuit “heartbreaking,” but ruled nonetheless that legal precedent under a New York case called the Matter of Alison D. v. Virginia M. did not define a nonadoptive, nonbiological caretaker as a parent.

In its ruling on Tuesday, the appeals court overturned that earlier case, writing that “the definition of ‘parent’ established by this court 25 years ago in Alison D. has become unworkable when applied to increasingly varied familial relationships.” It further held that “where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the nonbiological, nonadoptive partner has standing to seek visitation and custody.”

More broadly, the court noted that “Alison D.’s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable,” particularly in light of New York’s law allowing gay marriage, which was passed in 2011, and the United States Supreme Court’s landmark ruling last year granting same-sex couples the right to marry.

“The court clearly heard us,” said Eric Wrubel, a lawyer who argued Brooke and Elizabeth’s case on behalf of the child, whose welfare was central in the appellate decision. “They clearly see that the bright lines of biology and adoption just don’t fit today with marriage equality. They understand that couples and families these days are not just mom and dad, and husband and wife.”

Elizabeth’s lawyer, Sheryl Bjork, could not be reached for comment.
The appeals court accompanied its ruling in the case of Brooke and Elizabeth with a decision in a similar dispute between a biological mother of a child who sued her former partner, the nonbiological mother, for child support. After paying child support, the nonbiological mother asked to be granted custody and visitation rights. The court agreed with her request.

Most states, including ones that often are considered conservative, like Oklahoma and South Carolina, already permit de facto parents to ask for custody and visitation rights. In bringing New York up to speed with many other states, the appeals court cited a growing body of social science research that, as it put it, “reveals the trauma children suffer as a result of separation from a primary attachment figure — such as a de facto parent — regardless of that figure’s biological or adoptive ties to the children.”

Nancy D. Polikoff, a professor at the American University Washington College of Law, said, “We’ve seen this all over the country, even in states that might be called gay unfriendly.”

“Many courts have simply said that this person looks like a parent and you cannot just eliminate them from the child’s life,” added Professor Polikoff, who has written briefs for similar cases in the past. “To have New York, where there are so many same-sex couples, be an outlier was a problem. But this catches New York up.”

A version of this article appears in print on August 31, 2016, on Page A17 of the New York edition with the headline: New York Court Expands Definition of Parenthood.
A Complex Case Tests New York State’s Expanded Definition of Parenthood

By SHARON OTTERMAN  OCT. 18, 2016

The two women avoided each other’s gaze in the compact courtroom last week, separated by their lawyers, file boxes and three-inch binders filled with old emails and documents. Somewhere in all the paper was the answer to a question that is being tested as never before in New York State: Were both women the parents of the energetic 6-year-old boy they loved? Or just one of them?

Deciding who is a parent in New York used to be a relatively simple matter. A parent was either biologically related to the child or had legally adopted the child. But in State Supreme Court in Manhattan, the first custody case is underway to test a newly expanded definition of parentage, as handed down by the state’s highest court in August.

The new definition is aimed at accounting for the complexity of nontraditional families, including same-sex couples. Now, to determine if someone is a parent, judges can consider whether a couple intended to have and raise a child together, among other factors. So in the courtroom in Manhattan, Circe Hamilton, 44, and her former partner Kelly Gunn, 52, are battling over whether Ms. Gunn should be
recognized as a parent to the boy, Abush, whom Ms. Hamilton adopted from Ethiopia in 2011.

In a city filled with complicated relationships, this one stands out. In the original adoption paperwork, completed in early 2009, the British-born Ms. Hamilton appears as a single woman with a boyfriend, and Ms. Gunn is described as a roommate. But that was because Ethiopia does not allow gay couples to adopt, both women acknowledge. In reality, the two women, who began dating in 2004, had planned to raise the child together, and their application reflected some joint assets. Ms. Gunn said her intent was to eventually co-adopt the child in a second-parent adoption proceeding.

They broke up in December 2009, and Ms. Hamilton decided to move forward with the adoption alone, she testified. Despite the breakup, the women remained close. When Ms. Hamilton went to Ethiopia to get Abush, Ms. Gunn met her and the boy in London to fly together to Manhattan. When Ms. Hamilton, a freelance photographer, returned to her tiny apartment in the West Village, she said she was overwhelmed by the challenges of parenting. Ms. Gunn, who ran a successful design company, stepped in, babysitting regularly and attending Abush’s doctors’ appointments, and briefly employing Ms. Hamilton at her firm, according to court testimony.

The women continued to occasionally stay together in a house they had once jointly owned on Fire Island. Abush had a crib there, and to Ms. Hamilton, these gestures represented the generosity of a trusted friend, she said recently. “She was someone I had loved, whom I respected,” she said of Ms. Gunn. “I had no reason not to trust a friend offering help.”

But to Ms. Gunn, the relationship with Abush was much more. She now describes her situation as analogous to that of a couple who had broken up during a biological pregnancy. It was as if the adoption agreement was a conception, conferring upon the child both her and Ms. Hamilton’s DNA. “He wouldn’t have come into our lives without me,” Ms. Gunn said. “He is a product of our mutual intention, our mutual efforts.”
The minutia of their daily lives in recent years — who took Abush to his play dates, his school appointments, his sports classes — are now pieces of a puzzle in a trial that has already had 15 days of testimony, with at least a week to go. The judge must decide whether Ms. Gunn’s involvement in Abush’s life amounts to her being a parent, and if it gives her standing to sue in a second hearing for custody and visitation.

Justice Frank P. Nervo, who is presiding over the case, has come up with questions to guide the lawyers. How formalized was the relationship between Ms. Gunn and Abush? What did he think Ms. Gunn’s role was? Did Ms. Gunn assume the duties of a parent? What would be the impact on Abush if their relationship ended?

Almost all states now legally recognize de facto parenthood to account for the realities of modern families. In expanding its parenthood definition, the New York State Court of Appeals said in its Aug. 30 ruling that it was seeking a definition that provided “equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.”

Parents without adoptive or biological ties can now sue for the right to see children after couples break up, hopefully protecting them from the trauma of forced separation from a parent. “Now the legal parent cannot unilaterally cut the other person out of their life,” said Nancy D. Polikoff, a professor at the American University Washington College of Law.

Yet Abush’s case is a tough first test of the state’s new rule because its facts are unusually complicated and disputed by the involved parties, Ms. Polikoff said.

Ms. Hamilton said she made clear that she intended to continue with the adoption alone, and that Ms. Gunn “told every single person in her life that she didn’t want to be a mother.”

Ms. Gunn disputes that. She said she thought of the breakup as a separation and that she also raised Abush, including regular overnight stays at her home each week. “We are still some kind of family,” she said she remembered thinking after Ms. Hamilton moved out. “We are just going to look different than we thought.”
Ms. Gunn said she agreed in 2012 to take the title of godmother to honor her role in Abush’s life. “Despite my own sadness and regret over not being one of Abush’s adoptive parents, I long ago made peace with my role as a godmother,” she wrote to Ms. Hamilton in a 2015 email. “I have never inferred or articulated to Abush, or to anyone, that I am his mother.”

Ms. Gunn now says that those statements were influenced by her fear of losing access to Abush, who calls her Kee. Ms. Gunn’s lawyers argue it is not the title, but the actual role she played that should be considered.

This summer, Ms. Hamilton announced that she wanted to move back to her native London with Abush. Ms. Gunn responded by saying she would move, too. “I need you not to follow us there. This is mine and Abush’s journey,” Ms. Hamilton said she told her, adding that she did not want Ms. Gunn to visit London for six months to give them time to settle in. She said they would be back to New York in October to visit.

But Ms. Gunn could not fathom the thought of losing access to Abush. In late August, Ms. Gunn took him to Fire Island for a goodbye trip. A photograph from the ferry there shows him hugging her and clinging to her chest. Two days later, Ms. Gunn surprised Ms. Hamilton with the lawsuit.

A judge ordered Ms. Hamilton to appear in court on Sept. 1 with 90 minutes’ notice, not enough time to get a lawyer. “I am the sole parent; I have the sole custody for my child,” she told the judge, according to a transcript. But Nancy Chemtob, Ms. Gunn’s lawyer, argued that Ms. Hamilton was improperly trying to leave the country with a child both women parented.

The judge ordered Abush’s passport confiscated until the matter is resolved. Ms. Gunn was granted time with the boy twice a week until the court rules.

Ms. Hamilton said she is in shock, and feels Ms. Gunn is trying to rewrite history. “It’s the most terrifying place to be,” she said.

“You can’t wish or will yourself to be a parent against the objections of the legal parent,” Bonnie Rabin, one of Ms. Hamilton’s lawyers, said of Ms. Gunn. “She is
trying to will herself into this intact family.”

But Ms. Gunn said she could do nothing else; she had promised a little boy she loves to be involved in his life, and does not understand why this parenting situation has to be either-or.

“I realized I could never look Abush in the eyes again if I don’t fight for him,” Ms. Gunn said. “He should be able to have the two people who raised him and loved him be with him, without having to fear losing one of us.”

A version of this article appears in print on October 19, 2016, on Page A17 of the New York edition with the headline: A Complicated Case Tests the State’s Expanded Definition of Parenthood.
When the Law Says a Parent Isn’t a Parent

It is easy to interpret the popularity of a network television series like “Modern Family” as proof that we have mainstreamed the various and sweeping ways domestic life has reshaped itself over the past two decades. A nation of squares would not embrace a comedy about a badly dressed, middle-aged gay couple raising an adopted Vietnamese baby, we tell ourselves, no matter what they might say in Copenhagen or Berlin.

Gay rights are moving forward; single women now account for 41 percent of all births. Americans build caring families with lovers, friends and neighbors; from one-night stands and anonymous providers of genetic material. And yet, even in a place as progressive as New York, the legal system has been slow to synchronize to these altered realities.

It is hard to imagine anyone experiencing this more viscerally right now than a man named Jonathan Sporn, a 54-year-old pharmaceuticals executive living on the Upper West Side, who in a sense has fallen prey to a system that excessively privileges the conventional family models from which there seems to be a growing exodus.

According to a custody petition Dr. Sporn filed in Manhattan Supreme Court last month, he and his girlfriend, Leann Leutner, had a baby boy — Lincoln Amory Aurelian Sporn Leutner — last July, with the help of in vitro fertilization. The couple had issues conceiving but
found success with the use of an anonymous sperm donor. Dr. Sporn and Ms. Leutner, both of whom had divorced previous partners, were not married. But they had lived together since 2010 and were deeply committed to starting a family.

Then in mid-December, Ms. Leutner, a lawyer at Simpson Thacher & Bartlett, left with Lincoln for New Jersey, where a few days before the end of the year she got a new apartment. On New Year’s Day, she committed suicide. Her death, according to the petition, followed previous attempts to take her own life and a long history of psychological difficulty made worse by postpartum depression. Her departure for New Jersey had been preceded by a stay at Mount Sinai for psychiatric treatment. Ms. Leutner left the hospital prematurely, the petition states, against Dr. Sporn’s judgment, assisted by a friend.

Ever since his mother’s death, the baby has been in the custody of child protective services. He is currently in foster care in New York City, even though Dr. Sporn desperately wants him returned home and Ms. Leutner’s sister, Susan Sylvester, who lives in Illinois, is also seeking custody.

How could such a strange state of affairs have come to pass? In a proceeding on Tuesday, Justice Laura E. Drager acknowledged that mandated visits to both homes determined that either would be suitable for Lincoln. She also said it was in the best interest of the child, and the city, to settle the matter quickly. And yet, Lincoln technically occupies the Dickensian status of “destitute,” a term new to New York State family statute pertaining to children who have no known parents. The next hearing on the child’s fate is scheduled for March.

Dr. Sporn’s petition offers a moving portrait of his investment in fatherhood, outlining the joy he took in his son’s birth, the willingness with which he changed diapers and bathed the baby. He found himself falling “deeper and deeper in love” with the child. “I looked forward to his cries in the night just to have another opportunity to hold this child in my arms and soothe him back to sleep,” he says in court documents.

But from the perspective of the law, a parent in Dr. Sporn’s situation is effectively not a parent at all. He was not married to Lincoln’s mother. He has no blood relationship to the child. And he did not take steps to legally adopt him after his birth.

The law doesn’t reflexively recognize the role you have played, or the obvious parental intent that attaches to anyone who has gone to the trouble to have a child with assisted reproductive technology, or the number of times you’ve performed 3 a.m. feedings. Dr. Sporn’s case resembles the kind gay parents frequently find themselves in when they split up: a mother or a father who is not biologically related to the child typically has a difficult time gaining recognition as a parent in court if formal adoption proceedings haven’t already been started.

Legal precedent itself is confusing. A few years ago, Susan Sommer, the director of constitutional litigation at Lambda Legal, won a case for a client who sought to be regarded as a legal parent to a child, not genetically her own, whom she had with a female partner. The couple previously had a civil union in Vermont, and the court in New York agreed to comply with Vermont law regarding parental rights. But the decision did not overtly overturn a New York precedent, more than 20 years old, that determined a lesbian mother unrelated to her child was a legal stranger. Yet genetics aren’t always paramount either. In a 2006 New York City case, a man was helping to raise a child he thought was
his. After it was revealed that another man was the biological father, he was still held responsible for child support.

“There was a time when being ‘illegitimate’ afflicted a whole array of legal disabilities on a child,” Ms. Sommer said. “The law had to, as a constitutional matter, adjust.” And it started to: a series of United States Supreme Court cases in the 1960s and ’70s sought to protect children from disadvantage if their parents were unmarried.

But there is still much ground to be covered. We’re watching “Modern Family,” but certain dimensions of the legal system have yet to change the channel from the era of black and white.

E-mail: bigcity@nytimes.com

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Executive Summary

This research brief analyzes multiple data sources to provide a demographic portrait of LGBT parenting in the United States. Main findings from the report include:

- An estimated 37% of LGBT-identified adults have had a child at some time in their lives.
- An estimated 3 million LGBT Americans have had a child and as many as 6 million American children and adults have an LGBT parent.
- Among those under age 50 who are living alone or with a spouse or partner, nearly half of LGBT women (48%) are raising a child under age 18 along with a fifth of LGBT men (20%).
- More than 125,000 same-sex couple households (19%) include nearly 220,000 children under age 18.
  - More than 111,000 same-sex couples are raising an estimated 170,000 biological, step, or adopted children.
  - Same-sex couples who consider themselves to be spouses are more than twice as likely to be raising biological, step, or adopted children when compared to same-sex couples who say that they are unmarried partners (31% versus 14%, respectively).
  - Same-sex couples raising children are four times more likely than their different-sex counterparts to be raising an adopted child. An estimated 16,000 same-sex couples are raising more than 22,000 adopted children in the US.
  - Same-sex couples are six times more likely than their different-sex counterparts to be raising foster children. Approximately 2,600 same-sex couples are raising an estimated 3,400 foster children in the US.
  - More than a quarter of same-sex couples raising children (25.6%) include children identified as grandchildren, siblings, or other children who are related or unrelated to one of the spouses or partners. Approximately 32,000 same-sex couple households include more than 48,000 such children.
- Same-sex couple parents and their children are more likely to be racial and ethnic minorities.
  - An estimated 39% of individuals in same-sex couples who have children under age 18 in the home are people of color, compared to 36% of those in different-sex couples who are non-White.
  - Among children under 18 living with same-sex couples, half (50%) are non-White compared to 41% of children living with different-sex couples.
- Childrearing among same-sex couples is most common in Southern, Mountain West, and Midwest regions of the country. States with the highest proportions of same-sex couples raising biological, adopted or step children include Mississippi (26%), Wyoming (25%), Alaska (23%), Idaho (22%), and Montana (22%).
- LGBT individuals and same-sex couples raising children evidence some economic disadvantage.
  - Single LGBT adults raising children are three times more likely than comparable non-LGBT individuals to report household incomes near the poverty threshold.
  - Married or partnered LGBT individuals living in two-adult households with children are twice as likely as comparable non-LGBT individuals to report household incomes near the poverty threshold.
  - The median annual household income of same-sex couples with children under age 18 in the home is lower than comparable different-sex couples ($63,900 versus $74,000, respectively).
Introduction
This research brief offers analyses from several data sources to provide a demographic portrait of lesbian, gay, bisexual and transgender (LGBT) parenting in the United States. Data sources include the 2008/2010 General Social Survey, the Gallup Daily Tracking Survey, Census 2010, and the Census Bureau’s 2011 American Community Survey (ACS). Details on the data sources are provided in the Methodology section.

How many LGBT people have ever had a child?
Analyses of the 2008/2010 General Social Survey (GSS) estimate that 37% of lesbian, gay, or bisexual (LGB) identified individuals have had a child. A similar proportion of transgender respondents (38%) in the National Transgender Discrimination Survey (NTDS) indicated that they were parents.1

Census 2010 tabulations find that there are nearly 235 million adults age 18 and older in the US and data from the Gallup Daily Tracking Survey show that an estimated 3.5% of adults in the US self-identify as LGBT. This implies that there are more than 8.2 million LGBT-identified adults in the US. Applying the parenting figures from the GSS and NTDS data implies that an estimated 3 million LGBT individuals have likely had a child (see Figure 1).

The GSS data also show that, on average, LGB individuals who have had children report having two children. If this is also true for transgender individuals, it means that as many as 6 million American children and adults have an LGBT parent. This implies that approximately 2% of Americans have an LGBT-identified parent.

How many LGBT people are parenting young children?
Gallup Daily Tracking Survey data only provide information about the presence of children under 18 in the home instead of actual parenting status. To assess the likelihood of parenting among LGBT and non-LGBT individuals, these next analyses consider comparisons among those most likely to be in a parental role with any children in the household: men and women age 50 or younger who are living alone or with a spouse or partner.

The data show that among this group, 35% are raising a child under age 18. This holds true for nearly half of the LGBT women (48%) in the group and a fifth of the LGBT men (20%). This compares to approximately 70% of comparable non-LGBT men and women (see Figure 2).

Figure 2. % LGBT individuals and same-sex couples with any children under age 18 in the home, by sex
Gallup Daily Tracking Survey, June-Sept 2012
2011 American Community Survey

How many same-sex couples are raising children?
Estimates from Census 2010 suggest that there are nearly 650,000 same-sex couples living in the US. Data from the 2011 ACS show that an estimated 19% of same-sex couple households include children under age 18. This is true for 27% of female couples and nearly 11% of male couples.

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1 GSS respondents are asked, “How many children have you ever had? Please count all that were born alive at any time (including any you had from a previous marriage).” The NTDS figure is based on multiple questions about having and parenting children.
On average, same-sex couple households with children under age 18 include 1.75 children. This means that there are approximately 125,000 same-sex couples raising nearly 220,000 children. Approximately 3 in a thousand children (0.3%) in the US are living with a same-sex couple.

**Parenting of biological, adopted, and step children**

Among same-sex couples raising children, *Census 2010* estimates show that more than 111,000 same-sex couples (17%) are raising nearly 170,000 biological, step, or adopted children. Among female couples, nearly 24% are raising a biological, adopted, or step child compared to 10% of male couples (see Figure 3).

*Census 2010* figures show that same-sex couples who consider themselves to be spouses are more than twice as likely to be raising biological, step, or adopted children when compared to same-sex couples who say that they are unmarried partners. Among the same-sex couples who consider themselves to be spouses, 31% (more than 41,000 couples) are raising biological, step, or adopted children under age 18 compared to 14% (nearly 70,000 couples) of same-sex couples who consider themselves to be unmarried partners (see Figure 3).

Nearly 35% of female spousal couples and 28% of male spousal couples are raising biological, step or adopted children. For unmarried partners, the estimates are 21% and 5%, respectively.

Same-sex couples are more likely than their different-sex counterparts to have children who are not identified as biological or step-children of the spouses or partners. This includes adopted children, foster children, other related children like siblings and grandchildren, and non-related children.

**Adopted children**

Same-sex couples raising children are four times more likely than their different-sex counterparts to be raising an adopted child. Among couples with children under age 18 in the home, 13% of same-sex couples have an adopted child compared to just 3% of different-sex couples. More than 16,000 same-sex couples are raising an estimated 22,000 adopted children in the US (see Figure 4).

Among all children under age 18 being raised by same-sex couples, approximately one in ten (10%) are adopted, compared to just 2% of children being raised by different-sex couples. In total, 1.4% of all adopted children under age 18 living in households with same-sex or different-sex couples live in a same-sex couple household.

**Parenting of foster and other children**

Same-sex couples are six times more likely than their different-sex counterparts to be raising foster children. Among couples with children under age 18, 2% of same-sex couples are raising a foster child compared to just 0.3% of different-sex couples. Approximately 2,600 same-sex couples are raising an estimated 3,400 foster children in the US. In total, 1.7% of foster children living with same-sex or different-sex couples are being raised by same-sex couples.

More than a quarter of same-sex couples raising children (25.6%) include children identified as grandchildren, siblings, or other children who are related or unrelated to one of the spouses or partners. Approximately 32,000 same-sex couple households include more than 48,000 such children. Among these children living with couples, 0.8% live with a same-sex couple.

![Figure 3. % Same-sex couples with biological, adopted, or step children under age 18 in the home, by relationship status and sex](image)

![Figure 4. Relationship of children under age 18 to householder (person 1) in same-sex couple households](image)
Demographic characteristics of LGBT parents and their children

Sex

Among LGB-identified adults in the GSS who report ever having given birth to or fathered a child, 80% are female, compared to 57% of their heterosexual counterparts.

In the Gallup data, among single LGBT individuals or those who are partnered or married and living in a two-adult household, women comprise 72% of those raising children compared to 55% of comparable non-LGBT individuals.

Among same-sex couples with children under age 18 in the home identified in the 2011 ACS, 61% are female couples.

Age

LGB-identified individuals who report ever having a child in the GSS data indicate that they had their first child at a younger age than their heterosexual counterparts. The median age at which LGB individuals had their first children is 21 compared to 23 for heterosexual individuals.

Among individuals in couples, the median age for those with children under age 18 in the home is 40 for both same-sex and different-sex couples. However, same-sex adoptive parents are younger than their different-sex counterparts by about 2 years. The median age of same-sex adoptive parents is 42 versus 44 for comparable different-sex parents.

Children under 18 being raised by same-sex couples are slightly older than those being raised by different-sex couples. The median age of children under age 18 living with same-sex couples is 9 compared to 8 for those living with different-sex couples. However, adopted children living with same-sex couples are younger. They report a median age of 6 compared to a median age of 10 among adopted children living with different-sex couples.

Race/ethnicity

Parenting is more prevalent among racial and ethnic minorities who are part of a same-sex couple. An estimated 41% of non-White women in same-sex couples have children under age 18 in the home as do 20% of comparable non-White men. Among their White counterparts, the comparable figures are 23% and 8%, respectively.

Among non-White individuals in same-sex couples, a third (33%) is raising a biological, step, or adopted child, compared to 18% of their White counterparts. For men, the same comparison is 16% versus 5%, respectively.

An estimated 39% of individuals in same-sex couples who have children under age 18 in the home are non-White, compared to 36% of individuals in different-sex couples.

![Figure 5. Race/ethnicity of spouses/partners and children under age 18, by couple type](image)

Among children under 18 living with same-sex couples, half (50%) are non-White compared to 41% of children living with different-sex couples.

Geographic distribution

Childrearing among same-sex couples is highest in the South, Mountain West, and Midwest areas of the country. (see Figure 6).

States with the highest proportions of same-sex couples raising biological, adopted or step children include Mississippi (26%), Wyoming (25%), Alaska (23%), Idaho (22%), Montana (22%), Kansas (22%), North Dakota (22%), Arkansas (21%), South Dakota (21%), and Oklahoma (21%).
Socio-economic status
There is evidence of some economic disadvantage among LGBT people and same-sex couples raising children. This is perhaps not surprising given that LGBT parents and those in same-sex couples are more likely to have characteristics associated with a greater likelihood of being in poverty. For example, LGBT parents and those in same-sex couples are more likely to be female, tend to be younger, and are more likely to be racial/ethnic minorities when compared to non-LGBT people or those in different-sex couples.

Analyses of the Gallup data show that single LGBT adults raising children are three times more likely than comparable non-LGBT individuals to report household incomes near the poverty threshold (less than $12,000 per year). Married or partnered LGBT individuals living in two-adult households with children are twice as likely as comparable non-LGBT individuals to report household incomes near the poverty threshold (less than $24,000 per year).

The median annual household income of same-sex couples with children under age 18 in the home is lower than comparable different-sex couples ($63,900 versus $74,000, respectively).

Among couples with biological, step, and adopted children, the difference is slightly larger, with same-sex couples reporting median annual household income of $63,500 versus $74,900 for different-sex couples.

Other factors that could affect the economic circumstances of same-sex couples with children are employment and labor force participation. While 81% of individuals in both same-sex and different-sex couples with children under age 18 in the home indicate that they are in the labor force, those in same-sex couples are less likely to be employed (72% versus 76% of those in comparable different-sex couples).

Among couples with children, same-sex and different-sex couples are just as likely to have both spouses or partners employed (56%), but same-sex couples are more likely to have neither partner employed (14% versus 5% for different-sex couples). One spouse or partner is employed while the other is not among 31% of same-sex couples with children compared to 38% of comparable different-sex couples.
Methodology
The analyses use four data sources as described below.

General Social Survey, 2008/2010
The General Social Survey is a biannual survey conducted by NORC. Data for 2008 and 2010 are combined for these analyses, which use the online Survey Documentation and Analysis tool developed and maintained by the Computer-assisted Survey Methods Program (CSM) at the University of California, Berkeley. The data include 118 observations of respondents who identified as gay, lesbian, or bisexual.

Gallup Daily Tracking Survey, June-September 2012
Gallup conducts a daily tracking survey that, since June 2012, asks respondents if they “personally identify as lesbian, gay, bisexual, or transgender.” Analyses in this report are based on the June-September data that include more than 121,000 responses, of which 3,525 answered yes to that question.

Census 2010
Data from Census 2010 are based on “preferred” estimates of same-sex couples released by the US Census Bureau in 2011 (see Gates and Cooke, 2011; O’Connell and Feliz, 2011).

2011 American Community Survey
Analyses use the 2011 Public Use Microdata Sample (PUMS) from the American Community Survey. Couples are defined as such when a householder (Person 1 on the survey form) identifies another individual age 16 or older as his or her “husband/wife” or “unmarried partner.”

Same-sex couple data are adjusted to account for measurement error, whereby some different-sex couples, particularly married couples, miscode the sex of one partner and appear to be a same-sex couple (see Gates and Cooke, 2011; O’Connell and Feliz, 2011). The adjustment procedure, described in Carpenter and Gates (2008), attempts to delete same-sex couples that are most likely to be different-sex couples who miscoded their sex. In doing so, the resulting sample likely under-represents actual same-sex couples who consider themselves to be spouses, as some of these couples are removed in order to eliminate most of the miscoded different-sex couples.

About the author
Gary J. Gates, PhD is the Williams Distinguished Scholar and a national expert in the demographic, geographic, and economic characteristics of the LGBT population.

About the Institute
The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public. These studies can be accessed at the Williams Institute website.

For more information
The Williams Institute, UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476
(310)267-4382
williamsinstitute@law.ucla.edu www.law.ucla.edu/williamsinstitute
Executive Summary

The past several decades have seen a proliferation of studies on lesbian, gay, and bisexual (LGB) parenting, with increased attention to (a) family building by LGB people; (b) the transition to parenthood for LGB parents; and (c) functioning and experiences of LGB parents and their children. The findings are consistent in suggesting that despite confronting heterosexism in a variety of social contexts -- including the health care system, the legal system, and the school system -- LGB parents and their children are functioning quite well. This report provides an overview of the contemporary LGB-parent family research. We emphasize research that has been subjected to scientific peer review. Critical areas for future investigations are noted, such as how race, ethnicity, social class, region of residence, and the changing legal landscape affect the experiences of LGB parents and their children.

Family Building by LGB People

LGB Parents Formerly in Heterosexual Relationships

- In the majority of contemporary LGB-parent families, the children were conceived in the context of different-sex relationships.
- Since most contemporary research on LGB parenting focuses on the newer phenomenon of planned LGB families, research is needed on LGB stepfamily formation post-heterosexual divorce, covering such topics as incorporating a new stepparent and a new family identity. This can inform the development of parenting resources for LGB stepfamilies.

LGB-Parent Families Formed Through Donor Insemination (DI)

- Because many states prohibit the nonbiological mother from legally adopting her child, female same-sex couples that choose DI to build their families face choices (e.g., who will be the biological mother; whether to use sperm from a known or unknown donor) that have profound legal and psychological implications.
- LGB-parent families continue to experience discrimination in health care settings (e.g., during the perinatal period).
- More research is needed on the influence of social class on the DI decisions of sexual minority women.
- Few studies have addressed the psychological consequences of infertility in LB women who fail to conceive through DI.
LGB-Parent Families Formed Through Adoption

- Same-sex couples are approximately 4.5 times more likely than different-sex couples to be rearing adopted children.
- LGB parents adopt through international, public domestic, or private domestic programs, with varied information about and access to the birth parents of the children they adopt.
- The legalities of adoption by LGB parents are complicated since many birth parents and all international agencies prohibit adoption by same-sex couples, resulting in a pool of available children that far exceeds the number of heterosexual prospective adoptive parents.
- LGB prospective parents are vulnerable to discriminatory attitudes on the part of adoption professionals.
- More research is needed on the impact of power and privilege (especially with regard to race, class, and gender) on LGB prospective parents’ responses to perceived discrimination during the adoption process.

LGB-Parent Families Formed Through Surrogacy

- The limited available data on LGB-parent families formed through surrogacy suggest that this option is used primarily by affluent gay men.
- Studies are needed that explore the gender, race, and class dynamics of domestic and international surrogacy.

The Transition to Parenthood

- LGB prospective parents perceive less support from their families of origin than do heterosexual parents, but many LGB parents find that family ties strengthen after the arrival of the child.
- The involvement and support of the family of origin may vary depending on the LGB parent’s biological and legal ties to the child.
- Similar to heterosexual parents, LG parents’ mental health and relationship quality decline across the transition to parenthood, although support from friends, family, and the workplace buffers all parents from the challenges of new parenthood.
- Same-sex couples with children share childcare, housework, and paid employment more equally than different-sex couples with children.

LGB-Parent Families’ Functioning and Experiences

LGB Parents: Functioning and Experiences

- Studies comparing LG and heterosexual parents in regard to mental health, parenting stress, and parenting competence have found few differences based on family structure.
• Conditions linked to poorer well-being for LG parents include: living in less supportive legal contexts, perceiving less support from family or supervisors, having higher levels of internalized homophobia, and encountering more child behavior problems.
• More research is needed that explores the unique strengths that LGB people bring to parenthood that may protect against mental health challenges.
• Studies are also needed to examine the intersecting identities of race, gender, class, and sexual orientation vis-à-vis family formation, mate selection, and overall family life.

**Impact on Children of Having LGB Parents**

• Researchers have found few differences between children raised by lesbian and heterosexual parents in terms of self-esteem, quality of life, psychological adjustment, or social functioning (research on the psychosocial outcomes of children with gay male parents is limited).
• Several studies, some of which have utilized nationally representative datasets, provide no evidence that children with same-sex parents demonstrate problems with respect to their academic and educational outcomes.
• According to self-, peer-, and parent-report, children and adolescents with same- and different-sex parents do not differ in social competence or relationships with peers.
• There is some evidence that the play behavior of girls and boys in same-sex parent families may be less gender-stereotyped than the play behavior of girls and boys in different-sex-parent families.
• Research on adolescents reared since birth by lesbian mothers found that youth with male role models were similar in psychological adjustment to adolescents without male role models.
• Although adolescents and young adults reared by LGB parents are no more likely to self-identify as exclusively lesbian/gay than those reared by heterosexual parents, having a lesbian mother was associated with a greater likelihood of considering or having a same-sex relationship, and more expansive, less categorical notions of sexuality.
• Adolescents and adults point to potential strengths associated with growing up in LGB-parent households, including resilience and empathy toward diverse and marginalized groups.

**Bullying and Harassment**

• Studies that compare the teasing/bullying experiences of children with LGB and heterosexual parents are conflicting, with some suggesting higher rates of reported bullying among children with LGB parents and others finding no differences in these rates, according to self- and parent-report. However, homophobic slurs were reported only by children with same-sex parents.
• Whereas perceived stigmatization by peers has been linked to compromised well-being in children of LGB parents, both the broader school context and family processes may offset some of the negative impact of bullying.
Relationships between Parents or Donors and Children

- Compared to heterosexual parents, LGB parents have not been found to differ, on average, in parental warmth, emotional involvement, and quality of relationships with their children. Children’s relationships with their biological mothers appear similar in quality to their relationships with their nonbiological mothers, which researchers attribute in part to the fact that lesbian mothers tend to share coparenting. However, parent-child closeness and contact may be threatened when same-sex parents break up, suggesting that legal parentage may have important implications for parent-child relationships post-same-sex relationship dissolution.

- Compared to heterosexual parents, LGB parents tend to demonstrate less gender-stereotyped attitudes and to be more accepting of gender-atypical behavior in their children.

- In lesbian-parent families, the relationships that children have with their sperm donors vary in quality and intensity, and the nature of these relationships may change over time. More research is needed that explores children’s, and LGB parents’, relationships with known donors, as well as with identity release donors (i.e., anonymous donors who agree to be contacted when the child reaches some specified age, such as 18 years).
About the Williams Institute

The Williams Institute is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A national think tank at UCLA Law, the Williams Institute produces high-quality research with real-world relevance and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers, and the public.

About the Authors

**Abbie E. Goldberg** is the 2013-2014 Visiting Scholar at the Williams Institute. She is also an Associate Professor of Psychology at Clark University and a Senior Research Fellow at the Evan B. Donaldson Adoption Institute.

**Nanette K. Gartrell** is a Williams Institute Visiting Distinguished Scholar. She also has a Guest Appointment at the University of Amsterdam.

**Gary Gates** is a Williams Institute Distinguished Scholar. He is a national expert in the demographic, geographic, and economic characteristics of the LGBT population.

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For more information

The Williams Institute
UCLA School of Law
Box 951476
Los Angeles, CA 90095

williamsinstitute@law.ucla.edu
www.law.ucla.edu/williamsinstitute
China in and beyond the Headlines

Edited by Timothy B. Weston and Lionel M. Jensen
Homosexuality in China, like in other countries around the world, can be a very sensitive concern, often taken as a threat to conventional society and, in far too many cases, a cause for violent repression, incarceration, and even death. Although China has had a very long history of same-sex relations and erotica, much of which was widely documented in imperial times, the Communist Revolution brought a moralizing denunciation of homosexuality as perverse that was only ambiguously and contradictorily written into the criminal codes and medical diagnosis manuals. However, with the reforms of the last decades Chinese society has become more open and accepting of this sexual orientation, in keeping with its official decriminalization by the state.

While lesbian and gay life in contemporary China is improving, problems do remain. A visible queer culture has emerged in many cities. Gay bars, gay saunas, and gay parks, for instance, appear in the country’s larger, more cosmopolitan urban centers. Websites are on the rise that report lesbian- and gay-related news and provide forums on queer issues as well as Internet dating services. Lesbian and gay film and cultural festivals, gay pageantry, and gay pride month are held in big cosmopolitan cities such as Beijing and Shanghai. Lesbian support groups and gay rights organizations in the name of AIDS prevention have formed in many cities, and the National Chinese Male Tongzhi Alliance was established in 2009.¹

Many young people today come out as gay and lesbian, and some of their parents even become vocal supporters of gay rights. Evidence of acceptance has reached a point where same-sex marriage ceremonies are held symbolically on the streets of central Beijing and in other public and private
locations in other cities. Still, the rise of a visible queer culture in China has been met with regulations and interference. Police intervention in gay social activities such as the interruption of gay pageantry in January 2010 and the recent raid on Mudanyan, a public park where gay people meet in Beijing, in September 2010 continue to appear in the media. Moreover, prostitution seems to have become a very prominent and troublesome issue for Chinese gay culture.

Exactly how should the public understand and react to contemporary queer culture in China? Simple answers such as "there must be more tolerance" or "there must be more repression" cannot describe the complexity of the situation. When the media present a rosy picture of lesbian and gay life in China now, they usually provide two important pieces of background information: homosexuality was decriminalized in 1997, and it was officially taken out of the category of mental illness in 2001. But how do we reconcile these legal facts with continuing police harassment?

To come to terms with this contradiction will require us to understand when and how homosexuality was officially criminalized and when and how it was pathologized in the PRC. These critical matters still remain unclear. Little research on the history of homosexuality in the PRC has been done or published in English. By examining the history of official portraits of homosexuality in the PRC as either pathological or normal, I hope to shed some light on this shadowed subject. Furthermore, by revealing what still remains in contemporary Chinese law that could be applied to homosexual activities and how the medical profession defines homosexuality today, this essay will account for the difficulty of presenting a straightforward description of contemporary Chinese gay culture.

DECRIMINALIZATION

Hailed as a legal milestone, the decriminalization of homosexuality in the 1997 Criminal Law of the PRC was actually a secondary consequence of two distinct changes in the existing criminal code. First, the provision on hooliganism (liumang) was eliminated. Second, the provision that "all crimes must be expressly prescribed by the law" (zuixing fadian) was reinstated so that no one would be criminalized for any conduct that was not officially prohibited in the law. These two changes were important revisions to the first Criminal Law of the PRC, promulgated in 1979, a few years after Mao's death and the end of the Cultural Revolution. Because sex between men was not clearly proscribed but was criminalized after being interpreted as a type of hooliganism under the old 1979 Law, these two changes in the new law amounted to the decriminalization of homosexuality.
Hooligans and Hooliganism

No stipulations that explicitly address homosexuality are found in the 1979 Criminal Law. Provision 160, on the "Crimes of Hooliganism," specified gang fights, provoking fights and stirring up trouble, sexual assault on women or other hooligan activities, and the disruption of public order. Provision 79, called the analogy clause by legal experts, says that "crimes not clearly stipulated in the provisions of this law may be sentenced by using the most similar provisions in the law with the approval of the Supreme People's Court." According to Guo Xiaofei, one of the few scholars specializing in homosexuality-related legal issues in China, it was exactly these two provisions in the 1979 Criminal Law that made the criminalization of homosexuality possible. Anal sex between men could be punished as "other hooligan activities" under Provision 160 in official judiciary interpretations, which was made possible by the analogy clause.⁴

The meaning of "hooligan" (liumang) has constantly changed in China in modern times. One late-Qing writer described liumang as "those jobless migrants who were likely to create unnecessary conflicts in society."⁵ According to Zhou Dan, an openly gay attorney and legal scholar writing in contemporary China, "hooliganism" was neither a legal term nor the name of a crime in the imperial and Republican periods. It was not until the 1950s under the Chinese communist regime that "hooligan" began to enter political and legal documents. Zhou traces the authoritative definition of liumang to the Chinese translation of Karl Marx's Communist Manifesto, in which the German term lumpenproletariat was rendered into liumang wuchanze, "hooligan proletariat," in Chinese. In the Communist Manifesto, the lumpenproletariat was described as "the social scum, that passively rotting mass thrown off by the lowest layers of the old society, [who] may, here and there, be swept into the movement by a proletarian revolution; its conditions of life, however, prepare it far more for the part of a bribed tool of reactionary intrigue."⁶ This description of liumang wuchanze gave a new meaning to the term hooligan in the context of socialist China.⁷

Subscribing to Marxism, the communist state held that hooligans represented remnants of the old society and thus were to be subjected to socialist education and reform in the new China. Those who refused to change and continued to disrupt the social order would be punished by the state. It was in this context that gang fights, provoking fights and stirring up trouble, sexual assaults on women, and the disruption of the public order were listed as hooligan activities. Sex between men was also considered as a kind of hooligan activity but was not an openly discussed issue. Efforts to promulgate a new criminal code under the communist regime were made after the founding of the PRC, but the new laws were not formalized until 1979, in the wake of the Cultural Revolution, in an effort to enhance the socialist legal system.⁸
**jijian (Sodomy or Anal Sex between Males)**

In twentieth-century China homosexuality could be narrowly understood as *jijian* (anal sex between men). In the sixteenth century, according to Matthew Sommer, the Ming-dynasty legal code punished anal sex between men through an analogy clause, stipulating that "whoever inserts his penis into another man's anus for lascivious play shall receive 100 blows of the heavy bamboo, in application by analogy of the statute 'pouring foul material into the mouth of another person.'" As Sommer points out, "the statute quoted above never mentions *jijian* at all. *Jijian* as a legal term later appeared in the Qing law."

*Jijian* can be translated as "sodomy," or "buggery." In Chinese, *ji* can refer to the penis, and *jian* may also refer to illicit sex between a man and woman. The word also carries the connotation that when a man has sexual intercourse with a married woman who is not his wife, he could potentially derail the patriline of the woman’s husband’s family by begetting an illegitimate son who could inherit the property of the woman’s husband." Since sex between men could not achieve this effect, the term *jijian* has departed from the original meaning of *jian*. When *ji* and *jian* are put together to mean anal sex between men, the term *jijian* becomes an oxymoron. Nevertheless, under a 1734 Qing law, anal sex between men—whether forced or consensual—was criminalized in the name of *jijian* through an analogy clause. The category of sexual offenses between men was modeled after the preexisting classification of illicit sex between men and women, and the act was punished accordingly.\(^{11}\)

In one of its last efforts to modernize China, the Qing-dynasty government rewrote its legal code before its fall in 1911. One of the important features in the 1907 Qing legal code was the abolition of the aforementioned analogy clause. As a result, the statute on anal sex between men disappeared. Under the Republican government (1912–1949) following the fall of the Qing, no effort was made to criminalize sex between men, and the legal rule of "all crimes must be expressly prescribed by the law" also became a norm.\(^{12}\)

After the founding of the PRC in 1949, several drafts of the criminal code were written as policies and guidelines for tackling criminal activities, but no formal laws were promulgated until 1979. Except for a 1950 draft law that included forced sodomy (*jijian*) between male adults under the category of rape, the issue of sex between men did not appear in the legal documents of the central government.\(^{12}\) Yet the issue of sex between men was constantly raised by local law enforcement personnel anxious for clarification and direction from the central state apparatus. The Heilongjiang Provincial High People's Court, for instance, in a letter dated March 19, 1957, asked the National Supreme People’s Court for instructions in a case of consensual anal sex between two men who were held in a local labor
reform camp. This correspondence between the two levels of government offices is a rare historical document that addressed the issue of homosexuality during the Mao era and is worth quoting at length. The Heilongjiang letter reads as follows:

Serial Number 139
Supreme People’s Court.

In Huling County, two labor reform convicts, Li and Li, had consensual sexual intercourse [sodomy, jijian]. The Middle Level People’s Court of Mudanjiang District in our province, which is in charge of the county, asked whether their behavior constitutes a crime that should be held accountable as a criminal offense.

One argument is that consensual sodomy [ziyuan jijian] is a behavior that severely violates the social moral norm. In addition, this behavior occurred during their labor reform period, which exerted a very bad influence over other labor reform convicts. Therefore, both of them should be held accountable for a criminal offense.

Another argument is that this type of consensual sex between men, although having a bad influence, is an issue of social norms. They should be disciplined administratively, but not be held accountable for a criminal offense.

After discussion, we think that this is a kind of moral corruption detrimental to the social norm, and a behavior that violates the human body’s physiology and function. Therefore, those who sodomize others by force should be sentenced to punishment. But as for whether the mutual behavior between two consenting persons constitutes a criminal offense, the central government has not had a regulation. According to Provision 154 of the Soviet Union Criminal Code, a man who has sexual intercourse with another man should be sentenced to three to five years of loss of freedom. What is the correct way to understand this provision? How do we understand whether the punishment also applies to consensual behavior? We don’t have any basis or confidence to deal with this case and therefore specially ask the instruction of the Supreme People’s Court.

The National Supreme People’s Court responded on April 29, 1957, as follows:

[We] have received the inquiry from your court numbered 139 of March 19. Regarding the question whether sodomy between two consenting adults constitutes a crime, a legislative solution is needed in the future. Before a clear provision is made in the law, we think it appropriate not to treat the case your court mentioned as a criminal offense.11

In this internal government correspondence, the writer of the Heilongjiang letter used the term sodomy (jijian) for both consensual and forced sex between men. While the Heilongjiang authorities seemed to know that forced sodomy constituted a crime, they found it difficult to deal with consensual
sodomy. The letter from the National Supreme People's Court was clear that the current law carried no exact stipulation on consensual jijian and suggested that the local government should not criminalize this kind of act. It remained silent on the issue of forced sodomy.

The problem of lack of exact stipulations from the central government on sex between men, consensual or forced, persisted into the period after the promulgation of the 1979 Criminal Law. The problem was partially solved with the pronouncement of The Answer to the Questions on How to Deal with Current Hooligan Cases by the National Supreme People's Court and the National Supreme People's Procurator on November 2, 1984. It was in this document that jijian was clearly listed under "other hooligan activities" of Provision 160 of the 1979 Criminal Law. Among the six kinds of "other hooligan activities that are severe and constitute the crime of hooliganism" were "sodomizing young children, sodomizing adolescents by force, or severe cases of using violence and coercion to commit sodomy repeatedly." As in this important government document, although forced sex between men is clearly criminalized, the question of whether anal sex between consenting male adults should be considered hooliganism still remained unanswered.

Beyond the Realm of Formal Law

By law, anal sex between consenting male adults did not constitute a crime, or at least the 1979 Criminal Law and the 1984 interpretation of the crime of "other hooligan activities" did not mention consensual sodomy. In everyday life, however, men could be punished outside the formal legal system for engaging in anal sex during the Maoist and post-Mao reform period. Members of the Communist Party who engaged in consensual male-male sex could be disciplined with a warning within the party or have their party membership revoked. Nonparty members could lose their jobs, be detained without trial for a short period of time, or be sent to labor reform for longer durations. Moreover, although the 1984 interpretation only made clear that sodomy with minors and forced sodomy were severe cases of the hooligan crime, the police could still argue that anal sex between men both in public and in private was a type of general hooligan activity and thus they would make arrests accordingly. In those arrests, whether or not anal sex was involved was an important basis for disciplinary detention. One victim remembered that he was caught in bed naked with a male friend in his work unit dormitory by the police in 1994. During the interrogation, they were beaten into confessing that they had anal sex and were sentenced to fifteen days of detention. Afterward, a sympathetic police officer told them that they would not be detained had they not admitted to having anal sex. This piece of advice was backed up by what he had heard from other homosexual friends.
THE 1997 CRIMINAL LAW

A new Criminal Law of the PRC was promulgated in 1997 (still in effect today), and the Criminal Law of 1979 was invalidated at the same time. In the new 1997 Criminal Law, the provision on hooliganism was deleted. Some of the crimes listed under the provision on hooliganism were rephrased and stipulated more specifically under different provisions, including acting indecently toward or assaulting a woman sexually by force, threats and any other similar means, and indecent conduct with a minor (Provision 237); gang fighting (Provision 292); provoking a fight and stirring up trouble (Provision 293); and engaging in licentious group activities (Provision 301). No provision on sodomy was written into the new Criminal Law. In addition, Provision 3 of the new law clearly stipulates that “an act which is expressly defined by law as a criminal act shall be grounds for conviction and sentencing in accordance with law; if it is not expressly defined by law as a criminal act, it may not be considered grounds for conviction and sentencing.” Theoretically, as a result of these changes, the 1984 interpretation of “other hooligan activities” was now invalidated. The story, however, does not end here.

THE PUBLIC ORDER ADMINISTRATIVE PENALTY REGULATION OF THE PRC

In the PRC, the People’s Republic of China Public Order Administrative Penalty Regulation (Zhonghua reming gongheguo zhi’an guanli chuafa tiaoli) has been in place since 1957, and a new version was issued in 1987 only to be revised again in 1994. The 1994 regulation’s stated function is as follows:

Criminal acts as defined by the Criminal Law of the PRC, such as disrupting the social order, impairing the public security, infringing on the rights of other citizens, and exploiting or destroying public and private property are to be held accountable by law. Perpetrators who commit similar acts but less severe than those defined in the Criminal Law should be punished for the disruption of the social order according to this Regulation.

In Article 19 of the 1994 Regulation, “other hooligan activities,” which could include consensual sex between men as understood through free interpretation by the police, were stipulated as behaviors disrupting public order, and men arrested under this article were subject to detention, fines, or warning. In fact, most men found by the police engaging in consensual sex with other men were arrested exactly in the name of disrupting the social order, presumably based on this regulation. The regulation was in place
until March 1, 2006, when it was replaced by the Public Order Administrative Penalty Law of the PRC, in which the term "hooligan" does not appear.

WAS THERE A DECRIMINALIZATION OF HOMOSEXUALITY IN 1997?

As the preceding discussion shows (through the 1984 legal interpretation of the "other hooligan activities" that was stipulated in the 1979 Criminal Law), men who had anal sex with minors in any case or with male adults by force could be held in criminal offense for anal sex. Men who engaged in consensual sex were subject to arrest by the police, and penalties could be applied to those who had anal sex, presumably according to the 1984 interpretation and the 1994 regulation. Therefore, it is safe to say that it is "anal sex between men" (jiitud), not homosexuality in general, that was criminalized under the Criminal Law, at least from 1979 to 1997. With the changes in the 1997 law, no legal stipulations support the criminalization of anal sex between men anymore. This circumstance of law and practice has been interpreted as the "decriminalization of homosexuality."

The term tongxinglian (same-sex love), however, never appeared in any official Chinese legal document, and moreover, sex between women has not been a legal issue in the PRC. The much-reported 1991 "homosexuality" case in Wuwei County, Anhui Province, made these facts widely known. A father accused his daughter and her girlfriend of "committing homosexuality" and asked the local police to "strictly punish the ugly phenomenon" between "the two hooligans." The county public security division reported the case to the Chao Hu district, which again reported to the provincial level for advice. The case in turn reached the National Ministry of Public Security. Chao Hu district received this response from the Anhui Provincial Public Security Department:

Regarding the Wuwei County homosexuality case that you reported, we have consulted with the Ministry of Public Security, and the answer is as follows: Currently, the law of our country does not have a clear stipulation on what homosexuality is and its legal status. In light of this situation, in principle, the case you reported should not be accepted. It is also inappropriate to treat the case as a kind of hooligan behavior and penalize [the people involved] for disrupting the social order. As for how to handle this particular case, you should consult related departments such as the procurators' offices and the judicial court."

This 1991 document demonstrates a clear position by the National Ministry of Public Security on the issue of homosexuality. The ministry did not make any connection between tongxinglian and anal sex between men.
While anal sex between men was understood as a type of hooligan activity and could be penalized under the Criminal Law and the 1994 regulation, homosexuality was neither a crime nor could it be explained as a type of hooligan activity appropriate for penalization. In other words, love between people of the same sex was not made illegal, but anal sex between consenting adult males potentially remained a criminal behavior.

In *Homosexuality in the Purview of Chinese Law*, Guo Xiaofei argues that no “decriminalization of homosexuality” has ever really occurred: “In the 1997 revision of the 1979 Criminal Law, the changes on the question [of hooliganism] had nothing to do with [the issue of] homosexuality in terms of the motivation on the part of the lawmakers, and the connection made [between the new law and the result of] decriminalization of anal sex between men is also an ‘interpretation after the event.’” Guo’s central argument is that the issue of homosexuality has not really been within the purview of Chinese legal thought, especially since the founding of the PRC. The legal code is dominated by heterosexist assumptions. Specifically, the reinstatement of the principle of “all crimes must be expressly prescribed by the law” made the ambiguous “other hooligan activities” impossible to include in the new 1997 law, and that is why the crime of hooliganism had to be dissolved into different specific crimes, along with the annulment of the 1984 interpretation.

As an unintended consequence of the reinstatement of these legal principles, sex between consenting male adults was decriminalized. Although forced sex between a man and a male minor can be punished under the provision of indecent conduct with a minor, sex between and among adult men by force cannot be found anywhere in the new law. That the issue of coercion has not been adequately addressed has led many legal specialists to complain about the failure of “the decriminalization of sodomy.” For Guo, this situation exactly proves that the issue of homosexuality has been persistently outside the purview of Chinese lawmakers, and the so-called “decriminalization of homosexuality” has come about not intentionally but as an “unintended result.”

**SEX BETWEEN MEN UNDER THE 1997 CRIMINAL LAW**

The crime of forcing *women* into prostitution (*mai* *yin*) in the 1979 Criminal Law was changed to the crime of organizing or forcing *others* into prostitution (Provision 358) in the new 1997 Criminal Law. Provision 359 also includes the crime of seducing or introducing others into prostitution, or providing others with places for prostitution. Under these provisions in the new law, sex between men could be criminalized as a form of male prostitution.
The famous 2004 Nanjing "homosexual prostitution case" (tongxinglian maijin an) set the precedent. According to the procurator's indictment, brought in January 2003, Li Ning, who colluded with a certain Liu and a certain Leng, placed newspaper advertisements in the name of recruiting "male public relations personnel," as a front for hiring and organizing many young men to engage in prostitution with male consumers at his three different bars. From the seven confirmed cases of organized prostitution, Li profited 124,700 yuan.

At first, the procurator's office declined the police request for an arrest warrant, based on the legal interpretation that Provision 358 on "organizing others for prostitution" does not have a clear stipulation on organizing same-sex prostitution and the rule that "all crimes must be expressly prescribed by the law." Upon receiving this response, the police in Nanjing asked the procurator's office to reconsider this case. Meanwhile they released Li, since he already had been detained for thirty days, which is the maximum legal detention period. The procurator's office, however, sustained their earlier decision after their first reconsideration.

In caution, both the procurator's office and the police decided to refer the case to the provincial level. Following deliberation, the judicial department of Jiangsu Province, to which the city of Nanjing is administratively subject, decided to refer the case to the National Supreme People's Court for instruction. The Supreme People's Court in turn remanded the case to the Standing Committee of the National People's Congress, which eventually offered an oral response: use the provision on the crime of organizing prostitution to punish those who organize young men to sell sex to men. On the basis of this oral response, the court interpreted the "others" in the provision as referring to both male and female. Li Ning was summoned again in October 2003 and in February 2004 was sentenced to eight years in prison plus a 60,000 yuan fine for organizing prostitution.25

Victims of blackmail, along with the perpetrators, can also be punished by the police for engaging in prostitution. Thus the net of deterrent threat is widened. But with the intensification of economic inequality in China, many poor young men resort to homosexual prostitution and become what is known as "money boys." Some of them simply engage in blackmail by taking advantage of closeted gay men who are looking for anonymous sex. In one case that was reported in two mainstream Tianjin newspapers, Liu, a married man over forty who lives in the city and works for a company, admitted a long history of homosexual tendencies. On August 18, 2002, Liu, via a gay website, became acquainted with Xiaoqiang, and the two decided to meet later that night. After they met, Liu brought Xiaoqiang and his friend, another young man, to the dormitory of his company, and the three of them had sex there. Afterward, the two young men demanded 1,500 yuan from Liu. Following an hour of failed negotiations, Liu sneaked
out and called the police for help, accusing Xiaoyi and his friend of blackmail. However, once the police determined what had happened, they detained all three, fining them 5,000 yuan each. According to the police, the three had engaged in prostitution as described in the Public Order Administrative Penalty Regulation. 26

That the police could charge blackmail victims with homosexual sex on the grounds that they were engaging in prostitution suggests that many men feel insecure, if not threatened, when having casual sex with other men. Although recently the situation has improved for blackmail victims, these men may be punished for engaging in group sex (jiuzhong yinlian) under the current law. This provision against group sex clearly does not aim at homosexuals but could certainly be applied to this group of people. This troubling legal ambiguity is one of the reasons that the famous sociologist, gay rights advocate, and authoritative scholar on homosexuality in China, Li Yinhe, is openly campaigning for the abolition of the 1997 Criminal Law's provision on group sex.

DEPATHOLOGIZATION

Like the criminalization and subsequent decriminalization of homosexuality, its official pathologization and depathologization also occurred after the end of the Mao era. Unlike the decriminalization process, which was only a side effect of the promulgation of the new Criminal Law, depathologization was clearly a result of efforts on the part of medical experts and gay rights advocates.

Pathologization: A Post-Mao Phenomenon

While some people, as shown in the 1957 Heilongjiang letter to the Supreme People's Court, may have believed homosexuality to be a mental illness, it was not until the 1980s that it was officially categorized as such in the PRC. Official classifications of mental disorders and diagnostic criteria were not employed in the first half of the twentieth century, before the communists took power. In 1958 the Ministry of Health drafted a classification of mental disorders for the first national conference on the prevention of mental illness, but in the end this draft was never officially released. 27

After the Cultural Revolution, several versions of mental disorder classification were drafted and revised between 1978 and 1984. The 1981 version was the first official one and was named Chinese Classification of Mental Disorders (CCMD). Subsequently, the CCMD was recommended to doctors all over the country who were working with mental illness. This preliminary taxonomy was expanded in 1984 with the formulation of specific
diagnostic criteria. Over a four-year period, the criteria for three general types of mental disorders were released separately. According to Yang Desen, who wrote a brief history of the classification and criteria-making process, a very important additional task undertaken by the doctors and experts was the translation of the most up-to-date draft version of the "Mental and Behavioral Disorders" chapter of the International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD-10), by the World Health Organization (WHO) and the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) by the American Psychiatric Association. These two documents served as "necessary reference materials" for the formulation of the comprehensive Chinese diagnostic criteria that were first drafted in 1988.28

In April 1989 the first completed draft including both the classification and diagnostic criteria of mental disorders was finalized at an extended conference of the standing committee of the Chinese Society of Psychiatry held in Xi'an. In order to acknowledge the earlier efforts to formulate explicit criteria, the first combined and complete version of Chinese Classification and Diagnostic Criteria of Mental Disorders was named the second edition (CCMD-2).29 In the CCMD-2 that was adopted by the Chinese Society of Psychiatry and issued to the public in 1989, homosexuality was listed as a type of psychosexual disorder (xingxinli zhang'ai) and was officially pathologized.

In treating homosexuality as a type of psychosexual disorder, the Chinese Society of Psychiatry seemed to have followed not the DSM-III, which had taken homosexuality off the list of mental illnesses, but the ninth revision of the International Statistical Classification of Diseases, in which homosexuality remained among the two pieces of "necessary reference materials" on the list of mental disorders. In 1990, however, the WHO passed the tenth edition of the ICD, which came into use in WHO member states from 1994. Chapter 5 of ICD-10 clearly states that "sexual orientation by itself is not to be regarded as a disorder."

In 1994 the Chinese Society of Psychiatry revised the CCMD-2 and began to implement the CCMD-2-R. With respect to the CCMD-2-R, the committee undertaking revisions "still listed homosexuality as a 'sexual perversion' [xingbianzai], [deciding] not to adopt the method practiced in foreign countries that removes homosexuality from the disease classification system and considers it as absolutely normal." According to CCMD-2 and CCMD-2-R, both those who accept their sexual orientation (egosyntonic homosexuals) and those who want to change their sexual orientation (egodystonic homosexuals) were diagnosed as suffering from the mental disorder.

Wan Yanhai, a public health expert and gay rights advocate, actively campaigned for the depathologization of homosexuality during the second half of the 1990s and also wrote an account of the process. According to Wan,
the reason that in 1994 some medical experts insisted on keep homosexuality on the list of mental illnesses was that they believed a "patient" status could sometimes protect homosexuals from police arrests. However, there were others who supported the pathologization because they believed that homosexuality violated social norms and law and that the psychiatric profession had the responsibility to reform and control it. The pathologization of homosexuality at that time could be used as an excuse both to protect and to prosecute homosexuals."

The Making of the CCMD-3

Chinese medical experts have persistently claimed that they want to create a system for classifying mental disorders that is suitable for Chinese particularities while also meeting international standards. Facing the discrepancy between the newly changed international standard of the ICD-10 and the Chinese criteria of the CCMD-2-R, the Chinese Society of Psychiatry established a committee of medical experts to put together CCMD-3 in September 1996. Immediately afterward, an activist group called Aizhi ("Loving Knowledge") Action Project, organized by Wan Yanhai, began to campaign for the depathologization of homosexuality.

One thing that the Aizhi Action Project did was to focus Chinese medical experts' attention on the recent depathologization of homosexuality around the world, especially in the United States. This work triggered a debate among medical experts. Between August 1997 and February 1998, eleven articles appeared in the Psychiatric Health News (Jingshen weisheng tongxun), a professional journal published by the Zhejiang Psychiatric Health Institute. Some proposed that China should adopt the standard of DSM-4 and ICD-10 that eliminates homosexuality from the classification of mental disorders. Others insisted that homosexuality be classified as an abnormal sexual behavior, unacceptable according to Chinese social norms. Still others recommended compromises, such as not classifying homosexuality as a disorder but still calling for a cure, or still considering homosexual attraction as an illness but finding another name for it.

In addition to affecting the discussion, another important achievement of the Aizhi Action Project was bringing the medical experts and the gay community together. In the past, the medical experts could only meet homosexuals who believed their sexual orientation to be problematic and sought their assistance. With the gay community involved, the doctors met many gay people who were entirely comfortable with their sexual orientation. Again, according to Wan, this kind of communication contributed tremendously to the change in how the medical experts viewed homosexuality and the later depathologization of homosexuality.
In April 2001 the Chinese Society of Psychiatry published the third edition of the Chinese Classification and Diagnostic Criteria of Mental Disorders (CCMD-3). In the CCMD-3, homosexuality is still listed as a sexual orientation disorder (xingzhi xiang zhang'ai) under the category of psychosexual disorders. It reads as follows.

62.3 Sexual Orientation Disorder
It refers to a disorder caused by various kinds of sexual maturation and the development of sexual orientation, which is not necessarily abnormal from the perspective of sexual love [xing ai] per se. But, along with the sexual maturation and the development of sexual orientation, some people might develop a mental disorder. For instance, the individual does not wish to be or hesitates to act in a certain way, and is anxious about, depressed, or agonized by [his sexual orientation]. Some of them attempt to find treatment in order to change. This is the main reason that CCMD-3 includes homosexuality and bisexuality [on its list].

62.3.1 Homosexuality
[Diagnosing criteria]
1. Fits the definition of sexual orientation disorder.
2. Under a normal living condition, from adolescence, [an individual] has begun to show persistent sexual love interest toward members of the same sex, including thoughts, feelings, and sexual behaviors.
3. Although able to have normal sex with members of the opposite sex, [the individual] has difficulties in establishing and maintaining a family relationship with a member of the opposite sex due to obviously declining or lack of sexual interest.

What has become evidence for the official depathologization of homosexuality in China is the statement that "[sexual orientation] is not necessarily abnormal from the perspective of sexual love per se." It is a compromised way of saying that "sexual orientation by itself is not to be regarded as a disorder," as stated in ICD-10. As later explained by medical experts and journalists, the important message in this statement is that the medical authority simply does not consider homosexuality abnormal, even though "homosexuality" is still listed under the category of "sexual orientation disorder." According to the CCMD-3, only those who cannot adapt themselves to their homosexual orientation are still defined as suffering from such a disorder, although the criteria for diagnosing homosexuality do not seem to support this interpretation.

This kind of ambiguity could be a result of the twin guidelines for the making of the CCMD-3, that is, meeting international standards while also preserving Chinese characteristics. Following the ICD-10, the CCMD-3 writers suggest that homosexual orientation is not a disorder. Maintaining the notion of Zhongguo tese, "Chinese characteristics," they create a concept of sexual love, which seems different from the notion of sexual orientation.
Because the concept of sexual love is never clearly defined in these materials and sexual love is deemed “not necessarily abnormal,” the difference between sexual orientation and sexual love remains unclear. There is still much that must change before the complexities of the human heart can be accounted for even in a more enlightened age.

As this short account shows, both the official criminalization and pathologization occurred in the post-Mao period, as part of an effort to standardize the Chinese legal system and medical profession after the end of the Cultural Revolution. The decriminalization of homosexuality was only a side effect of the promulgation of the new 1997 Criminal Law of the PRC, when the Chinese government further strengthened its legal system in light of the social and economic changes occurring since the promulgation of the 1979 Criminal Law. The revision and final release of the CCMD-3 in 2001, which intentionally depathologized homosexuality, was clearly a gesture on the part of Chinese psychiatric professionals to meet international standards of medical practice, albeit incompletely.

Both Western and Chinese media tend to characterize the Mao era as a dark period of political oppression and the post-Mao period as a moment of liberation when social control loosened up, and they assume, explicitly and implicitly, that it was the Maoist regime that made homosexuality both a crime and a mental illness. This chapter does not argue that the Mao era was not repressive for homosexuals in China, and it is clear that further research needs to be done on the history of homosexuality during this period. What I hope my critical investigation into the history of the medical and political representation of homosexuality may have accomplished is to demonstrate how the focus on one issue “beyond the headlines” can permit us to understand the historical transition from China’s “communist” past to its “reformist” present.

SUGGESTIONS FOR FURTHER READING

Books


Chinese Court Sides With Gay Man in ‘Conversion’ Suit

By DAN LEVIN  DEC. 19, 2014

BEIJING — In a victory for gay rights advocates in China, a Beijing court ruled on Friday that a Chinese clinic must pay compensation to a gay man who sued it for giving him electric shocks intended to change his sexual orientation.

Stating that homosexuality is not a mental illness, the Haidian District People’s Court ordered the Xinyupiaoxiang Counseling Center in the southwestern city of Chongqing to pay 3,400 renminbi, or $560, for costs incurred by the plaintiff, Yang Teng. It also ordered Baidu, China’s leading search engine, which was also named in the lawsuit, to remove the advertisement that Mr. Yang said led him to the clinic.

Reached by telephone after the verdict was announced, Mr. Yang said he thought the verdict “has inspired a lot of gay people.” He added, “It shows them that we don’t need to be cured, and when things like this happen and we look to protect our rights from being violated, we can get a fair result.”

Mr. Yang filed the lawsuit against the clinic in March with the assistance of the Beijing L.G.B.T. Center, a nonprofit organization representing gay, lesbian, bisexual and transgender people. He visited the clinic in February, after his parents found out about his sexuality and pressured him to become straight.

Though China decriminalized homosexuality in 1997 and stopped classifying it
as a mental illness in 2001, discrimination remains common. An industry of clinics has sprung up promising to “cure” gay people through hypnosis and electric shocks.

Such treatments have been dismissed as cruel and harmful by mainstream medical practitioners in the West, with bans on so-called gay conversion therapy signed into law in California and New Jersey.

Mr. Yang’s lawsuit, which alleged that the clinic had claimed that electric shock treatment was safe and effective, asked for compensation of more than 14,000 renminbi, or $2,300, to cover his costs for the therapy, travel and lost earnings, in addition to damages for psychological and physical harm. The court did not award damages or find fault with Baidu, which has removed ads promoting such therapy, said Kaiser Kuo, a company spokesman.

Mr. Kuo said Baidu supported the verdict. “We’ll be very vigilant in the future about advertisements for false treatments for ‘gay therapy,’ ” he said. “We sincerely hope Yang Teng finds some solace in the court’s decision.”

Wei Xiaogang, executive director of the Beijing Gender Health Education Institute, hailed the verdict as critically important for gays and lesbians in China.

“The court said homosexuality is not a disease,” he said. “This is the first case really talking about homosexuality, so it’s really going to give people the legal support they need to fight back against these clinics.”

Chen Jiehao contributed research.

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BEIJING — A judge ruled on Wednesday against a gay couple who had sought the right to marry, in China’s first court case addressing the issue of same-sex unions.

The couple, Sun Wenlin and Hu Mingliang, filed a lawsuit against a civil affairs bureau in Changsha, Hunan Province, in southern China, after the office refused to grant them the right to marry when they tried to register in June 2015.

In a surprising move, a district court accepted the case early this year, the first time a Chinese court had agreed to hear such a lawsuit. An initial hearing scheduled for January was postponed. The court held a hearing on Wednesday morning, and the judge issued a ruling a few hours later. News of the ruling began circulating on social media shortly afterward.

Mr. Sun said in an interview that he and Mr. Hu planned to appeal. They will have to do so in the next 15 days, according to Chinese law.

Mr. Sun said that he had argued that he and Mr. Hu should be allowed to marry since the law did not explicitly ban same-sex marriage.

“We said this at the hearing, but they just kept repeating articles that mention...
‘a man and a woman,’ ” he said, referring to the civil affairs bureau.

The bureau cited three articles from China’s marriage law and two from the official marriage registration regulation, he said, with four mentioning “a man and a woman” and one stating that a civil affairs bureau may refuse applications if it believes a couple is not qualified to marry.

“But the fact that marriage between a man and a woman is legal does not suggest that marriage between two men is illegal,” he said. “This is illogical. I asked them to name one article that explicitly bans marriage between two men, but they never answered my question directly.”

The court also ruled that the couple would have to cover the litigation fee, which is 50 renminbi, or $7.70, by themselves.

The case has galvanized some gay rights advocates in China. Photographs and video taken in Changsha showed many people gathering outside the courthouse in the morning to support Mr. Sun and Mr. Hu.

The case has also received considerable attention on Chinese social media as a test of the authorities’ attitude toward same-sex marriage. Internet users said that although the result was unsurprising, the couple had achieved a big step.

“In this era, being able to knock open the court’s door is already a victory. Keep going,” a user with the handle Garden on the Roof wrote on Weibo, China’s equivalent of Twitter.

Mr. Sun said he and Mr. Hu were “definitely disappointed.”

“But after seeing so many people are paying attention to this case, we feel very hopeful,” he added.

Li Yinhe, a Chinese sexologist who has backed same-sex marriage, said the ruling was expected. Even if the couple appealed, she said, the court was unlikely to eventually accept their argument.
“Many other countries that have since allowed same-sex marriage didn’t explicitly ban same-sex marriage before, either,” she said.

The phone of the civil affairs bureau rang unanswered on Wednesday afternoon.

Some Chinese state-run news organizations had reported on the case over the winter, including the English-language edition of Global Times, a prominent and populist state-run newspaper. The Twitter account of People’s Daily, the official newspaper of the Communist Party, posted news of the ruling on Wednesday, using a photograph of the couple holding hands while crossing a street.

“Whether I want to marry or not, it should be my right to decide,” Mr. Sun, 27, said in an interview with The New York Times in late January.

Mr. Sun told his family that he is gay when he was 14 and has been a vocal supporter of gay rights.

For eight months, he ran a teahouse in southern Changsha where he gave weekly talks on sexuality and identity.

Mr. Hu, 37, a security guard, met Mr. Sun through a chat group in 2014. They said they did not spend a day apart after their first meeting. They tried to register their marriage on the first anniversary of their relationship.

A lawyer for the couple filed the lawsuit with the Changsha Furong District People’s Court on Dec. 16. Court employees initially refused to accept the paperwork. But on Jan. 5, the court said it was accepting the case.

The couple said that a pair of police officers visited them in December, telling them that a married couple had an important duty to have children. The parties spoke for 40 minutes. The officers told the couple they were not acting on behalf of the court.

“Around the world, in other places, gay people have joined forces to fight for their rights,” Mr. Sun said in the interview in January. “They can get married and
no longer face discrimination. Inside China, we still live a life like this. We can’t get married, and we suffer discrimination.”

Follow Edward Wong on Twitter @comradewong.

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A version of this article appears in print on April 14, 2016, on Page A9 of the New York edition with the headline: Judge in China Rules That a Same-Sex Couple Can’t Marry.
BEIJING — Gay activists in China brought their demands for public acceptance to a court here on Tuesday, when a student pressed education officials to remove books that describe homosexuality as an affliction.

The meeting at a court in the Fengtai district, an industrial suburb of Beijing, came after months of campaigning by Chen Qiuyan, a university student in southern China who has demanded that the Ministry of Education amend or cut the offending textbooks and course materials. Two dozen supporters gathered outside the concrete courthouse, waving placards and a rainbow flag, despite the biting cold.

“We worked for a long time for an opportunity for dialogue,” Ms. Chen, a 20-year-old obscured by a knitted hat shaped like a sheep, told reporters and supporters before the meeting. “We’ve finally achieved it.”

Her meeting with two education officials lasted an hour and ended without
reaching an agreement, said Ms. Chen’s lawyer, Wang Zhenyu, who also attended. The officials said their ministry had no say over the teaching materials that colleges and universities choose, Mr. Wang said. He added that he thought the claim was far-fetched in a country as rigorously censored as China.

But he saw a bright side.

“The people from the Ministry of Education said they had read reports about this case, and they had studied whether or not homosexuality was an illness,” Mr. Wang said. “They’re paying attention to this issue. I think that’s good. Only if there’s attention on a problem can it be solved.”

The meeting was not a trial but a judge-brokered discussion between Ms. Chen and the officials, Mr. Wang said. Ms. Chen, who also uses the name Qiu Bai, lodged her administrative law case in Beijing after a similar one was rejected by a court in Guangzhou, the capital of Guangdong Province in southern China, where she is a university student. Mr. Wang said he and Ms. Chen would discuss what steps to take next.

But Mr. Wang and other supporters said that, even without a decisive outcome, the encounter was a small victory given that the Chinese government has increasingly restricted and detained advocates of contentious social causes, including feminists, human rights lawyers and civic groups.

“The fact that we’ve been able to lodge a suit about the teaching texts is itself a change from the past,” Mr. Wang said. “To be able to go to court, and have the media here report about it, that indicates that this topic is slowly opening up and prejudice can be slowly eradicated.”

Mr. Wang has also represented a Chinese filmmaker, Fan Popo, who recently sued the broadcasting and television regulator after his documentary “Mama Rainbow,” about mothers learning to accept and love their gay children, was removed from Chinese websites.

“Over all, the space for survival of NGOs has been shrinking,” said Xin Ying,
the executive director of the **Beijing L.G.B.T. Center**. She was in the crowd outside the courthouse.

“These two cases, Qiu Bai and Fan Popo, have been a surprise to us and left us feeling that there is still space for some activism,” said Ms. Xin, who also uses the name Xiao Tie.

Ms. Chen said she wanted Chinese textbooks in psychology and other subjects to follow a path set by the Chinese Society of Psychiatry. In 2001, the society **removed homosexuality and bisexuality** from its list of recognized mental disorders. But Ms. Chen’s broader hope, she said, is to fight widespread social prejudices that have forced many gays to hide their sexual orientation from their families, friends and employers.

Homosexuality is not outlawed in China, although the police can use other legal provisions against gays. And hostility and intolerance can make it difficult for many people to live as openly gay.

When Ms. Chen was puzzling over her own sexual orientation, she trawled the shelves of her university library for guidance. Many books, however, presented homosexuality as an illness or a failing that is to be cured or overcome, rather than embraced, she said. Five psychology textbooks published after 2001 did not reflect the new medical guidelines and instead classified homosexuality as an illness, she said.

“In China, we lack systematic sex education, not to speak of education in gender diversity,” Ms. Xin said.

“That makes it difficult for comrades to find their own identity, because they don’t have other channels to learn about L.G.B.T. issues,” she added, using the Chinese slang term “comrades” for gay men and lesbians.

A study last year by the Gay and Lesbian Campus Association in China, based in Guangzhou, found that, in 31 psychology textbooks that were published in China after 2001 and that mentioned homosexuality, 13 classified it as a disorder.
University and college classes on student mental health also described homosexuality as a sickness, said Peng Yanhui, a friend and supporter of Ms. Chen who accompanied her to Beijing for the court meeting.

“Public attitudes have been improving, largely because of the role of the Internet in spreading information,” Mr. Peng said. “Understanding is the fundamental basis for eradicating prejudice, so if textbooks spread mistaken ideas like this, that is increasing prejudice.”

Mr. Peng, who has also used the name Yang Teng, gained prominence last year for successfully suing a clinic in Beijing that gave him electric shocks in an attempt to alter his sexual orientation. He said that his family had discovered he was gay only by reading reports about the case and that they had come to accept him.

Ms. Chen said her family rejected her after they learned that she was a lesbian.

“What I’m trying to do is eradicate prejudice in society toward comrades,” she said. “It’s very difficult to make your parents, that generation, to accept.”

Follow Chris Buckley on Twitter at @ChuBailiang.

Adam Wu contributed research.

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Transgender Man Was Unfairly Fired, but Bias Not Proved, Chinese Court Says

By VANESSA PIAO     JAN. 2, 2017

BEIJING — In what has been described as China’s first case involving transgender discrimination in the workplace, a court in the southwestern province of Guizhou has ruled that the plaintiff was illegally fired but that there was no proof that his dismissal was a result of bias against transgender people.

“We found this a little bit of a shame,” Huang Sha, the lawyer for the plaintiff, a 28-year-old transgender man who has been identified in the state news media only as “Mr. C” and who has declined to provide his real name to protect his privacy, said in a telephone interview.

Mr. C, who was born a woman but says he has long considered himself a man, was dismissed from the Ciming Health Checkup Center in Guiyang, the provincial capital, in April 2015 after a one-week probation. In March 2016, Mr. C filed his case with a local labor arbitration committee asking for compensation and a written apology. Mr. C said in an interview in April that the company’s human resources manager had complained that he dressed like a gay man and looked too
“unhealthy” to be an employee for a health checkup company.

In May, the arbitration committee ordered the company to pay Mr. C 402.30 renminbi, about $61 at the time, for the probation period, but rejected his demand for an additional month’s pay of 2,000 renminbi and an apology. He and Mr. Huang then brought the case to court.

The court held its first hearing in June but adjourned when Mr. Huang demanded an examination of two documents that the company had submitted as evidence that Mr. C had been fired for poor performance, failing to dress according to company standards and missing work.

The case resumed in December, after court-appointed experts from the Center of Forensic Science at the Southwest University of Political Science and Law concluded there was no way to authenticate the two documents, Mr. Huang said. The court’s ruling was issued on Dec. 30.

Mr. Huang said the court concluded that the company had failed to prove that it had fired Mr. C for reasons permitted as grounds for dismissal under labor law and ordered the company to pay Mr. C the 2,000 renminbi in compensation. But the court also said there was no proof that Mr. C’s termination had resulted from the company’s discriminatory attitude toward transgender people and did not grant Mr. C’s demand for an apology.

“This has demonstrated how low the cost of breaking the law is for employers,” Mr. Huang said, referring to the amount of compensation. “This is why the current job discrimination situation is so grim.”

“This case also highlights the problem of ‘invisible discrimination,’ because employers can always claim they fired people for reasons other than the one they’re accused of,” he said.

In recent years, there have been several high-profile lawsuits involving gender and sexual orientation, but most produced outcomes disappointing to activists. In September, a court in Beijing ruled against a lesbian who had sued the Ministry of
Education over textbooks that referred to homosexuality as a disease. In April, a court in Hunan Province rejected a gay couple’s demand that they be allowed to marry.

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A version of this article appears in print on January 3, 2017, on Page A10 of the New York edition with the headline: Chinese Court Says ‘Mr. C’ Was Fired Unjustifiably.