

The Lesbian De Facto Parent Standard in *Holtzman v. Knott*:
Judicial Policy Innovation and Diffusion

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“Lack of love and guidance in the lives of children is a major problem in our society. Does it make sense for the law to worsen this sad fact by denying a child contact with one they have come to accept as their parent, especially when it clearly appears to be in the best interest of the child?”

-- *In re H.S.H-K.: Holtzman v. Knott*, 193 Wis. 2d 649, 663 (Wis. 1995), *cert. denied*, *Knott v. Holtzman*, 516 U.S. 975 (1995), quoting Dane County Circuit Court Judge George A. W. Northrup.

I. Introduction

*Holtzman v. Knott*¹ is a pioneering case. As leading family law scholar Nancy Polikoff explains, it was the first decision in the history of the United States in which a court recognized a lesbian as the “de facto parent” of a child whom her partner had conceived and delivered during the course of their relationship.² This is an important issue, not only for same-sex couples, but for all disputes between legally unmarried partners involving visitation with children where the petitioning party lacks some other legal connection to the children. The cases that address this issue, however, mostly involve lesbian couples.³ Thus, while this issue attracts far less attention than same-sex marriage, it will remain a more pressing issue for same-sex couples until they win marriage rights⁴ because it is an increasingly common problem, and it presents a claim that lesbian petitioners increasingly can win.⁵

¹ *In re H.S.H-K.: Holtzman v. Knott* 193 Wis. 2d 649, 533 N.W. 2d 419 (Wis. 1995), *cert. denied*, *Knott v. Holtzman*, 516 U.S. 975 (1995). Other sources that I will discuss below, *e.g.* *V.C. v. M.J.B.*, 319 N.J. Super. 103, 111 (N.J. Super. Ct. App. Div. 1999), cite this case as “*Custody of H-S.H.K.*” However, for ease of reference, I will refer to it hereinafter as *Holtzman*.

² Nancy Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305-35, 324 (John D’Emilio, William B. Turner, and Urvashi Vaid, eds. 2000). *See also*, Michael T. Morley, et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 *YALE L. & POL’Y REV.* 169, 203-05 (2003).

³ De facto parent claims are far less likely to arise for heterosexual couples simply because most states have some sort of statute specifying who may claim paternity and how. *See, e.g.*, Wis. Stat. 48.025 (2005) (establishing procedure for declaration of “paternal interest” in non-marital child), *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (state law making husband of child’s mother the presumptive father of the child does not violate due process right of man other than husband who claims to be actual father).

⁴ Currently, Massachusetts is the only state that recognizes same-sex marriages. *Goodridge v. Dept. of Public Health*, 798 N.E. 2d 941 (Mass. 2003). *But see* Pam Belluck, *Same-Sex Marriage Vote Advances in Massachusetts*, *NY TIMES*, Jan. 3, 2007 (Mass. legislature took first vote in process of allowing state constitutional amendment to prohibit same-sex marriages to go to popular vote). The following states provide some form of civil union or

As the issue of de facto parents in *Holtzman* demonstrates, refusal to recognize same-sex marriages creates unnecessary uncertainty and expense for same-sex couples and for the legal system. For example, the courts of Vermont and Virginia have recently had to devote significant resources to adjudicating a dispute between lesbian ex-partners that would have been legally much simpler had these two lesbians been able to marry.⁶ *Miller-Jenkins* is a very important case in its own right. But it is also important because it is the latest wrinkle in the ongoing legal saga of what happens to same-sex couples when they lack the statutory forms of relationship recognition that opposite-sex couples can take for granted. It thus provides an important opportunity to look back at *Holtzman* and related cases to analyze the legal principle of de facto parenthood.

Miller-Jenkins is unique because it involves an interstate custody dispute between a lesbian couple who had entered into a civil union in Vermont.⁷ Because the vast majority of

domestic partnership that grants some of the rights and benefits of marriage to same-sex couples, but not marriage per se. Coverage varies widely: NJ, *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (N.J. 2006), Laura Mansnerus, *Legislators Vote for Gay Unions in N.J.*, NY TIMES, Dec. 15, 2006; CA, Cal. Fam. Code §308.5; CT, Conn. Gen. Stat. §§ 46b-38aa to 46b-38oo; Vermont, VT Stat. Ann. tit. 15 §1201(4)(2003); HI, Haw. Rev. Stat. § 572-1; DC, D.C. Code § 32-702; ME, 22 M.R.S. §2710.

⁵ This issue also presents a new twist for lesbian/gay civil rights activists insofar as it involves one lesbian filing suit against another. However, it seems clear that most activists will side with the petitioning ex-partner in these cases because, from the movement perspective, the issue is legal recognition of families consisting of same-sex couples and their children. See *infra*, text accompanying note __ for further discussion of this point. Mary Bonauto of Gay and Lesbian Advocates and Defenders, who represented the plaintiffs in *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003) (state's refusal to permit same-sex marriages violates state constitutional guarantee of equal protection of the laws), also represented the coparent (defendant-appellee) in *Miller-Jenkins*, 2006 VT 78.

⁶ *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78. See April Witt, *About Isabella*, WASH. POST, Feb. 4, 2007 (story about the Miller-Jenkins case).

⁷ *Miller-Jenkins*, 2006 VT 78 at P3. Vermont was the first state to grant the rights and benefits of marriage to same-sex couples, but did so by creating a separate category, civil unions, that is distinct from marriage. See *id.* at P31 through P40 for discussion of the relationship between civil unions and marriage under VT statutes, P36 for judicial notice of the fact that VT was the first state to create such a legal status for same-sex couples, and P36 n. 2 for reference to the similar legislative schemes that California, Cal. Fam. Code § 297 (West 2006), and Connecticut, Conn. Gen. Stat. §§ 46b-3811 to 46b-38oo (2006), have created. How other states should address cases involving same-sex couples in Vermont civil unions is a question that will remain important until all states recognize same-sex marriages, but in many states it is a relatively simple matter of applying a statute that prohibits recognition of same-sex unions of any sort. See, e.g., *Alons v. Iowa District Court*, 698 N.W. 2d 858 (Iowa 2005) (petitioners lack standing to intervene for purpose of preventing trial court from dividing property between two lesbians who wished to end their VT civil union); *Burns v. Burns*, 253 Ga. App. 600 (Ga. Ct. App. 2002), *reh'g denied, cert. denied*, 2002

states provide no legal relationship recognition for same-sex couples, for the foreseeable future, when same-sex couples who have children end their relationship, they are much more likely to do so in a state where statutes governing divorce, child custody, and visitation make no explicit provision for same-sex couples. This problem can also arise with unmarried heterosexual couples. *Holtzman* and its progeny provide a framework with which courts can evaluate claims to visitation by parties whose relationship status is not expressly determined by any applicable legislation.⁸ Widespread adoption of the de facto parent test⁹ in *Holtzman* would serve as a useful interim step until all states recognize same-sex marriages. The test balances well the rights of all parties, and the need for courts to exercise their equitable powers on behalf of the child's best interest while also enforcing relevant statutory provisions.¹⁰

This article describes the holding and rationale of *Holtzman*, along with brief descriptions of subsequent cases, both those that grant standing to the petitioner and those that do not. This article also provides demographic information about the states that have directly addressed the issue, as well as a comparison group of states that restrict the parenting rights of lesbians and gay

Ga. Lexis 626 (Ga. July 15, 2002) (refusing to recognize VT civil union in custody dispute between divorced parents).

⁸ *Miller-Jenkins* also presents the important question, which is beyond the scope of this article, of whether a state must recognize an order from another state granting visitation to a lesbian ex-partner. This question implicates the Parental Kidnapping Prevention Act (PKPA) (28 U.S.C. § 1738A), 2006 VT 78 at P2, and, in Vermont, the Uniform Child Custody Jurisdiction Act (UCCJA) (15 V.S.A. §§ 1031-1051) (other states have enacted the Uniform Child Custody Jurisdiction Enforcement Act, e.g., 2005 Wis. Act 130, replacing the UCCJA, Wis. Stat. Chap. 822), *id.* The VT Supreme Court effectively held that the issue of the civil union was irrelevant because what mattered was the VT family court's determination that the petitioner is a parent of the child, which decision the VA courts were bound to respect under the PKPA. *Id.* at P20. The VT Supreme Court also made the observation that its own precedent forbade lower courts to grant full faith and credit (FFC) to custody orders from other states if those states had refused FFC to an earlier VT court order – why should VT (or any state) give more effect to orders of other states than it does to its own? *Id.* at P19. Ultimately, the U.S. Supreme Court may have to decide the interstate recognition issue, but regardless, in the interim, any lesbian ex-partner who faces an interstate visitation dispute will likely be better off if she has an order from her home state granting her the right to visitation. The Virginia Court of Appeals has held that the Virginia trial court violated the PKPA by deciding a custody and visitation issue in a case where another state had already ruled. *See Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E. 2d 330 (Va. App. 2006).

⁹ *See infra*, note 67 and accompanying text for the four-part de facto parent test in *Holtzman*.

¹⁰ *See infra*, notes 56-69 and accompanying text for discussion.

men in various ways.¹¹ With most states having yet to address the issue directly, the legal, policy, and political climate will have a significant impact on the outcome of any case that raises the issue *de novo* in any given state. As the discussion of the existing cases makes clear, each state court has relied on its own unique combination of statutes and precedent in deciding the visitation rights of ex-partners as co-parents, even as the states that came to the issue later have looked to decisions in Wisconsin and New Jersey, frequently relying on Wisconsin's four-part test for deciding who qualifies as a *de facto* parent. Demographic information is relevant to the larger legal, policy, and political context,¹² and therefore should help litigators who must decide whether to risk adverse precedent by bringing a case in the hope of vindicating the visitation rights of an ex-partner.

The issue of recognizing visitation rights in the ex-partner of a fit, legal parent arises precisely at the threshold of law and policy. State courts usually have a broad grant of authority from the legislature to ensure that their decisions reflect the best interest of children.¹³ Should

¹¹ See *infra*, note XX and accompanying text. A number of states have adjudicated the visitation rights of lesbian ex-partners, but many have not. Their failure to do so does not reflect a rejection of such rights. The issue probably has not come up. Insofar as one wants to compare the states that have recognized lesbians as *de facto* parents with those that have not, one option is to use states that otherwise restrict the parenting rights of lesbians and gay men, such as Florida, which prohibits lesbians and gay men from adopting. Fla. Stat. § 63.042(3); *Lofton v. Sec'y of the Dep't. of Children and Family Servs.*, 358 F.3d 804 (CA 11 2004), *reh'g en banc denied*, 377 F.3d 1275 (CA11 2004), *cert. denied*, 543 U.S. 1081 (2005).

¹² The argument of this article implicitly raises the vexed question of the basis on which judges do and should render their opinions. However, that question is beyond the scope of this article. DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* (2003), has demonstrated that judges who are younger, racial/ethnic minority, and/or female are more likely to find in favor of lesbian/gay plaintiffs than judges who are older, white, and/or male. However, without delving into the literature on whether judges' identities do or should influence their decisions, I take it that the statutes, precedents, and other sources of law that judges claim to rely on in deciding cases reflect the demographic characteristics of the state in question. This chain connecting judicial opinions to demographic characteristics should be uncontroversial, since legislation by all accounts should reflect the preferences of the persons whose legislators create it.

¹³ See Jovana Vujovic, *Family Law Chapter: Child Custody and Visitation*, 5 GEO. J. GENDER & L. 477, 481 (2004) (overview of state laws); *Developments in the Law: IV. Changing Realities of Parenthood: The Law's Evolving Response to the Evolving Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052 (2003). For a specific example, see Wis. Stat. 48.01 (2005): "This Chapter may be cited as 'The Children's Code'. In construing this chapter, the best interest of the child or unborn child shall always be of paramount consideration. This chapter shall be liberally construed to effectuate the following express legislative purposes." See also, *In re Parentage of L.B.: Carvin v. Britain*, 122 P.3d 161, 155 Wn.2d 679 (Wn. 2005): 683, "The equitable power of the courts to

the courts use that authority in order to enforce visitation rights on behalf of the co-parent, against the legal parent's wishes? Does the fact that the legislature has not conferred legal recognition on same-sex unions – or that the state may have amended its constitution to prohibit recognition of same-sex unions¹⁴ -- mean that the court should follow by rejecting visitation claims from ex-partners? Should the courts focus instead on the well-being of the child by providing equitable relief consistent with other policy priorities as manifest in statutes?

This article takes the position that, where possible, state supreme courts should recognize the visitation rights of de facto parents, thus giving to trial judges the leeway to order visitation with the co-parent where the facts demonstrate that doing so is in the best interest of the child.¹⁵ In the absence of specific legislative direction, this is in some sense a policy choice by the court, but it is a policy choice that legislatures often seem willing to grant to courts. Further, insofar as state supreme courts grant visitation rights to ex-partners of fit, legal parents by construing applicable statutes, legislatures have the option of reversing the court's decision if they so choose.¹⁶ To take the other position – courts should not use long-standing equitable powers to

adjudicate relationships between children and families is well recognized, and our legislature has evinced no intent to preclude the application of an equitable remedy in circumstances such as these," 699 n. 18, "It is well recognized, both in Washington and nationally, that child custody and visitation orders may be established by reliance on courts' equity powers and the common law. *See* 2 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 20.3, at 484 (2d ed. 1987) (noting "equity has inherent power to award custody," and as such "custody awards may be made regardless of statutory language" provided jurisdiction exists)."

¹⁴ The precise impact of state constitutional amendments prohibiting same-sex marriages remains to be seen, and will vary by state. Some such amendments simply prohibit marriages. *See, e.g.*, Montana: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." It seems that this language would have no necessary implications for a judge who must decide if a lesbian ex-partner should have visitation rights under Montana law. Several states, however, have amendments with the following or similar language: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." Does recognition of visitation rights in a lesbian ex-partner have the effect of conferring a legal status substantially similar to marriage, albeit after the fact, on her and the child's mother? For a compilation of state constitutional amendments prohibiting same-sex marriages as of 2004, see Carrie Evans, *EQUALITY FROM STATE TO STATE: GAY, LESBIAN, BISEXUAL, AND TRANSGENDER AMERICANS AND STATE LEGISLATION 2004* (Human Rights Campaign 2004). For discussion of the possible impact of anti-marriage amendments on de facto parenting decisions, see *infra*, notes 249-71 and accompanying text.

¹⁵ Thus, I agree with Gay and Lesbian Advocates and Defenders, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 *UCLA WOMEN'S L.J.* 151,155 (1999-2000).

¹⁶ *See infra*, text accompanying notes ___ to ___.

adjudicate visitation disputes between lesbian couples – is to assert that such defacto parents should have no redress at law.¹⁷

Section II of this article describes *Holtzman v. Knott*, and cases from other states, noting their similarities to and differences from *Holtzman*. Section III provides an overview of the political science literature on the question of policy innovation and diffusion, as an aide in thinking about why Wisconsin would lead the nation in recognizing visitation rights in lesbian co-parents, and what factors best explain why other states have followed. Section IV explores those factors in detail.

II. *Holtzman v. Knott* and the De Facto Parent Standard

In the ten years after *Holtzman v. Knott*, courts in seven other states granted the right to petition for visitation to the lesbian ex-partners of biological mothers.¹⁸ Five of those states, New Jersey,¹⁹ Maryland,²⁰ Rhode Island,²¹ Colorado,²² and Washington,²³ relied on the de facto parent test in *Holtzman*; Massachusetts²⁴ and Pennsylvania²⁵ did not rely directly on *Holtzman*.

¹⁷ See also, *Alons v. Iowa District Court*, 698 N.W. 2d 858 (Iowa 2005) (petitioners lack standing to intervene for purpose of preventing trial court from dividing property between two lesbians who wished to end their VT civil union). In custody and visitation disputes, the legal parent does have legal recourse, by definition. In *Alons*, the issue was property division between separating lesbians. Although the court did ultimately adjudicate their dispute, conservatives sued the district court in order to prevent it from doing so, thus creating the possibility that neither member of the couple could have legal recourse.

¹⁸ See Sarah Opichka, *Comment: Custody Cases and the Expansion of the Equitable Parent Doctrine: When Should “Acting Like” A Parent Be Enough?* 19 WIS. WOMEN’S L.J. 319 (2004). Opichka states, “This four-factor test, however, has not been followed by other courts,” *id.* at 321. The reason for Opichka’s error on this point is not clear from her article.

¹⁹ *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539 (NJ 2000), *cert. denied*, 531 U.S. 926 (2000).

²⁰ *S.F. v. M.D.*, 132 Md. App. 99, 751 A.2d 9 (Md. Ct. Sp. App., 1999).

²¹ *Rubano v. DiCenzo*, 759 A.2d 959, 2000 RI Lexis 182 (RI 2000).

²² *In the Interest of E.L.M.C., a Child, and Concerning Cheryl Ann Clark, Appellant, and Elsey Maxwell McLeod, Appellee*, 2004 Colo. App. LEXIS 1186 (Colo. Ct. App, 2004), *cert. denied*, 2004 Colo. LEXIS 851 (Colo., Oct. 25, 2004).

²³ *In the Matter of the Parentage of L.B., Carvin v. Britain*, 155 Wn.2d 679, 122 P.3d 161 (2005).

²⁴ *E.N.O. v. L.M.M.*, 429 Mass. 824 (Mass. 1999).

²⁵ *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (Pa. 2001). The Pennsylvania Superior Court has ruled more recently on this case, *T.B. v. L.R.M.*, 2005 PA Super 114, 874 A.2d 34 (2005), but that ruling addressed only the factual

In contrast, courts in California²⁶ and Tennessee²⁷ denied lesbian ex-partners' petitions for visitation.²⁸ Whatever the outcome, as growing numbers of lesbian couples chose to have children, a growing number of states confronted the problem of how to adjudicate disputes between them over custody and visitation of the children when the adults end the relationship, given the absence of statutory recognition for same-sex relationships in most states.²⁹ *Holtzman* is an important reference point for this emerging legal and policy debate because it identifies the major points of argument involved, and because it has guided the courts of several other states.

A. Wisconsin

Holtzman v. Knott emerged from the "close, committed" relationship of over ten years between the two parties.³⁰ Shortly after starting their relationship, Holtzman and Knott bought a

findings of the trial court on remand, not the legal determination that the plaintiff should have the right to petition for visitation.

²⁶ 228 Cal. App. 3d 831 (Cal. Ct. App. 1991). *But see*, *Elisa B. v. Superior Court*, 37 Cal. 4th 108, 117 P.3d 660, 666 (2005) (treating lesbian partner as parent and imposing child-support obligations under Uniform Parentage Act), *K.M. v. E.G.*, 37 Cal. 4th 130, 117 P.3d 673, 675 (2005) (both women are parents when one provides ova for other to carry), *Kristine H. v. Lisa R.*, 37 Cal. 4th 156, 117 P.3d 690 (2005) (partner estopped from attacking validity of joint parenting agreement). Notice how these cases reflect more complicated developments beyond the basic question of whether one partner may petition for visitation with the ex-partner's child.

²⁷ *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

²⁸ For this article, I distinguish cases that present the issue of recognizing lesbian co-parents substantially intermixed with other legal issues. This category includes *LaChapelle v. Mitten* (*In re L.M.K.O.*), 607 N.W.2d 151 (2000) (dispute involved not only competing claims between former lesbian partners, but also known sperm donor who claimed rights as well), *Laspina-Williams v. Laspina-Williams*, 46 Conn. Supp. 165, 742 A.2d 840 (Conn. Super. Ct. 1999) (legal parent had participated with the co-parent in securing from the court a declaration of the co-parent as a "coguardian" for legal purposes before the adults' relationship began to sour), and *Barnae v. Barnae*, 123 N.M. 538, 943 P.2d 1036 (1997) (interlocutory appeal holding that trial court did have jurisdiction in interstate dispute between lesbian couple). For discussion of these cases, see Ruthann Robson, *Making Mothers: Lesbian Legal Theory & The Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RIGHTS L. REP. 15 (2000).

²⁹ *But see supra*, note 4. For this article, I also distinguish *In re Soohoo v. Johnson*, 2006 Minn. App. Unpub. Lexis 324. This case involves a dispute over custody and visitation between lesbian ex-partners, but the court held that no *de facto* parent status exists in MN. *Id.* at 2. However, it granted the petitioner's request for visitation under Minn. Stat. § 257C.08, subd. 4, which allows parties who are not foster parents and have lived in the same household for two years with an unmarried minor to petition for visitation with the minor if "(1) visitation rights would be in the child's best interests; (2) the petitioner and the child had established emotional ties that created a parent-child relationship; and (3) visitation rights would not interfere with the relationship between the custodial parent and the child." *Id.* at 5. The differences between these factors and those of the *Holtzman* court, *infra* note 62 and accompanying text, would make for an interesting study, but that study is beyond the scope of this article.

³⁰ *Holtzman*, 533 N.W. 2d at 421.

house together in Boston.³¹ They decided to raise a child together. Knott served as the birth mother and the child was born in 1988.³² The trial court found ample evidence to indicate both parties' intention to serve as parents to the child: Holtzman attended the delivery, the two chose the child's given name jointly and hyphenated their own surnames to create his, they recognized Holtzman's parents as the child's grandparents, and Holtzman provided the primary financial support for the family during the first five years of the child's life.³³ Having ended the relationship in January 1993, Knott moved out of the house she shared with Holtzman, taking the child with her.³⁴ After Knott tried to terminate Holtzman's relationship with the child, Holtzman filed separate petitions, first for custody and then for visitation.³⁵ The guardian ad litem reported that the child clearly regarded Holtzman as his parent and wished to continue seeing her even though he realized that doing so upset Knott.³⁶

The plaintiff presented her claims for custody or visitation under Wis. Stat. sec. 767.24 (1991-92).³⁷ The trial court dismissed the claim for custody, finding that Holtzman had not presented any evidence to justify her doubts about Knott's capacity to function as a parent.³⁸ It then concluded that the statute predicated the court's authority to require visitation on an antecedent "action affecting the family," which in this case could only mean a custody action, since divorce was not an option for a couple who could not legally marry.³⁹ No such action

³¹ *Id.*

³² *Id.*

³³ *Id.* at 421-22.

³⁴ *Id.* at 422.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 423.

³⁸ *Id.* at 424.

³⁹ *Id.* at 424.

having occurred, the trial judge could find no basis for Holtzman's claim to have standing to petition for visitation.⁴⁰ He stated his dissatisfaction with the law in his opinion, writing,

The court sees this as a case where a family member ought to have the right to visit and keep an eye on the welfare of a minor child with whom she has developed a parent-like relationship. Unfortunately because the law does not recognize the alternative type of relationship which existed in this case, this court can not offer the relief Holtzman seeks.⁴¹

He called on the Wisconsin legislature and the Wisconsin Supreme Court to address the issue.⁴²

Thus, when the supreme court reversed the trial court on the issue of Holtzman's petition for visitation, it granted the trial judge's plea for a change in existing law.⁴³ In doing so, it conferred an unprecedented form of legal recognition on a lesbian relationship. It seemed unlikely that the supreme court would rule as the trial judge wanted because it had held only four years earlier in *In re Z.J.H.*, on very similar facts, that the unmarried former partner of a fit, legal parent could not petition for visitation under Wisconsin law.⁴⁴ However, the composition of the supreme court had changed in the interim.⁴⁵ Those changes created a majority for the proposition that the statutory scheme governing visitation in Wisconsin did not occupy the

⁴⁰ *Id.*

⁴¹ *Id.* at 422-23, quoting trial judge.

⁴² *Id.*

⁴³ *Id.* at 422-23.

⁴⁴ *In Re The Interest Of Z.J.H.: Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991).

⁴⁵ Justices on the court at the time of *Z.J.H.*, 1991, were Heffernan, Callow, Bablitch, Abrahamson, Day, Steinmetz, and Ceci. Abrahamson and Bablitch dissented. Justices on the court at the time of *Holtzman*, 1995, were Heffernan, Bablitch, Geske, Abrahamson, Day, Steinmetz, and Wilcox. *PORTRAITS OF JUSTICE: THE WISCONSIN SUPREME COURT'S FIRST 150 YEARS 86-95* (Trina E. Gray et al. eds., 2nd ed. 2003). Abrahamson wrote the majority opinion, with Day, Steinmetz, and Wilcox dissenting from the decision insofar as it granted Holtzman the right to petition for visitation. *Holtzman*, 533 N.W. 2d at 419.

field,⁴⁶ leaving the courts free to exercise their long-standing equitable power to grant visitation in the best interest of the child even in circumstances that the statute did not expressly envision.⁴⁷

It is important to emphasize how the Wisconsin Supreme Court couched its holding in *Holtzman*. The case presented two questions, whether Holtzman could petition for custody and whether she could petition for visitation.⁴⁸ In finding that she could not petition for custody, but could petition for visitation, the Court adjudicated Holtzman's rights. They emphasized, however, that "The proceedings must focus on the child."⁴⁹ In other words, the individual who would petition for visitation under the terms of the *Holtzman* decision faced the high initial hurdle of demonstrating that she (or, presumably, he) had established a "parent-like relationship" with the child and that the legal parent had interfered with that relationship.⁵⁰ Only then could a petitioner ask a trial court to consider if visitation would be in the child's best interest.⁵¹

This emphasis on the child's best interest was central to the *Holtzman* decision in two senses. First, the primary purpose of the decision was to protect the best interest of the child.⁵² Second, the Court justified its use of equitable power to grant permission to petition for visitation in a circumstance that the statute did not encompass by reference to the legislature's frequent repetition of the child's best interest as the paramount policy priority in all cases of custody and visitation.⁵³ That is, as is often the case, the majority that allegedly legislated from the bench had a clear statutory basis for the policy preference it articulated in making its decision.

The *Holtzman* opinion contains an extensive discussion of the law of child custody and visitation as it stood in Wisconsin in 1994 and 1995, and how that law had developed over the

⁴⁶ See *infra*, note 53.

⁴⁷ *Holtzman*, 533 N.W.2d at 421.

⁴⁸ *Id.* at 420.

⁴⁹ *Id.* at 421.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 436-37.

⁵³ *Id.* at 431, 434-37.

previous twenty years.⁵⁴ It found that visitation under sec. 767 applies only at the dissolution of a marriage, and Holtzman's relationship with Knott was not a marriage, thus making that section inapplicable.⁵⁵ It also found, however, that "[t]he legislature did not intend any or all of the three visitation statutes to preempt the entire field of visitation."⁵⁶ Thus, the Court inferred that, in defining visitation under certain circumstances, the legislature did not intend to preempt the courts' long-standing equitable power to permit visitation where doing so was in the child's best interest.⁵⁷

But equitable decisions regarding visitation with a child must balance the child's best interest against the legal parent's constitutionally protected liberty interest in deciding how best to raise the child.⁵⁸ In order to achieve that balance, the Court held that a petitioner for visitation must first establish that she has a "parent-like relationship" with the child,⁵⁹ and secondly must demonstrate some "triggering event" to justify the court's interference in the parent's right to raise her child unhindered.⁶⁰ The parent's interruption of petitioner's relationship with the child constitutes such a triggering event.⁶¹ After such interruption, the petitioner must seek a visitation order from the court within a "reasonable time."⁶²

The Court identified four elements a petitioner must prove in order to demonstrate a "parent-like relationship" with a child, thereby gaining standing to petition for visitation:

- (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the

⁵⁴ *Id.* at 424-37.

⁵⁵ *Id.* at 424.

⁵⁶ *Id.* at 427.

⁵⁷ *Id.* at 430-31.

⁵⁸ *Id.* at 429, 435.

⁵⁹ *Id.* at 421, 435.

⁶⁰ *Id.* at 421, 435.

⁶¹ *Id.* at 421, 436.

⁶² *Id.*

petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.⁶³

The first element in this test is the most important, because it implicitly points up the odd double-bind the legal parent finds herself in. On one hand, she clearly has a constitutional right to decide how best to raise her own child, as the court recognized.⁶⁴ On the other hand, insofar as she exercises that right so as to foster a significant relationship between her child and her domestic partner, she creates at least a strong interest, perhaps even a legal right, in the child to be able to continue that relationship if doing so is in the child's best interest.⁶⁵

B. Dissents

Without meaning to, perhaps without recognizing it, the dissents in *Holtzman* demonstrated the extent to which the case turned on one's willingness to recognize some legitimacy in lesbian relationships. The dissenters argued that the majority had abandoned a clear statutory scheme and, in doing so, exposed fit, legal parents to interference in their

⁶³ *Id.* at 421 (footnote omitted), 435. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c), adopted May 16, 2000, defines "de facto parent" thus: "an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived."

⁶⁴ *Holtzman*, 553 N.W.2d at 421, 429.

⁶⁵ *Id.* at 434 n.34, quoting *Stickles v. Reichardt*, 203 Wis. 579, 582 (1932).

constitutional parenting rights from virtually all quarters.⁶⁶ They saw themselves as defending the rights of the legal parent.⁶⁷ But this argument implicitly assumed that no lesbian co-parent could have a more significant relationship to the child and to the legal parent than any other “third party,”⁶⁸ and that the legal significance of adult relationships depends entirely on statutory recognition. Hence the importance of the decision for lesbian/gay civil rights activists: the majority insisted that a lesbian relationship deserved some greater measure of legal recognition than a fit, legal mother’s relationships with third parties even if the legislature had not chosen to provide for their needs through some statutory recognition of their relationship, such as marriage or domestic partnership.

Given the lack of statutory recognition for lesbian relationships, this debate over the parenting rights of lesbian ex-partners, and the right of children to sustain relationships with their mothers’ ex-partners, also involves a debate over how to interpret silence from the legislature. Both the concurring and dissenting opinions in *Holtzman* focus mainly on the appropriate role of the judiciary relative to the legislature, with the underlying question, implicitly or explicitly, being the extent of the judiciary’s power to act in the name of the child’s best interest.

Concurring in *Holtzman*, Wisconsin Supreme Court Justice William Bablitch wrote that:

The dissents' unspoken but inevitable conclusion is that this legislative silence evinces a legislative intent that the best interests of these children [of dissolving non-traditional relationships] have no protection whatsoever when it comes to access to the people who

⁶⁶ *Holtzman*, 553 N.W.2d at 439-42 (Justice Day dissenting) 442, 449-50 (Justice Steinmetz dissenting), 451-52 (Justice Wilcox dissenting).

⁶⁷ *Id.*

⁶⁸ This position reflects the common, apparently quite sincere, belief of many conservatives that, if our society relinquishes its rule requiring discrimination against same-sex couples, we will have lost all basis for discriminating against other types of couples. The least sophisticated version of this argument is the claim that, if we permit same-sex marriages, we will have to permit marriages between adults and children, or between persons and animals. To state the obvious, we can easily articulate other legal grounds for prohibiting such relationships without violating our legal – constitutional, moral – commitment to provide equal protection of the laws for all consenting adults.

have raised them. The dissents would have us believe that the legislature intends these children to somehow engage in a societal Dickensian drift, with both the children and possibly society paying what could be an incalculable price for the errors of others. I do not believe the legislature could intend that harsh a result.⁶⁹

Dissenting, Justice Day responded to Justice Bablitch with the assertion that the majority, rather than defending the best interest of the child, only interfered in the right of a fit, legal parent to determine the child's best interest. Day quoted extensively from a California appellate opinion asserting that ending a relationship with one adult would be less harmful to the child than witnessing on-going conflict between that adult and the child's legal parent.⁷⁰ Of course, this claim would also militate in favor of granting sole custody to one parent in heterosexual divorces where the parties cannot refrain from conflict.

Day fails to address this point, but insofar as his larger position is that the court should defer to the legislature, he could claim that he merely defers to the express presumption in Wisconsin statute in favor of joint custody where heterosexual divorce is involved.⁷¹ But this statutory presumption begs the question: why does the benefit of joint custody exceed the harm of on-going parental conflict for the children of opposite-sex couples, but not for same-sex couples? If a judge, relying on the report of a guardian ad litem, can see that continued visitation with the non-legal parent in a same-sex couple is in the best interest of the child,⁷² and the legislature has charged the court with ensuring the child's best interest,⁷³ then why should the judge even take the parents' gender or sexual orientation into account?

⁶⁹ *Id.* at 438 (Bablitch concurring).

⁷⁰ *Id.* at 440, citing *In re the Marriage of Gayden*, 229 Cal. App. 3d 1510, 1517, 280 Cal. Rptr. 862 (1991) (Day, dissenting).

⁷¹ Wis. Stat. 767.24(2)(am) & (b) (2005).

⁷² *Holtzman*, 533 N.W. 2d at 422.

⁷³ *See supra*, note 13.

Day also stated the concern that the court had opened a fit, legal parent to unending litigation from virtually any “third party” who might choose to assert parenting rights to the child.⁷⁴ He began his dissent by joining in another dissent, by Justice Steinmetz. The solution to Day’s concern regarding unending litigation lay, according to Steinmetz, in judicial restraint. The first paragraph of Steinmetz’s dissent is a concise summary of the complaint against judicial activism:

The proper function of a state court is to apply the law that is declared by the popularly elected legislators of its state and of the United States, ensuring that constitutional rights are not trammled by individuals, business entities, or the government. A state court functions at its lowest ebb of legitimacy when it not only ignores constitutional mandates, but also legislates from the bench, usurping power from the appropriate legislative body and forcing the moral views of a small, relatively unaccountable group of judges upon all those living in the state. Sadly, the majority opinion in this case provides an illustration of a court at its lowest ebb of legitimacy.⁷⁵

Ultimately, the dispute between the majority and the dissents in *Holtzman*, as in many such cases, involves the question of definitions and who may properly make them. Day and Steinmetz would define the proper powers of the court such that it would leave to the legislature all power to define what constitutes a “family” and what powers the state may exercise over “the family” properly defined.

Yet Steinmetz’s dissent contains an empirical test of his argument. He noted that, in 1991, the legislature amended the primary statute governing familial relationships for the

⁷⁴ *Holtzman*, 553 N.W.2d at 441-42 (Day, dissenting). See also, *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913, 918 n.7 (Pa. 2001).

⁷⁵ *Id.* at 442 (Steinmetz, dissenting). See also, *id.*, “The majority opinion is a bad example of legislation by judicial fiat.” (Day, dissenting).

purpose of overriding a decision by the court denying visitation rights to a child's relative.⁷⁶ He then argued that, insofar as the legislature failed to override a key decision the court had relied on in deciding against the lesbian petitioner in *In re Z.J.H.*, it gave its imprimatur to the outcome of both cases.⁷⁷ In the long run, Steinmetz's test proves exactly the opposite of what he intended: just as the Wisconsin legislature has not overridden the decision on which *In re Z.J.H.* depends, or *Z.J.H.* itself, neither has it overridden *Holtzman*. The evidence strongly suggests, not that the legislature has determined the exclusive list of circumstances under which courts may intervene in the child rearing decisions of fit, legal parents, but that it has failed to do so in the past and continues that failure in the present, with the expectation that the courts will fill in the gaps that inevitably occur when citizens create situations that legislators cannot possibly anticipate.

From the dissents' perspective it might seem that the *Holtzman* majority betrayed its own stated commitment to the best interest of the child⁷⁸ in favor of recognizing same-sex couples. It is essential, however, to reiterate what the *Holtzman* court articulated – a standard by which a lesbian (or other) co-parent could establish her status as co-parent, or de facto parent, after which the trial court could evaluate whether or not the evidence supported the proposition that visitation between the co-parent and the child is in the child's best interest.⁷⁹ The Wisconsin Supreme Court already had in the trial record the assertion by the guardian ad litem that continuing the relationship between the co-parent and the child was in the child's best interest.⁸⁰ Predicating a dissent in *Holtzman* on the assertion that the legal parent should have the unfettered right to

⁷⁶ *Id.* at 444, citing *In re Marriage of Soergel*, 154 Wis. 2d 564, 453 N.W.2d 624 (1990) (Steinmetz, dissenting).

⁷⁷ *Holtzman*, 553 N.W.2d, citing *Van Cleve v. Hemminger*, 141 Wis. 2d 543, 415 N.W.2d 571 (Ct. App. 1987), *In re Z.J.H.*, 162 Wis. 2d 1002, 1023, 471 N.W.2d 202 (1991) (Steinmetz, dissenting).

⁷⁸ *Holtzman*, 553 N.W.2d at 421, 436-37.

⁷⁹ *Id.* at 421, 435.

⁸⁰ *Id.* at 422.

decide for her child⁸¹ creates the contradiction of defending the legal parent's choice when she has decided to shun the co-parent, but not at the earlier point when she decided to foster the relationship between the co-parent and her child.

It is possible that a relationship the legal parent originally considered beneficial to the child is no longer beneficial. But this is a factual issue for the trial court to decide, as the *Holtzman* majority held. Rather than deference to the legislature, the dissent's position that the court should dismiss the co-parent's petition involves the proposition that the court should disregard its long-standing powers to decide custody as a question of equity, and to apply estoppel to attempts by defendants to repudiate prior commitments.⁸² It is difficult, if not impossible, to avoid the conclusion that the sexual orientation of the co-parent in this case played a significant role in the reasoning of the dissenters.

C. Others

At least five other jurisdictions have adopted the Wisconsin standard for identifying a de facto parent. Courts in New Jersey, Maryland, Rhode Island, Colorado, and Washington cited *Holtzman* because they faced facts that were, in all important respects, very similar or identical to the facts of *Holtzman*. Whether through adoption or insemination, one member of a lesbian couple became the legal parent of the child, but demonstrated in word and deed that she also regarded her partner as the child's parent until they ended their relationship, at which point the legal parent tried to cut off all contact between the co-parent and the child.⁸³ All of the courts also framed the legal issue in effectively identical terms: given the constitutional right of a fit, legal parent to raise her child unimpeded, under what circumstances may a court recognize a

⁸¹ *Infra*, notes 70-75.

⁸² *Id.* at 430-31.

⁸³ *V.C.*, 163 N.J. at 205-10; *S.F.*, 132 Md. App. at 102-04; *Rubano*, 751 A.2d at 961-63; *Carvin*, 155 Wn.2d at 683-85; *E.L.M.C.*, 2004 Colo. App. Lexis 1186 at *5-*9.

“third party”⁸⁴ as having standing to petition for custody or visitation with that child?⁸⁵ All agreed with *Holtzman* that the legal parent’s right to make parenting decisions for her child did not encompass the right to terminate the child’s relationship with the co-parent once she made the initial choice to foster that relationship.⁸⁶

In doctrinal terms, these cases illustrate an approach to the issue that applies nationally. State law remains important, however, in determining exactly how the de facto parent standard applied. The Washington appeals court, as a unanimous three-judge panel,⁸⁷ followed Wisconsin exactly, requiring the plaintiff first to establish her status as de facto parent, then to show some “triggering event,” probably the legal parent’s attempt to terminate the de facto parent’s relationship with the child, before the court may consider a petition for visitation.⁸⁸ The Washington Supreme Court, by contrast, dropped the need for a “triggering event,” and placed a de facto parent “in legal parity” with any other legal parent, except that de facto parents enjoy the privileges and duties of parents not by right, but only on a showing that granting such privileges and duties is in the child’s best interest.⁸⁹ The New Jersey court found that establishing one’s

⁸⁴ The term “third party” is itself a problem in this context. On one hand, because the petitioners have neither blood nor legal relationships to the children, they are third parties. On the other hand, by deeming them de facto parents, the courts effectively state that they are more than third parties, albeit less than legal parents.

⁸⁵ *V.C.*, 163 N.J. at 218, 221-22; *S.F.*, 132 Md. App. at 109, 110; *Rubano*, 751 A.2d at 972-76; *Carvin*, 155 Wn.2d at 709-13; *E.L.M.C.*, 2004 Colo. App. Lexis 1186 at *20-*21.

⁸⁶ *V.C.*, 163 N.J. at 214, 222-24; *S.F.*, 132 Md. App. at 111; *Rubano*, 751 A.2d at 975, 977; *Carvin*, 155 Wn.2d at 710; *E.L.M.C.*, 2004 Colo. App. Lexis 1186 at *28, *45.

⁸⁷ *In re the Parentage of L.B.*, minor, *Carvin v. Britain*, 121 Wn. App. 460, 89 P.3d 271 (Wash. Ct. App., 2004). The opinion refers to two judges as “concurr[ing],” *id.* at 463, but no separate concurring opinions appear.

Washington Appellate Court rules provide that “[t]he presence of three judges and a concurrence of at least a majority thereof shall be required to dispose of a case, except for dismissal on stipulation of counsel of record.” Rule 6, “Authority,”

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=aca&set=CAR&ruleid=acacar06 (last visited October 6, 2006). Compare Thomas G. Robinson-O’Neill, *Note & Comment: Making Mommies: The Washington State Court of Appeals Exceeded its Authority by Creating a Common Law Parentage Action in In re Parentage of L.B.*, 79 WASH. L. REV. 1209 (2004).

⁸⁸ *Id.* at 487.

⁸⁹ *Carvin*, 155 Wn. 2d at 708. In its definition of “de facto parent,” the Washington Supreme Court expressly adopted the *Holtzman* standard. *Id.* One Justice signed this opinion, two dissented, and six “concurr[ed].” Although the opinion lists two justices as dissenting, only one dissenting opinion appears, *id.* at 715-23. Unlike the

status as de facto or psychological parent⁹⁰ alone was sufficient to give that parent rights that are nearly equal to those of the biological or adoptive parent, with the biological/adoptive parent having custody by presumption so long as all other factors were equal,⁹¹ but with visitation by the de facto parent also being “the presumptive rule.”⁹²

Similarly, in Maryland, having established de facto parenthood status under the *Holtzman* test, a petitioner must still show the legal parent to be unfit in order to demand custody, but does not need to make any further showing in order to ask for visitation.⁹³ In Colorado, by amendment to its Uniform Dissolution of Marriage Act, the General Assembly recognized the possibility of a psychological parent, allowing such person to petition for both “parenting time” and decision-making responsibilities. The statute contains no definition of “psychological parent,” however, leading the court to examine how other states, especially Wisconsin and New Jersey, had defined the term.⁹⁴

Court of Appeals Rules, *supra* note 72, the Washington Supreme Court rules contain nothing that might explain its use of the term “concurrency.” I infer that this was a 7-to-2 decision.

⁹⁰ The New Jersey court used “psychological, de facto, and functional” parent as synonyms, preferring “psychological.” *V.C.*, 163 N.J. at 214 n.3.

⁹¹ The Court noted that the fact of being the biological parent could determine custody in favor of that parent, but it also quoted the long list of factors to consider in any dispute over custody and visitation from N.J.S.A. 9:2-4: “the parents’ ability to agree, communicate and cooperate in matters relating to the child; the parents’ willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child’s education; the fitness of the parents; the geographical proximity of the parents’ homes; the extent and quality of time spent with the child prior to or subsequent to the separation; the parents’ employment responsibilities; and the age and number of the children.” *Id.* at 228.

⁹² *Id.* at 228.

⁹³ *S.F.*, Md. App. at 111.

⁹⁴ *E.L.M.C.*, Colo. App. Lexis 1186 at *18, *45. The Colorado case adds the fascinating element that the trial court forbade the legal parent to subject the child to “homophobic” religious teachings. Although it upheld the trial court’s grant of joint parental responsibilities to the ex-partner, the appeals court vacated the order with respect to religious teachings and remanded to the trial court for further consideration of that issue. Clark, the appellant, has an even stronger factual claim than most because the appellee, McLeod, is the child’s adoptive, not biological mother. That both women do not appear as the child’s adoptive parents reflects the fact that the government of China, where the child was born, does not permit same-sex couples to adopt. *Id.* at *5. However, as the court found, in terms of practical parenting involvement, Clark had as much claim as McLeod, *id.* at *8, and ending the child’s relationship with Clark would cause the child significant harm. *Id.* at *3. The important part of the back

The Rhode Island Supreme Court responded to questions from a family court judge who faced a motion for contempt against the legal parent, who refused to abide by a consent order stipulating terms of visitation.⁹⁵ The legal parent claimed, despite her previous agreement to the consent order, that the family court lacked jurisdiction to issue the order in the first place, thereby obviating any claim of contempt.⁹⁶ A majority of three justices held that the family court did have jurisdiction under a statute granting it the authority to determine a child's parentage on petition of "any interested party."⁹⁷ It invoked the four-part de facto parent test, especially the requirement of initial consent to the relationship, as articulated by the New Jersey Supreme Court, to cabin "any interested party."⁹⁸

The importance of both state statutes and political culture for determining the outcome of de facto parenting cases that lesbian plaintiffs initiate becomes clear in two cases where states grant lesbians de facto parent status without relying on *Holtzman*, and the two cases that the Washington appeals court cited as refusing to recognize a de facto parent status.⁹⁹ In Massachusetts, the Supreme Judicial Court affirmed a judgment granting temporary visitation pending a trial to determine the validity of a co-parenting contract between two lesbians.¹⁰⁰ Unlike the Wisconsin court, the Massachusetts court could point to a specific statute granting it

story that helps explain the reference to "homophobic" religious teachings, and the participation of conservative legal organizations as amici (*id.* at *1), is that McLeod has become a born-again Christian. Jen Christensen, *Parent v. Parent*, THE ADVOCATE, Dec. 21, 2004, p. 27.

⁹⁵ *Rubano*, 751 A.2d at 961-63.

⁹⁶ *Id.* at 963.

⁹⁷ *Id.* at 966-67. Two justices concurred in part, but dissented from the finding that the family court had jurisdiction. *Id.* at 979-80.

⁹⁸ *Id.* at 966-67, 968, 974-75. The *Rubano* court did not put the point in just this way. It did, however, defend the holding that the ex-partner had standing to petition for visitation under the "any interested party" language by distinguishing that holding from the analysis in *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down state statute granting third-party visitation as applied for over-breadth). *Rubano*, 751 A.2d at 967. It returned to *Troxel* in justifying its decision against the defendant's federal constitutional objections. *Id.* at 972-73. As part of that discussion, it pointed to *V.C.* and *Holtzman* for the point that a biological connection between parent and child did not always trump other legal claims, which point in turn precluded the defendant's challenge to the family court's jurisdiction. *Id.* at 974-75.

⁹⁹ *Carvin*, 121 Wn. App. at 486.

¹⁰⁰ *E.N.O. v. L.M.M.*, 429 Mass. 824; 711 N.E.2d 886 (1999).

equity jurisdiction. However, that statute alone did not fully settle the issue, as a dissenting justice still argued that no event had occurred to give the court jurisdiction even under the broad terms of that statute.¹⁰¹ The dissent also characterized the majority's opinion as an example of "judicial lawmaking."¹⁰²

The Pennsylvania Supreme Court relied primarily on its own cases, dating back to 1820, in upholding a lower court's grant of *in loco parentis* status to a lesbian petitioner.¹⁰³ Dismissing the legal mother's suggestion that the Court abandon *in loco parentis* entirely as a basis for granting custody or visitation, they noted that such a decision would have far-reaching consequences, "potentially affect[ing] the rights of stepparents, aunts, uncles or other family members who have raised children, but lack statutory protection of their interest in the child's visitation or custody."¹⁰⁴ As in *Holtzman*, the Pennsylvania court held that establishment of parenting status by a third party cannot occur without the initial consent of the legal parent to the beginning of the relationship between the third party and the child.¹⁰⁵ The Pennsylvania court also stated that "the evidentiary scale is tipped hard to the biological parent's side" in such cases.¹⁰⁶

Not all courts that have addressed this issue have granted the standing to petition for visitation that plaintiffs seek. *Nancy S. v. Michele G.* is a 1991 California decision recognizing a lesbian ex-partner as a de facto parent, but still finding that she had no standing to petition for visitation under California statute.¹⁰⁷ The *Nancy S.* court concluded that the problem was the

¹⁰¹ *Id.* at 894.

¹⁰² *Id.*

¹⁰³ *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913, 916 (Pa. 2001), citing *Logan v. Murray*, 6 Serg. & Rawle 175 (Pa. 1820).

¹⁰⁴ *Id.* at 917.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 920 n.8.

¹⁰⁷ 228 Cal. App. 3d 831 (Cal. Ct. App. 1991). See *Jacobs*, *supra* note **Error! Bookmark not defined.** for further discussion of this case. But see *Kristine H. v. Lisa R.*, 120 Cal. App. 4th 143 (Cal. Ct. App. 2004).

potential for exposing legal parents to multiple claims by third parties in subsequent cases if they expanded the existing definition of “parent” as the petitioner wished, even though the record in the instant case demonstrated that the petitioner had a strong claim.¹⁰⁸ As a more recent case notes, a statute that took effect in California on January 1, 2005 defines the rights of domestic partners and gives same-sex couples a statutory means of resolving custody and visitation disputes.¹⁰⁹ This case may indicate more than anything the substantial political and policy gains lesbian/gay civil rights activists achieved during the 1990s in states such as California.¹¹⁰ Further, in three cases decided during 2005, the California Supreme Court has recognized in different ways the parenting rights and responsibilities of lesbian partners.¹¹¹

By contrast, *In re Thompson* is a 1999 Tennessee appellate court case consolidating two demands for visitation by lesbian ex-partners, denying them both relief.¹¹² The Tennessee court did cite *Holtzman*,¹¹³ along with three other cases granting lesbian ex-partners standing to petition for visitation, but it gave more weight to similar cases holding the opposite and ultimately grounded its decision on the fact that the Tennessee General Assembly had not conferred any parenting rights on persons in the plaintiffs’ situation.¹¹⁴ Thus, while California

¹⁰⁸ 228 Cal. App. 3d at 841.

¹⁰⁹ *Kristine H.*, 120 Cal. App. at 150 n.5.

¹¹⁰ This is part of the reason why I omit California entirely from the consideration of demographic factors later in this essay. It does exemplify the correlation between population size and diversity, on one hand, and leadership on lesbian/gay civil rights, on the other, *see infra* note 206ff and accompanying text, but it does so to such a degree as to be *sui generis* for the purposes of the present study. Thus, California’s population according to the 2000 census was 33,871,648, almost exactly twice that of the most populous state in Table A, *infra*, which is Florida, with 17,019,068. California’s very large population and leadership in lesbian/gay civil rights make it an outlier such that it is not helpful for the present study. California’s leadership in lesbian/gay civil rights generally is clear from studies such as JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1945-1970* (1983) and NAN ALAMILLA BOYD, *WIDE-OPEN TOWN: A QUEER HISTORY OF SAN FRANCISCO TO 1965* (2003). *See also*, papers of Jim Foster, leading gay political activist in San Francisco during the 1970s and 1980s, and David Goodstein, former owner of THE ADVOCATE during the same period, both in Human Sexuality Collection, Cornell University Libraries.

¹¹¹ *See supra*, note 14.

¹¹² 11 S.W.3d 913 (Tenn. Ct. App. 1999).

¹¹³ *Id.* at 920 n.8.

¹¹⁴ *Id.* at 923.

has not led the nation on this particular lesbian/gay civil rights issue, and its citizens voted in 2000 to prohibit same-sex marriages,¹¹⁵ its legislature has enacted a comprehensive domestic partnership scheme for same-sex couples.¹¹⁶ The Tennessee General Assembly acted to prohibit same-sex marriages in 1996¹¹⁷ and Tennessee voters adopted a constitutional amendment in 2006 to prohibit same-sex marriage.¹¹⁸ Further, the Tennessee appellate court proved more deferent to legislative definitions than the courts in Wisconsin, New Jersey, Maryland, and Washington.¹¹⁹

These decisions indicate that states differ in their tolerance for judicial activism and for lesbian/gay civil rights. However, predicting which way a given state will go may prove difficult, especially given that many of the states that are most sympathetic to lesbian/gay civil rights claims have already decided the issue. This does not necessarily indicate that all of the remaining states are hostile. It could simply indicate that the issue has yet to arise in those states, although the failure of the issue to arise raises the inference that some factor makes potential plaintiffs and/or potential attorneys reluctant to file such a suit. Whether such reluctance is because relatively few lesbian couples feel secure having their own children in states where the law does not recognize their relationships, or because they do not trust the court system to adjudicate their disputes, or cannot find an attorney who is willing to file the suit, is irrelevant for

¹¹⁵ See Marriage Map at www.nglrf.org.

¹¹⁶ AB 205, the California Registered Domestic Partner Rights and Responsibilities Act of 2003, took effect on Jan. 1, 2005. For a comparison of rights and benefits between marriage and domestic partnership in CA, see <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1320> (last visited Jan. 18, 2007).

¹¹⁷ TENN. CODE ANN. § 36-3-113 (1996).

¹¹⁸ The Tennessee provision reads: “Any policy or law or judicial interpretation purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.” Eighty-one percent of Tennessee voters voted to ratify on Nov. 7, 2006. See *Equality from State to State 2006: Gay, Lesbian, Bisexual and Transgender Americans and State Legislation, A Report by the Human Rights Campaign Foundation* 24 (Dec. 2006).

¹¹⁹ Whether the Colorado court was more or less deferent to its legislature than the Tennessee court, given that the Colorado court was simply providing specific content for the term “psychological parent” in the statute, is an interesting question that I need not resolve here.

present purposes insofar as all of those factors indicate a relatively high degree of hostility to lesbian/gay civil rights claims, or the perception of such hostility.

It is possible, however, to test states' political preferences for lesbian/gay civil rights and to compare those preferences to their supreme courts' decisions regarding the parenting rights of lesbians and gay men. This analysis raises the question: to what extent is it "judicial activism"¹²⁰ for judges to render decisions that are consistent with the policy and political preferences of the people as expressed through their legislature on related but different topics? If both the Tennessee appeals court and the Wisconsin Supreme Court rendered decisions that are consistent with their states' larger preferences, why is the Wisconsin decision somehow less legitimate,¹²¹ or more "activist," for resting on equitable principles rather than on statutory language?

III. Judicial Policy Innovation

Without addressing the normative issue of whether judicial policy innovation is a good or bad thing, we can investigate whether factors other than law broadly defined – statutes, regulations, judicial precedents – influence state courts' decisions to recognize visitation rights in lesbian ex-partners. This is especially interesting and important in lesbian visitation cases because they raise a legal issue that, in most states, statutes do not address directly and that is highly fraught politically. The question of policy innovation and diffusion – why certain

¹²⁰ This term has become a favorite of conservatives, who use it to denounce court decisions supporting the rights of lesbians and gay men. See, transcript of speech by President George Bush, Oct. 31, 2006: "Another activist court issued a ruling that raises doubt about the institution of marriage. We believe that marriage is the union between a man and a woman and should be defended"; Sheryl Gay Stolberg, *G.O.P. Moves Fast to Reignite Issue of Gay Marriage*, N.Y. TIMES, Oct. 27, 2006; JAMES DOBSON, MARRIAGE UNDER FIRE 80 (2003) (quoting Gerard V. Bradley, law professor at Notre Dame, criticizing "willful judges." The law review literature on "judicial activism" generally, and especially the use of the accusation in debates about lesbian/gay civil rights, is vast. To cite only one recent, particularly creative example, see Tracy A. Thomas, *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 22 CONST. COMMENT. 137 (2005).

¹²¹ See *Holtzman*, 553 N.W.2d at 442 (Steinmetz dissenting): "Sadly, the majority opinion in this case provides an illustration of a court at its lowest ebb of legitimacy." See *supra*, note 76 for further discussion of this point in the context of *Holtzman*.

jurisdictions lead in policy innovation, and what patterns appear in the choices of subsequent jurisdictions to adopt an innovation once a leader has done so – has attracted considerable attention from students of public policy since Jack L. Walker first wrote about it in 1969.¹²² As a question of policy diffusion, *Holtzman* departs from the subjects of most existing studies in two respects: first, it is a judicial opinion, where most studies of diffusion focus on the legislative and executive branches;¹²³ second, it deals with a question at the intersection of family law and lesbian/gay civil rights, making it an issue that is both new and, potentially, highly controversial.

These factors make *Holtzman* a useful case for studying policy innovation and diffusion. It presents a set of facts that are entirely new, yet closely analogous to family situations that courts have long dealt with. Insofar as parenting rights for lesbians is a highly controversial issue, many judges will also insist that it is not an appropriate area for judicial innovation at all.

This section provides a brief overview of the literature on policy innovation and diffusion. It also explores how that literature applies to judicial decisions generally, and judicial decisions involving lesbian/gay civil rights in particular.

A. Judicial Policy Innovation and Diffusion

James N. G. Cauthen explains that judicial innovation differs from legislative and executive innovation in at least two important respects: first, judges may innovate only to the extent that litigants bring them suitable cases; second, the principle of respect for precedent, or *stare decisis*, places an explicit formal constraint on judicial policymaking that legislators and executives do not face.¹²⁴ Looking at lesbian/gay civil rights issues generally, one might expand Cauthen's point to suggest that judicial policy innovation differs from legislative and executive

¹²² Jack L. Walker, *The Diffusion of Innovations Among the American States* 63 AM. POLITICAL SCIENCE REV. 880-99 (1969).

¹²³ James N. G. Cauthen, *Judicial Innovation under State Constitutions: An Internal Determinants Investigation*, 21 AM. REV. OF POLITICS 19-42 (2000).

¹²⁴ *Id.* at 21.

policy innovation not only because of *stare decisis*, but also because of the larger question of whether judges should engage in policy innovation at all. Justice Antonin Scalia's vigorous dissents in major lesbian/gay civil rights cases make both of these points. Scalia argues that the principle of *stare decisis* should have led the majority in *Lawrence v. Texas* to uphold both the Texas sodomy law and the Court's own precedent finding that sodomy laws are constitutionally permissible,¹²⁵ and that the majority created wholly new doctrine while usurping the people's legislative authority when it struck down Colorado's Amendment 2 in *Romer v. Evans*.¹²⁶ As *Holtzman* and its progeny indicate, however, if a court's use of long-standing equitable power in an unprecedented factual situation – that is, if granting the right to petition for visitation to the lesbian ex-partner of a fit, legal parent¹²⁷ – constitutes policy innovation, the courts do engage in policy innovation. The question then becomes, under what circumstances is the Court willing to engage in such innovation?

In some respects, judicial decisions as policy innovations generally, and *Holtzman* in particular, may provide excellent vehicles for studying policy innovation and diffusion. The overview that Lawrence Grossback, et al., provide in their study demonstrates this point. Grossback's concern is to examine policy diffusion not merely as a matter of geographical proximity, but as a matter of ideological proximity as well. They conclude:

¹²⁵ 539 U.S. 558, 586-91 (2003) (Scalia dissenting).

¹²⁶ 517 U.S. 620, 636-53 (1996) (Scalia dissenting). *See also*, *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N.W. 2d 121 (Wis. Ct. App. 1992) (rejecting claim that state's failure to provide employee benefits to same-sex partner of state employee constitutes discrimination based either on sexual orientation or marital status). Creation of standards for deciding which same-sex couples would qualify for employee benefits "is precisely the type of action committed to the legislature, as the policymaking branch of government. It is beyond all powers of this or any other court." *Id.* at 123 n. 1. Similarly, one could characterize Chief Justice Rehnquist's majority opinion in *Missouri v. Jenkins*, 515 U.S. 70, 72 (1995) (overturning district court's desegregation plan for Kansas City schools) as an assertion that the district court had strayed too far into the realm of policy making. "In effect, the district court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students."

¹²⁷ *See* discussion of the *Holtzman* decision, *infra* at 3-7. *See also*, *Republican Party of Minnesota v. White*, 416 F.3d 738, 747 (8th Cir. 2005).

states learn from each other, but this learning depends more on the degree of ideological similarity between the states than the signals that come with region or mere adoption. As a state government decides whether or not to adopt a new policy, the government looks to those who have already adopted it. If states similar to them ideologically, and not just proximate to them geographically, have adopted, they are more likely to do so.¹²⁸

Lesbian/gay civil rights issues have been among the most ideologically contested in American politics for the past fifteen to twenty years. Therefore, it seems plausible to expect that ideological proximity would play a significant role in policy diffusion in this area. The question then becomes how to measure ideological proximity.

Judicial innovation, as opposed to legislative or executive innovation, may be an excellent way to test policy diffusion via ideological proximity. Policy innovation decisions may prove relatively easy for judges to make compared to the constraints facing legislators and executives.¹²⁹ In the absence of practical constraints, ideology is a likely candidate for determining how policy makers will decide an issue. Grossback, et al., note that key questions in studies of policy innovation include the sources of information that policy makers rely on and how they evaluate the risks of policy innovation for their states.¹³⁰ Judges have distinct advantages over other policy makers because litigants bring factual information to them and legal information from the entire nation is readily available via various dedicated reporting services. Further, any decision about the visitation rights of a lesbian ex-partner is virtually cost-free,¹³¹ and therefore risk-free, for everyone except the litigants themselves.¹³²

¹²⁸ Lawrence J. Grossback, Sean Nicholson-Crotty, and David A.M. Peterson, *Ideology and Learning in Policy Diffusion*, 32 AM. POL. RESEARCH 521-45, 540 (2004).

¹²⁹ See, e.g., *Jenkins*, 515 U.S. at XX, where Rehnquist details the millions of dollars the city of Kansas City and the State of Missouri spent on the Kansas City school district at the behest of the district court's desegregation plan.

¹³⁰ Grossback, *supra* note 128.

¹³¹ Except insofar as one posits increased or decreased social service costs depending on the impact of continuing or ending a particular relationship between a child and a lesbian ex-partner as de facto parent. See *infra* XX for the

Judicial policy innovation is an important and interesting question in its own right, especially for lawyers and legal scholars who seek the most reliable set of indicators for predicting how judges will decide new cases. This is particularly true for those areas of the law, including family law, that remain primarily under state jurisdiction. Discrepancies routinely emerge among the decisions of federal district and circuit courts, but in principle all such discrepancies should eventually achieve resolution through decisions of the United States Supreme Court. However, by definition, the states in our federal system should remain free to differ in their policy determinations on issues that remain within their purview. Absent any reason to expect complete, or even substantial, uniformity among policy making entities, studies of the factors that lead them to emulate each other, or refuse to emulate each other, become more important.¹³³

B. Policy Entrepreneurs

Lesbian couples disputing child custody and visitation provide an excellent opportunity to address what Michael Mintrom has called a “big puzzle” in the literature on policy innovation: how do new policy ideas enter government agendas and achieve diffusion?¹³⁴ Innovative policies must come from somewhere. As Cauthen notes, judges can innovate only insofar as suitable cases present themselves.¹³⁵ Mintrom draws on previous authors to define “policy entrepreneurs” as persons who try to initiate policy change by “identifying problems, networking

opinion of the guardian ad litem in *Holtzman* on this issue. Insofar as part of the issue here is political risk for judges, that will depend as a starting condition on whether they are elected or not. See American Bar Association *Fact Sheet on Judicial Selection Methods in the States*, undated, at http://www.abanet.org/leadership/fact_sheet.pdf. My analysis indicates no important correlation between the manner of selecting judges and the state’s position on de facto parent status for lesbian ex-partners. See also, Shirley S. Abrahamson, *Making Judicial Independence a Campaign Issue*, WISCONSIN LAWYER, Feb. 2005, 17-19, 59. As it happens, Abrahamson, the current Chief Justice of Wisconsin’s Supreme Court and author of the *Holtzman* opinion, is a leading authority on this issue.

¹³² THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS 15-16 (2002)

¹³³ See *Republican Party of Minn.*, 416 F.3d at 747, connecting states’ freedom as sovereign entities in the federal system to the choice to elect judges, and the policy-making function those judges play.

¹³⁴ Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. OF POLITICAL SCIENCE 738-70, 739 (1997).

¹³⁵ Cauthen, *supra* note 123, at 21.

in policy circles, shaping the terms of policy debates, and building coalitions.”¹³⁶ Certainly the attorney for the plaintiff and the guardian ad litem in *Holtzman* functioned as policy entrepreneurs.¹³⁷ The question remains, however: given that not all entrepreneurs succeed, what factors conduce to successful advocacy of policy innovation?

C. Political Culture

Although a majority of states and the federal government have so far refused to prohibit discrimination based on sexual orientation,¹³⁸ a number of cities¹³⁹ have done so. The passage of such ordinances was a major burst of policy innovation during the 1970s and 1980s. Studies of these municipal nondiscrimination ordinances are a useful indicator of political culture with respect to lesbian/gay civil rights.¹⁴⁰ Among the studies of municipal nondiscrimination ordinances, John Dorris finds that a measure of individualism in political culture at the state level correlates strongly with such policy adoptions.¹⁴¹ The source of his assessments of political culture is Daniel Elazar’s work.¹⁴² Elazar identifies three primary political cultures in the United

¹³⁶ *Id.* at 739.

¹³⁷ See *infra*, text accompanying notes 188-99.

¹³⁸ As of Jan. 2007, the following states, seventeen total plus the District of Columbia, prohibit discrimination based on sexual orientation: CA, CT, DC, HI, IL, MA, MD, ME, MN, NH, NJ, NM, NV, NY, RI, VT, WA, WI. Areas of coverage – e.g., employment, housing, credit, etc. – vary widely. For a detailed discussion of what the Wisconsin statute – the nation’s first, and unusually comprehensive in some ways, but omitting some areas that would become common in later statutes – covers, see William B. Turner, “*The Gay Rights State*”: *Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 2007 WISC. WOMEN’S L. J. XX. The National Gay and Lesbian Task Force provides a useful map, updated as of Jan. 1, 2007, at http://thetaskforce.org/downloads/reports/issue_maps/nondiscrimination_01_07.pdf (last visited Jan. 18, 2007).

¹³⁹ According to the nondiscrimination map of the NGLTF, *supra* note 132, “about 100 municipalities in the 33 states without nondiscrimination laws have local nondiscrimination laws.”

¹⁴⁰ Marieka Klawitter and Brian Hammer, *Spatial and Temporal Diffusion of Local Antidiscrimination Policies for Sexual Orientation* 22-38; John B. Dorris, *Antidiscrimination Laws in Local Government: A Public Policy Analysis of Municipal Lesbian and Gay Public Employment Protection* 39-62; and Charles W. Gossett, *Dillon’s Rule and Gay Rights: State Control over Local Efforts to Protect the Rights of Lesbians and Gay Men* 62-88, all in *GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION* (Ellen D.B. Riggle and Barry Tadlock, eds. 1999).

¹⁴¹ Dorris, *supra* note 140, at 49.

¹⁴² DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES*, 135, 136 (3rd ed., 1984). See also Ronald A. Hedlund, *Wisconsin: Pressure Politics and a Lingering Progressive Tradition*, in *INTEREST GROUP POLITICS IN THE MIDWESTERN STATES* 305-44 (Ronald J. Hrebemar and Clive S. Thomas eds., 1993). “Groups have

States: moralistic, individualistic, and traditionalistic.¹⁴³ The notion of political culture has a significant historical component, depending as it does on an evaluation of a state's characteristic approach to political and policy issues over an extended period and on population settlement patterns throughout the nation's history.¹⁴⁴

Elazar characterizes Wisconsin as moralistic, not individualistic or traditionalistic.¹⁴⁵

Elazar defines "moralistic" as reflecting a commitment to the improvement of the community as a whole, tempering individualism.¹⁴⁶ "Moralizing" in the sense of conservatives who oppose lesbian/gay civil rights on the basis of their religious beliefs or support for existing social norms would be more characteristic of Elazar's "traditionalistic" political culture, which shares with moralistic culture a willingness to use government actively, but differs in expecting government activism to reinforce existing hierarchies.¹⁴⁷ "Individualistic" political culture restricts government interference in individual decisions, characterizing politics primarily as an instrument by which citizens can pursue their own ends.¹⁴⁸

In the states that have permitted lesbian ex-partners to establish their status as de facto parents and petition for visitation on that basis, Elazar's map of political cultures shows a clear predominance of moralistic and individualistic cultures, often in combination, with traditionalistic culture appearing only in Maryland and in southern New Jersey. Those two areas are separated only by Delaware, a state whose family court has cited *Holtzman* for the purpose of

found that Wisconsin courts, like the other branches of state government, have developed an activist image and a reputation for aggressiveness." *Id.* at 335.

¹⁴³ Elazar, *supra* note 142, at 114-21.

¹⁴⁴ *Id.* at 122-34, esp. 127.

¹⁴⁵ *Id.* at 125, 135.

¹⁴⁶ Elazar, *supra* note 142, at 117-18.

¹⁴⁷ *Id.* at 118-19.

¹⁴⁸ *Id.* at 94-96.

permitting a gay man to adopt his partner's children.¹⁴⁹ In this geographical area, at least, even the predominance of traditionalist political culture is not enough to prevent victories by lesbian/gay policy entrepreneurs.

Elazar notes that conceptions of the public good in a moralizing culture can change dramatically over time.¹⁵⁰ The *Holtzman* decision, on this view, looks like an effort to achieve the public good (establishing de facto parental rights where they are in the child's best interest) by adapting existing law to meet an exigency that statutes had not anticipated. Similarly, Cauthen found that liberal citizen ideology¹⁵¹ correlated strongly with state judicial innovation.¹⁵² He found conversely that partisanship did not – that is, liberal citizen ideology is apparently not strongly correlated with Democratic versus Republican control of state government. This is consistent with the fact that a Republican governor in Wisconsin signed legislation prohibiting sexual-orientation discrimination.¹⁵³ It is also consistent with Wisconsin's history of electing Supreme Court justices, but doing so in a non-partisan manner.¹⁵⁴

Thus, the concept of political culture provides a useful bridge connecting judicial policy innovation to lesbian/gay civil rights claims. Elazar's map of political cultures corresponds well with the states that have recognized visitation rights in lesbian ex-partners. In order to make the

¹⁴⁹ *Id.* at 124-25. See *In re Peter Hart and George Hart*, 806 A.2d 1179, 1188 (Del. Fam. Ct. 2001), citing *Holtzman* in support of finding that gay male adoptive parent's partner is de facto parent to the children, permitting second-parent adoption.

¹⁵⁰ Elazar, *supra*, note 142, at 118.

¹⁵¹ Cauthen, *supra* note 123, at 27, borrows his definition of citizen ideology from William D. Berry, et al., *Measuring Citizen and Government Ideology in the American States, 1960-93*, 42 AM. J. POL. SCI. 327 (1998). Berry, et al., in turn rely on rankings of members of Congress by Americans for Democratic Action, which describes itself as "America's oldest independent liberal lobbying organization, <http://www.adaction.org/about.htm> (last visited Jan. 18, 2007) and the Committee on Political Education of the AFL-CIO. Berry, *supra* note 151, at 332, 334.

¹⁵² Cauthen, *supra* note 123, at 32.

¹⁵³ *Wisconsin First State to Pass Gay Rights Law*, THE ADVOCATE April 1, 1982. See also Hedlund, *supra* note 142 at 307-08.

¹⁵⁴ Shirley S. Abrahamson, *Introduction*, PORTRAITS OF JUSTICE, *supra* note 45, at ix.

concept of political culture more useful for present purposes, the next section discusses public opinion on lesbian/gay civil rights claims.

D. Public Opinion

Justices of the Wisconsin Supreme Court stand in non-partisan elections for ten-year terms.¹⁵⁵ Given such long terms, public opinion is not as relevant to them as it is to the elected officials in the legislative and executive branches, but it is a factor.¹⁵⁶ Similarly, public opinion plays a major role in political culture as a heuristic model. It is especially important for studying issues of family policy as they present lesbian/gay civil rights questions because the evidence indicates that the public's attitude toward lesbian/gay civil rights claims varies significantly depending on the specific issue.¹⁵⁷

In an overview of public opinion polling data on lesbian/gay civil rights issues, Alan Yang showed that the majority of Americans have supported equal employment rights for lesbians and gay men since 1977, with that majority growing from 56% to 84% between 1977 and 1997.¹⁵⁸ However, support for lesbian/gay employment rights varies significantly depending on the specific occupation.¹⁵⁹ Variation in public opinion within the category of employment rights is consistent with the more general observation that public opinion on lesbian/gay civil rights varies considerably depending on the specific issue, e.g., employment rights versus

¹⁵⁵ See Abrahamson, *supra* note 131.

¹⁵⁶ See Abrahamson, *supra* note 131.

¹⁵⁷ See, e.g., Gregory B. Lewis and Marc A. Rogers, *Does the Public Support Equal Employment Rights for Gays and Lesbians?*, in *GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS*, *supra* note 140, at 118-45 (support for employment rights varies according to the specific occupation).

¹⁵⁸ Alan Yang, *From Wrongs to Rights, 1973 to 1999: Public Opinion on Gay and Lesbian Americans Moves toward Equality* (1999), available at http://thetaskforce.org/reports_and_research/wrongs_rights. . See also, Jeni Loftus, *America's Liberalization in Attitudes toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762 (2001).

¹⁵⁹ Lewis and Rogers, *passim*; Schroeder at 98, both in Riggle and Tadlock, *supra* note 140. See also, Public Agenda, *Gay Rights: Red Flags*, http://www.publicagenda.org/issues/red_flags.cfm?issue_type=gay_rights (last visited Jan. 18, 2007). This web site provides recent polling data from a wide range of sources. Their "red flag" section provides cautions for interpreting data.

marriage rights, with support for marriage rights being much lower.¹⁶⁰ Between the extremes of support for and opposition to lesbian/gay civil rights claims, many Americans are deeply ambivalent on these issues.¹⁶¹

Support for same-sex marriage, however, rose only from 27% to 35% between 1992 and 1997, while support for the right of lesbians and gay men to adopt children rose from 29% to 40% over the same period.¹⁶² Responding in the early 1990s to the possibility that the Hawaii Supreme Court would require that state to permit same-sex marriages, Hawaiians amended their state constitution to prohibit such marriages. Over half of the other states also enacted legislation to prohibit same-sex marriages, whether performed in their own states or elsewhere.¹⁶³ As of 2006, twenty-six states had amended their constitutions to prohibit recognition of same-sex marriages.¹⁶⁴ That is, many states now have both statutes and constitutional amendments prohibiting the legal recognition of same-sex marriages. Thus, support for the concept of nondiscrimination on the basis of sexual orientation in some areas clearly does not translate directly into support across the board for lesbian/gay civil rights claims, and support for lesbian/gay civil rights claims in the area of family law and policy is perhaps lower than in any other.¹⁶⁵

¹⁶⁰ Yang, *supra* note 158, at 15; *Gay Right: Red Flags*, *supra* note 159.

¹⁶¹ Stephen C. Craig, et al., *Core Values, Value Conflict, and Citizens' Ambivalence about Gay Rights*, 58 POLITICAL RESEARCH QUARTERLY 5 (2005).

¹⁶² Yang, *supra* note 158, at 14-15. *But see Adoption by Gay Couples Wanes as Issue in U.S.*, THE ADVOCATE, Jan. 27, 2007, http://www.advocate.com/news_detail_ektid41464.asp (last visited Feb. 6, 2007) (opposition to adoption by lesbians and gay men rapidly declining, unlike United Kingdom, where it has become a major issue).

¹⁶³ *Baehr v. Miike*, 92 Haw. 634, 994 P.2d 566 (1999) (taking judicial notice of state constitutional amendment and subsequent legislation restricting marriage to persons of the opposite sex, reversing lower court ruling that state marriage statute violated equal protection of the laws by discriminating on the basis of sex).

¹⁶⁴ *See* Marriage Map, www.nglrf.org. The much-reported figure of 11 such amendments referred specifically to the proposals that appeared on ballots in the November 2004 election. Three other states, LA, MO, and NV already had such restrictions at the time. *See also* Evans, *supra* note 14.

¹⁶⁵ In Nov. 2006, Arizona became the first state to defeat a proposed state constitutional amendment prohibiting same-sex marriages. Some evidence indicates that opponents of the AZ measure had greater than usual success in persuading senior citizens to vote against it. *See* Patrick J. Egan and Kenneth Sherrill, *Same-Sex Marriage Initiatives and Lesbian, Gay, and Bisexual Voters in the 2006 Elections* 4 n.2, 10 (2006), available at

Even so, data exists to indicate that either the law itself, or judges' interpretations of the law, became more favorable to lesbian/gay civil rights claims between 1974 and 1994. Regina Werum and Bill Winders have demonstrated that, from 1974 to 1999, opponents of lesbian/gay rights claims achieved much greater success in state courts than proponents measured as a percentage of their total initiatives in all branches. Proponents had a much larger number of total initiatives, however (309 for proponents, 68 for opponents), of which state court cases made up a much smaller percentage of proponents' total (n = 35, or 11%) than of opponents' total (n = 19, or 28%). Further, over time, the judiciary went from a branch favoring opponents of lesbian/gay civil rights claims (10 of 18 cases from 1974 to 1979) to favoring proponents (22 of 28 cases from 1990 to 1994).¹⁶⁶

Werum and Winders' data for court decisions involving lesbian/gay civil rights claims cannot have captured the large number of trial court decisions in which judges decided the custody, visitation, or adoption rights of lesbian/gay parents or their ex-partners, the vast majority of which go unreported and unappealed. As Polikoff explains, to overcome the difficulty of tracking individual decisions, attorneys representing lesbian/gay clients formed a network beginning in the late 1970s through which they traded information and litigation strategies, both compiling a record of cases and, through trial and error, gradually changing legal outcomes for their clients.¹⁶⁷ Not surprisingly, this suggests that both the demographic

http://thetaskforce.org/reports_and_research/lgb_voters_2006. Several polls also indicated that AZ voters in 2004 and 2005 opposed an amendment to the federal constitution prohibiting same-sex marriages, so the issue may also be opposition to amending constitutions for the purpose of defining marriage. See *Recent State Polls on Same-Sex Marriage and Civil Unions*, May 6, 2005, available at

http://thetaskforce.org/reports_and_research/state_polls_marriage.

¹⁶⁶ Regina Werum and Bill Winders, *Who's "In" and Who's "Out": State Fragmentation and the Struggle over Gay Rights, 1974-1999* 48 SOCIAL PROBLEMS 386, 398, 396 (2001). Note that the numbers for changes in decisions over time include both federal and state court cases, and that the authors grouped the cases into four chronological periods to show change over time, but I give the numbers only for the first and last periods, which is why the total number of cases in the comparison over time is not the same as the number of state court cases.

¹⁶⁷ Polikoff, *supra* note 2, at 308-09.

characteristics and the existing law of the forum state create the conditions in which lesbian/gay litigants and their attorneys operate, and that the initiatives of those litigants and attorneys have brought about some significant changes. Combined with Daniel Pinello's study,¹⁶⁸ Werum and Winders' work demonstrates that state courts were becoming more receptive to lesbian/gay civil rights claims during the 1990s as a result of the increasing number of such claims and the increasing political success of the movement. Even so, how Wisconsin became known as "the gay rights state" through its leadership in the field wants explaining. The next section places Wisconsin into the larger history of the lesbian/gay civil rights movement, describing how it was a leader in terms of policy innovation on behalf of lesbian/gay civil rights.

IV. History, Demography, and Law

During the 1970s and 1980s, participants in the social movement for lesbian/gay civil rights created the conditions that would produce *Holtzman* and other cases beginning in 1995.¹⁶⁹ The dramatic upsurge in lesbian/gay civil rights activism that followed the Stonewall Riots of 1969 produced a growing number of individuals who never married, building their lives around their lesbian/gay identities instead.¹⁷⁰ Many such individuals worked to achieve policy changes to eliminate discrimination on the basis of sexual orientation at the local, state, and federal levels,

¹⁶⁸ Pinello, *supra* note 12, at 12 (2003).

¹⁶⁹ Polikoff, *supra* note 2, at 316-26.

¹⁷⁰ *Id.* at 315-16. On lesbian/gay, or "homophile," activism before 1969, see JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940 TO 1970* (1983). On the lesbian/gay/bisexual/transgender civil rights movement since 1969, see DUDLEY CLENDINEN AND ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* (1999), and *CREATING CHANGE*, *supra* note 2. The Stonewall Riots occurred in June 1969 when a group of mostly gay and transgendered men rioted during an otherwise routine police raid at a bar called the Stonewall Inn in Greenwich Village. Although historians have demonstrated important indicators of rising militance and organization among lesbians and gay men before the Riots, they still serve as a powerful symbol for the dramatic upsurge in lesbian/gay civil rights organizing since the late 1960s. See NAN ALAMILLA BOYD, *WIDE-OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965* (2003).

and through all three branches of government.¹⁷¹ Activists' growing success at repealing sodomy laws and enacting local ordinances and state laws prohibiting discrimination based on sexual orientation did not quickly translate into victories for lesbian/gay parents, however.¹⁷² Anti-discrimination legislation typically did not address parenting issues, and the political factors that led to its enactment did not immediately translate into judicial support for the claims of lesbian/gay parents.

A. Why Wisconsin?

Wisconsin exemplifies this lack of attention to parenting issues for lesbians and gay men in legislatures and judiciaries.¹⁷³ It was the first state in the nation to enact legislation prohibiting discrimination based on sexual orientation.¹⁷⁴ Republican Governor Lee Dreyfus signed the law in March 1982.¹⁷⁵ But in November 2006, Wisconsin also ratified an amendment to its state constitution forbidding recognition of same-sex marriages.¹⁷⁶ These two policy choices – prohibiting discrimination based on sexual orientation, and prohibiting recognition of same-sex marriages – seem contradictory, but they are actually quite consistent with the deep ambivalence that many Americans feel about lesbian/gay civil rights claims.¹⁷⁷

In some sense, the lesbian/gay civil rights movement has reflected this ambivalence with its legislative and litigation strategies. Before the United States Supreme Court held state

¹⁷¹ For a fascinating study of battles over lesbian/gay civil rights at the state level that explicitly considers both “vertical fragmentation,” or federalism, and “horizontal fragmentation,” or separation of powers among the three branches, see Werum and Winders, *supra* note 166.

¹⁷² Polikoff, *supra* note 2, at 316-35.

¹⁷³ See Amy Persin Linnert, *Note: In the Best Interests of the Child: An Analysis of Wisconsin Supreme Court Rulings Involving Same-Sex Couples with Children*, 12 HASTINGS WOMEN'S L.J. 319 (2001).

¹⁷⁴ *Wisconsin First State to Pass Gay Rights Law*, THE ADVOCATE April 1, 1982. See also, Turner, *supra* note 138.

¹⁷⁵ *Id.*

¹⁷⁶ *Equality from State to State 2006: Gay, Lesbian, Bisexual and Transgender Americans and State Legislation*, at 24.

¹⁷⁷ See *supra*, notes 157-161, esp. Craig, *supra* note 161, and accompanying text.

sodomy statutes unconstitutional,¹⁷⁸ many activists demanded that the state simply leave them alone by repealing statutes that criminalized their sexual activity.¹⁷⁹ Many observers, however, especially conservatives, see same-sex marriage as a declaration that “gay is good,” that lesbian/gay identity and relationships are morally valuable, and oppose it on those grounds. The lesbian/gay civil rights movement has yet to formulate a response that advances the moral case as effectively as conservatives do.¹⁸⁰

No response was necessary in 1982, when the argument for requiring the state to leave individuals alone was sufficient.¹⁸¹ Wisconsin’s antidiscrimination statute is comprehensive. It amended numerous provisions of state law, adding “sexual orientation” to the list of protected categories in statutes prohibiting discrimination in employment, housing, state contracts, public accommodations, and the National Guard.¹⁸² One area that it did not address was parenting.¹⁸³ Thus, on the one hand, Wisconsin had a national reputation as a leader in lesbian/gay civil rights. On the other hand, even if the legislation that created the reputation had addressed parenting issues, it would more likely have done so to address problems that lesbian/gay parents faced in securing custody or visitation in disputes resulting from heterosexual relationships. In the early decades of the movement, lesbians and gay men were far more likely to have children as the result of heterosexual marriages, and therefore to have custody disputes with their former spouses, than to have children with same-sex partners.¹⁸⁴ The “gayby” boom, in which large

¹⁷⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷⁹ *See Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun dissenting): “this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’” Citation omitted.

¹⁸⁰ *See* Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J.L. & FEMINISM* 139 (2005); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking beyond Political Liberalism*, 85 *GEO. L.J.* 1871 (1996-1997).

¹⁸¹ *See* Turner, *supra* note 138.

¹⁸² *Id.* Chapter 112, Wis. Laws of 1981.

¹⁸³ Turner, *supra* note 138; Chapter 112, Wis. Laws of 1981.

¹⁸⁴ Polikoff, *supra* note 2, at 317, 323.

numbers of lesbian and gay couples began to have children of their own, had not yet emerged at the time of the Wisconsin statute.¹⁸⁵

Early lesbian/gay civil rights legislation failed to address parenting for at least two reasons. First, the same social/cultural/political changes that enabled growing numbers of lesbians and gay men to refuse to enter into heterosexual marriages also enabled growing numbers of married lesbians and gay men to divorce their heterosexual partners. Many lesbian/gay divorcees had children. The problem of lesbian/gay parents losing custody and visitation battles with their heterosexual former spouses emerged before the problem of same-sex couples disputing custody and visitation with children whom the same-sex couple chose to have during their relationship.¹⁸⁶ Second, a dispute between two lesbians does not involve sexual-orientation discrimination in the same way that a dispute between a lesbian mother and a heterosexual father does. Given that fathers almost always have some form of statutory recourse for establishing their parent status, the discrimination, if any, in such cases will work against the legal lesbian mother. Where both parties are lesbians, the legal parent can invoke the absence of statutory recognition for the couple's relationship as the basis for also denying the ex-partner's relationship with the child.¹⁸⁷

By the mid-1990s, the growth of opportunities for lesbian couples to have children combined with the failure of lesbian/gay civil rights legislation to address the issue left room for two virtually identical cases in Wisconsin of lesbians petitioning for visitation with the children of their former partners. The first of these cases, *In re Z.J.H.*, would seem on its face to preclude

¹⁸⁵ See John Bowe, *Gay Donor or Gay Dad?*, NY TIMES, Nov. 19, 2006 (estimating that 34 percent of lesbian couples and 22 percent of gay male couples have at least one child under 18 at home, based on data from 2000 census).

¹⁸⁶ Polikoff, *supra* note 2, at 307-11.

¹⁸⁷ To be sure, disputes between lesbian ex-partners over custody and visitation do still involve discrimination based on sexual orientation insofar as the law assumes and, as Polikoff notes, will often favor a biological father over a lesbian de facto mother even if the lesbian de facto mother raised the child from birth and the biological father has had zero contact with the child. *Id.* at 323-24. See also *supra* note 3.

innovation in *Holtzman* simply because of *stare decisis*: in *Z.J.H.*, the Wisconsin Supreme Court held that a lesbian may not petition for visitation with the legal child of her ex-partner. But the issue of *stare decisis* does not play a large role in the *Holtzman* story. The *Holtzman* court explicitly overruled that part of *In re Z.J.H.* that conflicted with its holding in *Holtzman*.¹⁸⁸ Such activism on the part of the Wisconsin Supreme Court is part of the political culture that has made Wisconsin an unlikely leader in lesbian/gay civil rights issues.¹⁸⁹ Not that *stare decisis* is completely absent from the *Holtzman* debate. The dissenters in *Holtzman* emphasized, *inter alia*, their belief that the majority was exceeding its authority by overturning *In re Z.J.H.* and granting to *Holtzman* permission to petition for visitation. The question was clearly one for the legislature, not the judiciary, in the eyes of the dissenters.

However, during the 1990s in general, lesbian/gay civil rights activists increasingly found state courts congenial fora for pressing their civil rights claims. Daniel Pinello's comprehensive study of appellate decisions involving lesbian/gay civil rights claims documents this trend.¹⁹⁰ In his study of state judicial policy innovation, Cauthen found that factors internal to the state, including differences in language between the state and federal constitutions, correlated strongly to innovation in the early years, but that external factors, especially precedent from other, ideologically similar states, played an increasing role in later years.¹⁹¹ He argues that this indicates how the first court to adopt an innovation does so solely or primarily on the basis of its own constitution and statutes, as the *Holtzman* court did, but that subsequent states will typically

¹⁸⁸ 193 Wis. 2d at 676-91, discussing *In re Interest of Z.J.H.*, 162 Wis. 2d 1002 (1991).

¹⁸⁹ See, e.g., Hedlund, *supra* note 142, at 305-44. "Groups have found that Wisconsin courts, like the other branches of state government, have developed an activist image and a reputation for aggressiveness." *Id.* at 335.

¹⁹⁰ Pinello, *supra* note 12, at 2. See also William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENTARY 599 (1999) (state courts have been more favorable to lesbian/gay civil rights claims than federal courts, in contrast to the experience of African-Americans);

¹⁹¹ Cauthen, *supra* note 123, at 35.

borrow from the decisions of their predecessors, as other courts borrowed from *Holtzman*.¹⁹² In *Holtzman*, the basis for innovation must be more related to the fact that the claim involved family law, historically the province of the states in our system,¹⁹³ rather than any difference between the Wisconsin and federal constitutions. *Holtzman* involved interpretation exclusively of statutes, not the state or federal Constitution.¹⁹⁴ Also, the Wisconsin Supreme Court explicitly interprets the state Constitution in line with the federal Constitution, even where the language differs.¹⁹⁵

Cauthen measured innovation by using cases in which state supreme courts chose to set protections for individual rights higher under state constitutions than the federal court had done under the federal constitution.¹⁹⁶ For Cauthen, part of the importance of studying state judicial policy innovation stemmed from the perception that a “new federalism” had emerged as state courts demurred beginning in the late 1970s from the apparently increasing conservatism of the U.S. Supreme Court under Chief Justice Burger and Chief Justice Rehnquist.¹⁹⁷ He did not include privacy rights among the constitutional issues that he investigated.¹⁹⁸ In the wake of the Supreme Court’s 1986 *Bowers v. Hardwick* decision upholding Georgia’s sodomy law against a challenge centered on privacy rights, several state supreme courts, including Georgia’s, struck down their sodomy laws on the basis of their state constitutions’ privacy guarantees.¹⁹⁹ Sodomy laws were directly relevant to lesbian and gay parents because, as Polikoff explains, judges often

¹⁹² *Id.*

¹⁹³ Compare Brooke N. Silverthorn, *Note & Comment: When Parental Rights and Children’s Best Interests Collide: An Examination of Troxel v. Granville as It Relates to Gay and Lesbian Families*, 19 GA. ST. U.L. REV. 893 (2003).

¹⁹⁴ See *supra*, note 27ff and accompanying text.

¹⁹⁵ *State v. A.S.*, 2001 WI 48, P18n2, *Wagner v. Milwaukee County Election Commission*, 2003 WI 103, P77-79.

¹⁹⁶ *Id.* at 20.

¹⁹⁷ *Id.* at 22-24.

¹⁹⁸ *Id.* at 37.

¹⁹⁹ *Powell v. State*, 270 Ga. 327, 510 S.E.2d 18 (Ga. 1998); *Jegley v. Picado*, 349 Ark. 600, 80 S. W. 3d 332 (2002); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

denied their claims to custody, even visitation, by arguing that they presumably violated state law regularly through their sexual practices.²⁰⁰

Petitions for visitation by same-sex former partners, however, are significantly more complicated than most civil rights claims in terms of legal and constitutional doctrine. They involve the issue of the legal parent's rights relative to the state insofar as such petitions necessarily envision court orders affecting the parent's decisions regarding her child. Such petitions require courts to decide for or against innovation, however, not solely in terms of the level of protection the parent deserves relative to the state, but also the level of recognition the same-sex former partner deserves relative to the state, and to the legal parent – who must have ended her own relationship with the former partner for the case to come up at all – and to the child.

Lesbians as plaintiffs in de facto parenting cases stand in a different relationship to the state, and to the defendant, than one would ordinarily expect for a civil rights claim. Historically, in civil rights cases, plaintiffs appealed to the federal courts claiming unjust interference by state governments in their individual decisions.²⁰¹ In de facto parenting cases arising from lesbian relationships, however, the plaintiff seeks the assistance of state government to alter her ex-partner's constitutionally protected decisions regarding the raising of her child. The fact of lesbian plaintiffs suing lesbian defendants also posed problems, at least initially, for lesbian/gay civil rights organizations. Constitutional doctrine protecting the rights of biological parents works to the advantage of lesbian mothers when relatives or unrelated third parties

²⁰⁰ Polikoff, *supra* note 2, at 320-21.

²⁰¹ *See, e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954) (“separate but equal” doctrine overruled as applied to public schools because separate facilities for black and white students inherently unequal); *Roe v. Wade*, 410 U.S. 113 (1973) (state prohibitions on abortion in first two trimesters of pregnancy unduly restrict women’s right to privacy); *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional amendment repealing all existing lesbian/gay civil rights ordinances and forbidding all future nondiscrimination policies based on sexual orientation violates 14th Amendment’s equal protection clause).

challenge their custody of their children.²⁰² However, the National Center for Lesbian Rights²⁰³ had to revisit its policy of not representing one lesbian against another when lesbian legal mothers began using the same doctrine to prevent their ex-partners from visiting children the two women had cooperated to bear and raise during their relationship.²⁰⁴

B. Demographic Factors

Political scientists have produced several studies of local ordinances prohibiting discrimination based on sexual orientation.²⁰⁵ These studies provide a useful baseline for considering judicial innovation and diffusion even if the comparisons between ordinances and judicial opinions, and between local policies and state policies are necessarily inexact. The adoption of lesbian/gay civil rights ordinances presumably indicates some preference for lesbian/gay civil rights generally, although the situation can be more complicated than that.²⁰⁶ Studies of municipal nondiscrimination ordinances indicate that spatial and temporal factors play some role in the diffusion of these policies – that is, a policy diffusion model according to which policy innovations will spread over time to nearby jurisdictions simply by dint of their proximity has some predictive value.

However, the stronger correlations are with such demographic factors as racial and ethnic diversity, total population, income, and educational attainment.²⁰⁷ Indeed, spatial continuity is,

²⁰² Polikoff, *supra* note 2, at 324. *See also* Robson, *supra* note 28.

²⁰³ The National Center for Lesbian Rights, a public interest law firm based in San Francisco, provides services to lesbian, gay, bisexual, and transgender (LGBT) persons in a number of issue areas. www.nclrights.org (last visited Jan. 18, 2007).

²⁰⁴ *Id.*

²⁰⁵ *See supra*, note 136.

²⁰⁶ *See supra*, notes 156-60, 175-76 and accompanying text. Again, Wisconsin illustrates the point. Twenty-four years after enacting a statute to prohibit sexual-orientation discrimination, it amended its state constitution to prohibit recognition of same-sex marriages.

²⁰⁷ *See sources cited at supra*, note 140. Dorris finds in his study of municipal nondiscrimination ordinances that religion is not an important factor. Dorris, *supra* note 140, at 49, 52. Further, the Census Bureau, the source for the data in this study, is prohibited from collecting such information (P.L. 94-521 prohibits the Census Bureau from asking mandatory questions about religious affiliation, <http://www.census.gov/prod/www/religion.htm>, last visited Jan. 18, 2007).

on its face, a somewhat implausible explanation for policy adoptions except insofar as the policy relates closely to geographical or climatological factors. That Minnesota more resembles the Dakotas than the Carolinas in its decisions about spending on snow removal would surprise no one. If, however, the Dakotas have more in common with the Carolinas than with Minnesota in matters of lesbian/gay civil rights policies,²⁰⁸ some similarity between the two groups other than geographical proximity must offer the correct explanation.

With respect to lesbian/gay civil rights and de facto parent status, the difficulty of extrapolating from legislative and executive innovations to judicial innovation on the basis of geography becomes obvious in light of Polikoff's observation that "[a]ppellate courts in California and New York, the states with the largest number of planned lesbian and gay families, have both closed the door on all claims by nonbiological mothers and recognized the claims of semen donors."²⁰⁹ That is, in those two states when Polikoff wrote, courts conferred more legal recognition on biological fathers than on de facto lesbian parents even when the biological fathers had had no contact at all with the child.²¹⁰

More plausible than the simple diffusion model is an explanation based on the particular political histories of the jurisdictions in question. A historical explanation is more plausible for

²⁰⁸ Minnesota prohibits discrimination on the basis of sexual orientation in employment, public accommodations, education, housing, credit, and union practices. Minn. Stat. §363A.02 (2005). Neither North nor South Dakota, nor North nor South Carolina, has adopted any such protections. For an overview, see <http://www.lambdalegal.org/cgi-bin/iowa/states/index.html> (last visited Oct. 17, 2006).

²⁰⁹ Polikoff, *supra* note 2, at 324. The case law on this issue in California is confused at the moment. In *Kristine H. v. Lisa R.*, 120 Cal. App. 4th 143 (Cal. Ct. App. 2004), *rev. granted, depub.*, 97 P. 3d 72, an appeals court held that a judgment of the family court finding them "joint intended parents" based on the parties' stipulation prior to the child's birth was void because it exceeded the family court's jurisdiction. *Id.* at 150. It also found, however, that a "gender neutral" reading of California's Uniform Parent Act (UPA) could allow a lesbian to establish a legal parenting relationship with her ex-partner's child according to the criteria for establishing paternity. *Id.* at 150-51. The *Kristine* court acknowledged that its decision conflicted with a recent decision on similar facts by another appeals judge, *id.*, and noted that, as of January 1, 2005, new domestic partner legislation in California would allow same-sex couples the same rights under the state's family code as married, opposite-sex couples. *Id.* at n. 5. This decision is not citable, however, having been superseded by a grant of review by the California Supreme Court. *Id.* at 143.

²¹⁰ See Susan E. Dalton, *From Presumed Fathers To Lesbian Mothers: Sex Discrimination And The Legal Construction Of Parenthood*, 9 MICH. J. GENDER & L. 261 (2003).

Wisconsin because it led the nation, not only in recognizing lesbians as de facto parents, but in prohibiting sexual-orientation discrimination at the state level even though, as a state, it scores relatively low on the factors that best predict adoption of sexual-orientation nondiscrimination policies at the municipal level.²¹¹

Of course one must be cautious about extrapolating from data on cities to data on states, but it is not obvious why, if racial/ethnic diversity, total population, and educational attainment correlate strongly with municipal policy adoptions,²¹² they should not also do so with state policy adoptions. Recall also that Dorris's study of municipal policy adoptions found a state-level factor among the most explanatory.²¹³ The tables in Appendix A show rankings for the relevant characteristics in the 2000 census²¹⁴ of the following: the eight states that have recognized lesbians as de facto parents;²¹⁵ Tennessee, the one state in which a court has refused to recognize a lesbian ex-partner as a de facto parent and the legislature has provided no relief;²¹⁶ and the six states that significantly restrict custody or adoption by lesbians and gay men, whether by legislation or executive order.²¹⁷ Such restrictions serve here to define the opposite end of the spectrum: a legislative or executive restriction on the parenting rights of lesbians and gay men

²¹¹ See chart, appendix A.

²¹² Dorris, *supra* note 140, at 48-49.

²¹³ *Id.*

²¹⁴ *Holtzman* was decided in 1995, *V.C. v. M.J.B.* in 2000, which suggests that perhaps the 1990 census would capture the relevant data for Wisconsin and New Jersey more accurately. However, with the possible exception of the Hispanic population, none of the relevant characteristics is likely to have changed dramatically between 1990 and 2000, and the latter date is more relevant for the other states. See Betsy Guzman, *Census 2000 Brief: The Hispanic Population 2* (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>. Also, the 2000 census was the first to allow respondents to designate themselves as "mixed-race," which is a useful category for discerning racial and ethnic diversity. See Nicholas A. Jones and Amy Symens Smith, *Census 2000 Brief: The Two or More Races Population: 2000 1* (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf>.

²¹⁵ Colorado, Maryland, Massachusetts, New Jersey, Pennsylvania, Washington, Wisconsin.

²¹⁶ As opposed to California, where courts have denied lesbians' claims as de facto parents, but the legislature has mooted the point by created comprehensive domestic partner benefits for same-sex couples. See *supra* note 103. Although the principle underlying the choice of states for this study is to include those where significant policy activity, regardless of branch, has occurred on issues of lesbian/gay parenting, I have deliberately left California out because its large population and unique history in LGBT civil rights make it too much an outlier for present purposes.

²¹⁷ AR, FL, MS, ND, OK, UT. National Gay and Lesbian Task Force, Adoption Map, <http://www.thetaskforce.org/downloads/adoptionmap.pdf>.

versus a judicial expansion of those rights. This is more useful than simply comparing states that have not recognized lesbians as de facto parents to states that have, because such failure of recognition could indicate that the issue has yet to arise in that state's courts, reflecting a lack of decision on the issue rather than a negative decision.

Table 1 gives data for total population; median household income; educational attainment, measured as percentage of the population that has graduated from high school, and percentage of the population that has graduated from college; and population diversity, measured by the percentage of the population that is African-American, Hispanic, mixed-race, or foreign-born. It also gives a binary coding for: whether the state allows second-parent adoptions; whether it prohibits adoptions by lesbians and gay men; whether it prohibits sexual-orientation discrimination in employment; and whether it is a former slave state.²¹⁸ For each of the binary factors, a zero indicates the position more favorable to lesbian/gay civil rights, while a one indicates the opposite. Table 2 shows how each state ranks relative to the others for each of these factors. Table 3 creates an index of those factors by giving each state a score that is the result of adding together the state's rank on each factor in Table 2. Because the factors in question correlate positively with enactment of municipal lesbian/gay civil rights ordinances, the index in Table 3 follows the golf model, as a lower score indicates a higher likelihood of prohibiting sexual-orientation discrimination.

As a group, the states that have recognized lesbian de facto parents mostly cluster in a way that seems to confirm the predictive value of the factors that are significant for municipal ordinances. The combined rankings, totaling each state's scores for each factor, give few surprises in the first five entries: New Jersey, Massachusetts, Colorado, Washington, and Maryland. Insofar as we are interested in geographical factors, it is worth noting that three of

²¹⁸ See *infra*, note 227 for an explanation of this variable.

those states are on the east coast, but they are not contiguous. More, each one comes from one of the three conventional regions that the thirteen original colonies break into: New England, Mid-Atlantic, and Southern. The other two introduce a very high degree of geographical dispersion, almost the highest possible: Colorado in the middle of the continent, and Washington on the west coast.²¹⁹ Therefore, it is apparent that geography alone is not a useful explanatory variable.

Given that Colorado voters in 1992 amended their constitution to repeal existing local lesbian/gay civil rights ordinances, the state's high ranking here might seem surprising. However, as Evan Gerstman explains, the success of Amendment 2 probably tells us more about the success of Christian conservatives in persuading 54% of the state's population that lesbian/gay civil rights ordinances conferred "special rights" on lesbians and gay men than about the attitudes of Colorado citizens toward lesbian/gay civil rights ordinances *per se*.²²⁰ Also, it is well to remember in this context that Amendment 2 repealed lesbian/gay civil rights ordinances in three Colorado cities, Denver, Boulder and Aspen. The enactment of those ordinances may be as or more indicative for the state than the enactment of Amendment 2.

Colorado ranks eighth, one spot above Mississippi, in total population, and eighth in percentage of its population that is African-American. However, it scores second in percentage of the population that has graduated from high school and college, and in mixed-race²²¹ population. It ranks first among the states in this study in the percentage of its population that is

²¹⁹ The one major region of the United States that is conspicuously absent from the list of states that have recognized visitation rights for lesbian de facto parents is the South. On the relationship between this plainly geographical designation and the region's history and demography as predictive variables for policy innovation, *see infra*, note 227 and accompanying text.

²²⁰ EVAN GERSTMAN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* (1999) (proponents of Amendment 2 deliberately used "special rights" argument because they recognized that most Colorado voters had no desire to discriminate against lesbians and gay men, but were reluctant to equate sexual-orientation discrimination with racial and gender discrimination).

²²¹ The 2000 census was the first in United States history to allow respondents to designate themselves as "one or more races." *See* Nicholas A. Jones and Amy Symens Smith, *Census 2000 Brief: The Two or More Races Population*, Nov. 2001, <http://www.census.gov/prod/2001pubs/c2kbr01-6.pdf>.

Hispanic. Thus, it confirms the correlation between high levels of education and population diversity and support for lesbian/gay civil rights ordinances. It is also worth noting that Colorado is unique among the lesbian de facto parent states in that its decision on this issue involved the interpretation of the term “psychological parent,” which appears undefined in state statute. Thus, the Colorado court was interpreting a statute while the other states relied on their equitable jurisdiction in the absence of statutory authority.²²² Although it did not expressly confer rights on lesbian families, the Colorado legislature had already demonstrated an expansiveness in its definition of “family” that put it ahead of most other states even before a state court applied that statutory definition to a custody and visitation dispute between two lesbians.

At the other end of the spectrum, Mississippi scores high in only one category: it has the highest percentage African-American population. This serves in the table as one indicator for racial and ethnic diversity, which usually correlates positively with support for lesbian/gay civil rights policies. However, the former slave states²²³ tend to have relatively homogenous populations, with only the primary division between African- and British-Americans but relatively few members of the many other ethnic categories that characterize the rest of the United States. This is because slavery itself and its legacies, or sequelae, deterred many immigrants from settling there,²²⁴ as is reflected most clearly by the fact that Mississippi ranks

²²² See *supra*, note 69 and accompanying text.

²²³ I specify “former slave states” rather than “the South” because, for purposes of demographic characteristics, the presence of slaves before 1865 is more important than the state’s location. Of course slavery predominated in southern states rather than elsewhere in the American colonies and the United States because other regions were less suited to the plantation agriculture for which slavery was an economically viable form of labor. That is, geography was a crucial variable in determining which states had large numbers of slaves and which had only a few. For a useful overview, see Paul K. Conkin, *Hot, Humid, and Sad*, 64 J. OF SOUTHERN HIST. 3-22 (1998). On the other hand, Dorris finds no statistical correlation between geographical region and likelihood of adopting a lesbian/gay civil rights policy, further confirming the point that the real issue for present purposes is the demographic characteristics rather than geography. See Dorris, *supra* note 140, at 49.

²²⁴ See Conkin, *supra* note 223, at 8.

next to last in this group – one spot above North Dakota – for the percentage of the population that is Hispanic.²²⁵ Thus, Mississippi's high rank for the one factor of African-American population more confirms than disconfirms the hypothesis of some correlation between population diversity and support for lesbian/gay civil rights.

Florida and Utah are more puzzling. In this group, they rank at the top of the subgroup that restricts lesbian/gay parenting in household income and educational achievement. This seems contradictory insofar as support for lesbian/gay civil rights usually correlates positively with education and income.²²⁶ Being at the top of the group that restricts lesbian/gay parenting could be meaningless – among the states that have such restrictions, one of them had to rank above all others for these indicators. In terms of total population and population diversity measures, however, Florida ranks high. It has the largest total population of any state in this group, with nearly half again as many total persons as the next state, Pennsylvania. It ranks second in both the percentage of its population that is Hispanic, and that is foreign-born, and it ranks fourth in the percentage of African-Americans. Like Mississippi, Florida is a former slave state, but various historical factors, including its appeal as a tourist and retirement destination and its proximity to Cuba, influence its demographics. Perhaps the single most important factor about Florida in explaining its prohibition on adoptions by lesbians and gay men, however, is a specific historical event: the drive by Anita Bryant to repeal the Dade County lesbian/gay civil

²²⁵ At the risk of belaboring the obvious, of the states in this list, Mississippi is the closest to Central and South America. Thus, that Hispanics are 13.3% of New Jersey's population, but only 1.4% of Mississippi's, suggests that Hispanic immigrants choose their destinations based in part on something other than geographical proximity or climate, and that something about Mississippi deters them from settling there. The factor that deters Hispanic immigrants – and most other immigrants – from settling in Mississippi may be lack of economic opportunity, but that observation only begs the question of the extent to which Mississippi's consistently laggard economic performance is a function of its history of race relations. See Conkin, *supra* note 223.

²²⁶ See, e.g., Schroedel at 91; Lewis and Rogers, 126, both in Riggle and Tadlock, *supra* note 140.

rights ordinance in 1977. The Florida legislature passed the statute in question as part of the general backlash against this first move toward protecting lesbian/gay civil rights.²²⁷

Utah in some sense is the inverse of Mississippi. It has a low total population (thirteenth in the present set) and a low percentage African-American population (also thirteenth). However, it scores relatively high in three other categories: Hispanic population (fourth), income (sixth), and education (fifth in aggregate education ranking, sixth in percent college graduates, first in percentage high school graduates). Its high rank in education is particularly puzzling on its face, given the typically positive correlation between education and support for lesbian/gay civil rights. However, the situation in Utah confirms the findings of political scientist Jean Reith Schroedel that self-reported conservative ideological commitment overrides level of education, such that highly educated conservatives are very likely to oppose lesbian/gay civil rights.²²⁸

The big surprise is that Wisconsin and Pennsylvania both rank below Florida and Utah. Where Florida and Utah typically rank either very high or very low on individual factors, Wisconsin and Pennsylvania are consistently clustered around seventh or eighth place – right behind Utah in income and percent of population that is college educated. Pennsylvania's highest ranking is second, for total population. Wisconsin's highest ranking is fourth, for percent high school graduates. But across the board, the two typically hang together, tying each other for percent college graduates and tying with North Dakota for the next-to-last spot in percent mixed-race.

Thus, on the question of why Wisconsin led this group of states in recognizing lesbians as *de facto* parents, the data is less helpful. It shows that Wisconsin has a relatively homogenous,

²²⁷ On the other hand, although Bryant succeeded in persuading a significant majority of the citizens in Dade County to vote to repeal the lesbian/gay civil rights ordinance in 1977, when a very similar fight erupted again during the late 1990s, the drive to repeal the new ordinance failed. Dorris' list of cities with ordinances, which he compiled for his study, shows five in Florida, more than any other southern state. Dorris, *supra* note 140, at 55-56.

²²⁸ See Schroedel at 104, in *GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS*, *supra* note 140.

relatively small population, and below average educational attainment if measured by percent of the population that has graduated from college, but above average if measured by percent of the population that has graduated from high school. The fact that it lands near Utah on measures of income (UT sixth, WI seventh) and education (UT fifth, WI seventh) suggests that, especially in states with relatively homogenous populations (UT tenth, WI twelfth), ideology may be the most significant factor, as two demographically similar states end up on opposite ends of a controversial political issue for which their geographical differences play no apparent role. These results also suggest, consistent with Cauthen's findings, that ideology is more important for determining which state will introduce a given innovation, but that demographic factors increase in importance as the innovation becomes more common by spreading to other states.

C. Entrepreneurial Attorneys

What Wisconsin has that Utah does not is a long standing tradition of progressive politics and reformist government.²²⁹ Wisconsinites pride themselves on their leadership in major policy innovations, and there is no reason to expect that the tendency for such innovation would appear only in the legislative and executive branches, sparing the judiciary. Further, it seems likely that such a political and legal context would conduce to the production of policy entrepreneurs. In the *Holtzman* case, the plaintiff's attorney, Judith Sperling-Newton, and the guardian ad litem (GAL), Linda Balisle, clearly served as policy entrepreneurs, illustrating in the process both the possibilities and limitations of the courts as vehicles for policy change, and the role of social movement actors in using the courts for this purpose.

Balisle was a partner at Balisle and Roberson, a Madison, WI firm that specializes in family law, while she served as GAL in the *Holtzman* case. She asserts that she would find it

²²⁹ See ROBERT C. NESBIT, WISCONSIN: A HISTORY 399-456 (1973; 2d ed. rev. & updated by William F. Thompson, 1989); JOHN D. BUENKER, THE PROGRESSIVE ERA, 1893-1914, vol. IV of THE HISTORY OF WISCONSIN (1998).

difficult to practice family law without focusing on broader policy issues because individual cases are often so emotionally difficult for the litigants and for the attorneys. She sees the loss of attachment to important adults as a major factor contributing to subsequent problems for children, including low educational achievement and increased risk of incarceration. In *Holtzman*, she also firmly believed that continued contact between Holtzman and the child was in the child's best interest.²³⁰ Balisle was sufficiently persuaded of the merits, and the urgency, of the case that she petitioned the Wisconsin Supreme Court to bypass the court of appeals, which it did.²³¹

Such petition from a GAL is very unusual, as was the appeals court's decision to grant relief pending appeal, which in *Holtzman* meant visitation with the child.²³² Part of the standard for granting relief pending appeal is the appellant's likelihood of prevailing on the merits of the case.²³³ The appeals court noted that such success seemed highly unlikely, given controlling precedent, *In re Z.J.H.*,²³⁴ holding exactly the opposite of appellants' position, but the court stated, "[o]n the other hand, the appellant has a substantially better than average chance of reversing *Z.J.H.* than does the usual litigant who seeks to overturn a controlling supreme court decision."²³⁵ Presumably this calculation reflected in part the appeals court's recognition that the composition of the Wisconsin Supreme Court had changed since *Z.J.H.*²³⁶

²³⁰ Interview with Linda Balisle, in Madison, Wis. (Dec. 9, 2004). In fact, after the decision granting her the right to petition for visitation, Holtzman would go on to become the child's guardian and have sole custody of him. As of this writing, Knott has moved away from Madison, WI, maintaining contact with Holtzman and their son, but visiting with them infrequently. Interview with Sandra Holtzman (Dec. 2, 2005).

²³¹ *Holtzman*, 193 Wis. 2d at 663.

²³² Order granting relief pending appeal, *In re the Custody of H.S.H-K.: Sandra Lynn Holtzman v. Elsbeth Knott* (Wis. Ct. App., Dec. 21, 1993) (93-2911).

²³³ *Id.* at 1.

²³⁴ 162 Wis. 2d 1002 (1991). See *infra*, at 8.

²³⁵ Order granting relief pending appeal, *In re the Custody of H.S.H-K.: Sandra Lynn Holtzman v. Elsbeth Knott* (Wis. Ct. App., Dec. 21, 1993) (93-2911) at 2.

²³⁶ Justices on the court at the time of *Z.J.H.*, 1991, were Heffernan, Callow, Bablitch, Abrahamson, Day, Steinmetz, and Ceci. Abrahamson and Bablitch dissented. *Z.J.H.*, 162 Wis. 2d at 1028-34. Justices on the court at the time of *Holtzman*, 1995, were Heffernan, Bablitch, Geske, Abrahamson, Day, Steinmetz, and Wilcox. Abrahamson wrote

But the appeals court likely also recognized Balisle and Newton as unusually motivated and effective litigators in family law matters. In terms of legal culture, Madison, WI remained a small town in the mid 1990s. The judges and the attorneys who practiced before them mostly knew each other well by reputation.²³⁷ In 1994, Newton would lose a case before the Supreme Court in which the petitioner sought to adopt the child of her same-sex partner without first terminating the partner's parental rights, just four months before arguing *Holtzman* before the Supreme Court.²³⁸ But the appeals court had no way of knowing the outcome of that case when it granted relief pending appeal in December 1993. The loss of the second-parent adoption case, *In re Angel Lace*,²³⁹ proved an unusual and temporary setback for Newton, who has gone on to make a specialty out of helping same-sex couples have children, whether through adoptions or surrogacy.²⁴⁰ She had published the state bar association's guide to voluntary termination of parental rights in 1990²⁴¹ and was already an active participant in the national networks of attorneys who litigated and strategized on these issues that Polikoff describes.²⁴²

The *Holtzman* case, then, is the result of many factors, including Balisle's and Newton's roles as policy entrepreneurs who networked among colleagues locally and nationally, and brought a particular conceptual framework grounded in policy and law, as well as sympathy for the claims of lesbian plaintiffs, to their perception of the *Holtzman* case as a problem that the courts could solve. Also, as Grossback indicates, information flows were crucial for this policy

the majority opinion, with Day, Steinmetz, and Wilcox dissenting from the decision insofar as it granted Holtzman the right to petition for custody. *Holtzman*, 193 Wis. 2d at 656, 711, 730. For dates of service, see PORTRAITS OF JUSTICE, *supra* note 45, at 86-95.

²³⁷ Balisle interview, *supra* note 230; Interview with Judith Sperling-Newton (Dec. 8, 2004).

²³⁸ *In re Angel Lace*, 184 Wis. 2d 492 (Wis. 1994) (child is not available for adoption by legal mother's lesbian partner while legal mother continues to have parental rights).

²³⁹ *Id.*

²⁴⁰ See Law Center for Children and Families, www.law4kids.com. In the interest of full disclosure, I should note that I clerked for the Law Center for Children and Families from December 2005 to July 2006.

²⁴¹ JUDITH SPERLING NEWTON, VOLUNTARY TERMINATION OF PARENTAL RIGHTS (1990).

²⁴² Polikoff, *supra* note 2, at 308-09, 322, Sperling-Newton interview, *supra* note 237.

innovation insofar as Newton in particular participated actively in the national network of activists that exchanged opinions and ideas in the area even before the *Holtzman* decision.

V. Conclusion

Of the seven states that have recognized lesbian ex-partners as de facto parents, four are on the east coast: Massachusetts, New Jersey, Pennsylvania, and Maryland. Of the remaining three, one is in the upper Midwest (Wisconsin), one is in the mountain west (Colorado), and one is on the west coast (Washington). Geographical proximity is not a compelling explanation for similarity in public policy toward lesbian families among these states. Demographic similarity provides a better explanation. However, Wisconsin and Pennsylvania score below Florida and Utah – two states that significantly restrict the parenting rights of lesbians and gay men – on indicators that ordinarily correlate positively with the adoption of ordinances prohibiting sexual orientation discrimination. Thus, demographic similarity is not dispositive.

Ideological similarity, at least as measured by Elazar's designations of political culture, is perhaps the best explanation for why certain states have recognized lesbians as de facto parents. It stands to reason that cities with large total populations would have large populations of lesbians and gay men, making them likely centers of lesbian/gay civil rights activism. The cities that we most associate with such activism in the United States have even more specific factors that help explain their leadership in this area – they are often port cities where large numbers of service members chose to remain after their discharges from World War II; they tend to be noteworthy as cultural meccas with populations that are highly diverse as well as large.²⁴³

²⁴³ See, e.g., NAN ALAMILLA BOYD, *WIDE-OPEN TOWN: A QUEER HISTORY OF SAN FRANCISCO TO 1969* (2003); GEORGE CHAUNCEY, *GAY NEW YORK* (1995); ALLEN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (1985).

Wisconsin, as we have seen, has none of these features. Two of its cities, Milwaukee and Madison, did pass ordinances prohibiting sexual orientation discrimination early on. Milwaukee, the largest city in the state, has a long tradition of socialist politics, the primary source of which – settlement by large numbers of German immigrants – characterizes much of the state. Madison falls more into that other category of cities that have commonly enacted prohibitions on sexual-orientation discrimination – liberal bastions whose politics are dominated by a major research university (others include Iowa City, IA, Ann Arbor, MI, and Ithaca, NY).²⁴⁴

The other major conclusion to draw from *Holtzman* is the importance of distinguishing between policy innovation and diffusion. The characteristics that make a state likely to innovate in policy generally, whether legislative, executive, or judicial, may be quite different from the characteristics that lead other states to adopt policies from ideologically similar innovators, although presumably those characteristics cannot be too different if the states are sufficiently similar ideologically to adopt the same policies. Clearly, further research is necessary to provide more robust answers to these questions. However, as a new, potentially very controversial issue emerging within the last decade among state courts, mostly in the shadow of same-sex marriage, lesbian de facto parents as defined in the *Holtzman* decision provide an excellent opportunity for evaluating the conditions for judicial policy innovation, and the Wisconsin experience strongly indicates that the state's political and ideological history is the most important of those conditions.

More important than the factors influencing policy diffusion is the question of how to resolve the underlying cases: what parental rights should courts grant to non-legal parents when lesbian couples with children separate? We need not attribute homophobic intent to the

²⁴⁴ See Dillon, *Antidiscrimination Laws in Local Government* at 54-56, Gossett, *Dillon's Rule and Gay Rights* at 67-69, in *GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS*, *supra* note 140.

dissenting justices in *Holtzman* and other cases in order to note that equating lesbian co-parents with all other “third parties” for legal purposes entails enormous disrespect for lesbian relationships. Lesbians will find unsurprising the proposition that the law as it stands usually affords them little respect. Couching the issue in terms of the role of the courts versus the role of the legislature, to deny the courts the power to adjudicate visitation disputes between lesbian couples because of the absence of statute is to give to the majority the power to deprive persons in the minority of all redress. Such a proposition is inconsistent with the rule of law.

Epilogue: State Constitutional Amendments Prohibiting Same-Sex Marriages

Half of the states that have judicially recognized visitation rights in lesbian ex-partners – Colorado,²⁴⁵ Pennsylvania,²⁴⁶ Washington,²⁴⁷ and Wisconsin²⁴⁸ – now face the perplexity of having statutes, constitutional amendments, or both that prohibit the recognition of same-sex marriages. Such statutes and amendments may have little impact on the decisions in question. Courts need only use their equitable powers to recognize visitation rights in lesbian ex-partners because lesbians cannot marry one another.²⁴⁹ If they could, such cases would not come up. In some sense, then, defining lesbians as beyond the pale of marriage is merely redundant.²⁵⁰ The Pennsylvania courts have decided a custody dispute for a lesbian ex-couple, holding that the non-

²⁴⁵ Colo. Rev. Stat. § 140-2-104(1)(b), (2); constitutional amendment adopted, Nov. 7, 2006: “Only a union of one man and one woman shall be valid or recognized as marriage in this state.” See *Equality from State to State 2004*, *supra* note 16, and *2006*, *supra* note 122, for overviews of state legislation and constitutional amendments prohibiting recognition of same-sex marriages.

²⁴⁶ 23 Pa.C.S. § 1704.

²⁴⁷ Rev. Code Wash.. §§ 26.04.010(1), 26.04.020(1)(c); *Andersen v. King County*, 158 Wn. 2d 1, 138 P.3d 963 (2006).

²⁴⁸ Wis. Const. Art. XIII, sec. 13. Available at <http://www.legis.state.wi.us/statutes/wisconst.pdf>.

²⁴⁹ See, e.g., *Phillips v. Wisconsin Personnel Commission*, 167 Wis. 2d 205, 482 N.W. 2d 121 (Wis. Ct. App. 1992) (plaintiff has no claim to include her same-sex partner in her benefits as a state employee because state does not recognize same-sex marriages).

²⁵⁰ It is worth noting in this context that public opinion increasingly supports granting many of the individual incidents of marriage to same-sex couples, but not calling the result “marriage.” See Public Agenda, http://www.publicagenda.org/issues/red_flags_detail.cfm?issue_type=gay_rights&list=5&area=2 (last visited, Jan. 19, 2007).

biological parent may have, not merely visitation, but primary custody.²⁵¹ Interestingly, the opinion makes no reference either to the statute defining marriage, or to *T.B. v. L.R.M.*, the Pennsylvania lesbian visitation case.²⁵² But the Pennsylvania statute only defines marriage.²⁵³

Wisconsin's constitutional amendment is different. It reads: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."²⁵⁴ The question then becomes, does recognizing visitation rights in a lesbian ex-partner amount to conferring on her "a legal status identical or substantially similar to that of marriage"? It is possible to separate the incidents of marriage – inheritance, hospital visitation, child custody and visitation – from the status of marriage.²⁵⁵ One could argue that visitation rights are an incident of marriage, but do not thereby create a legal status that offends the amendment. Again, the need to adjudicate the ex-partner's claim to a specific incident of marriage occurs solely because she cannot adopt the status of marriage.

A Michigan Court of Appeals has addressed this issue as one of first impression.²⁵⁶ Although Michigan has not recognized de facto parent status, the Court's opinion specifically notes the similarity of language between the Michigan anti-marriage amendment and the Wisconsin anti-marriage amendment.²⁵⁷ The case involves whether the Michigan anti-marriage

²⁵¹ *Jones v. Jones*, 2005 PA Super 337, 884 A.2d 915 (Sup. Ct. Penn., 2005), appeal denied, 2006 Pa. Lexis 2307 (Nov. 28, 2006).

²⁵² *See supra*, notes 107 to 110 and accompanying text for discussion.

²⁵³ 23 Pa.C.S. § 1704: "It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."

²⁵⁴ Wis. Const. Art. XIII, sec. 13. Available at <http://www.legis.state.wi.us/statutes/wisconst.pdf>.

²⁵⁵ *See, e.g.*, Restatement (Second) of Conflict of Laws, § 284 (discussing principles to use in evaluating interstate marriage disputes).

²⁵⁶ *Nat'l Pride at Work v. Gov. of Mich.*, Michigan Court of Appeals, No. 265870, Feb. 1, 2007, at 2, available at http://courtofappeals.mjud.net/DOCUMENTS/OPINIONS/FINAL/COA/20070201_C265870_104_265870.OPN.PDF (last visited Feb. 5, 2007).

²⁵⁷ *Id.* at 2 n.3.

amendment²⁵⁸ prohibits state and local governments from conferring employment benefits such as health insurance coverage on the same-sex partners of employees.²⁵⁹ The trial court held that such benefits were a function of the employee's job status, not marital status, which is a matter of contract between the employer and the employee.²⁶⁰ Therefore, the constitutional amendment prohibiting recognition of same-sex marriages did not apply.²⁶¹

The Appeals Court reversed,²⁶² stating that “[t]he operative language of the amendment plainly precludes the extension of benefits related to an employment contract, if the benefits are conditioned on or provided because of an *agreement recognized as a marriage or similar union.*”²⁶³ The Court also rejected the contention that conferring employment benefits on same-sex partners of employees involved no legal recognition²⁶⁴ of the employee's relationship with her/his partner.²⁶⁵ It expressly adopted the position of the Attorney General, identifying five elements that domestic partnership registries for same-sex couples have in common with marriages.²⁶⁶

Again, precisely because persons other than former domestic partners could qualify as de facto parents under the four-part test in *Holtzman*, one could argue that conferring visitation rights on a lesbian to the child of her ex-partner does not involve “benefits... conditioned on or provided because of an agreement recognized as a marriage or similar union.”²⁶⁷ In *Holtzman*, had the couple been married, custody would have been an option for the petitioner. The court

²⁵⁸ “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” Mich. Const. 1963, art. 1, § 25, quoted at *Nat'l Pride at Work* at 2 n. 2.

²⁵⁹ *Nat'l Pride at Work* at 3.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 4.

²⁶² *Id.* at 2, 15.

²⁶³ *Id.* at 7 (emphasis in original).

²⁶⁴ *See id.* at 6-7, n. 11 for discussion of ordinary v. legal meaning of “recognize.”

²⁶⁵ *Id.* at 8-9.

²⁶⁶ *Id.* at 9.

²⁶⁷ *Id.* at 7.

conferred the right to petition for visitation, but not custody, because the custody provisions of the relevant statute applied only to divorcing – that is, to married – couples.

We cannot predict how courts will decide this issue. We can predict that it will arise, given the growing number of same-sex couples who have children. The most important point, however, is the fact that lesbian couples will continue to face the enormous anxiety that comes with significant uncertainty about how the law will treat their relationships, with each other, and with their children. Such uncertainty is tantamount to no law at all.

Table 1. Factors influencing adoption of municipal lesbian/gay civil rights ordinances by state for states that have recognized lesbian ex-partners as de facto parents, and for states that have significant legislative or executive restrictions on the parenting rights of lesbians and gay men. Source: <http://quickfacts.census.gov/qfd/>

	Population (2003 est.)	Income (median household)	College (% grad)	HS (% grad)	Af-Am (%)	Hispanic (%)	Mixed Race (%)	Foreign Born (%)	Allows 2nd parent adoptions	Proh. L/G Adoptions	Proh. Emp. Disc.	Former Slave State
WI	5,472,299	\$43,791	22.4	85.1	5.7	3.6	1.2	3.6	1	0	0	0
NJ	8,638,396	55,146	29.8	82.1	13.6	13.3	2.5	17.5	0	0	0	0
WA	6,131,445	45,776	27.7	87.1	3.2	7.5	3.6	10.4	0	0	1	0
MD	5,508,909	52,868	31.4	83.8	27.9	4.3	2	9.8	0	0	0	1
CO	4,550,688	47,203	32.7	86.9	3.8	17.1	2.8	8.6	1	0	1	0
PA	12,281,054	40,106	22.4	81.9	10	3.2	1.2	4.1	0	0	1	0
MA	6,349,097	50,502	33.2	84.8	5.4	6.8	2.3	12.2	0	0	0	0
RI	1,048,319	45,006	25.6	78	6.1	10.3	1.5	11.4	0	0	0	0
MS	2,881,281	31,330	16.9	72.9	36.3	1.4	0.7	1.4	1	1	1	1
FL	17,019,068	38,819	22.3	79.9	14.6	16.8	2.4	16.7	1	1	1	1
AR	2,673,400	32,182	16.7	75.3	15.7	3.2	1.3	2.8	1	1	1	1
OK	3,450,654	33,400	20.3	80.6	7.6	5.2	4.5	3.8	1	1	1	0
ND	642,200	34,604	22	83.9	0.6	1.2	1.2	1.9	1	1	1	0
UT	2,233,169	45,726	26.1	87.7	0.8	9	2.1	7.1	1	1	1	0
TN	5,841,748	36,360	19.6	75.9	16.4	2.2	1.1	2.8	1	0	1	1
USA	290,809,777	\$41,994	24.4	80.4	12.3	12.5	2.4	11.1				
									1 = no	0 = no	1 = no	0 = no

Table 2: States Ranked by Category

Rank	Total Population	Median Household Income	% College Grad	% High School Grad	% Af-Am	% Hispanic	% Mixed Race	% Foreign Born
1	FL	NJ	MA	UT	MS	CO	OK	NJ
2	PA	MD	CO	WA	MD	FL	WA	FL
3	NJ	MA	MD	CO	TN	NJ	CO	MA
4	MA	CO	NJ	WI	AR	RI	NJ	RI
5	WA	WA	WA	MA	FL	UT	FL	WA
6	TN	UT	UT	ND	NJ	WA	MA	MD
7	MD	RI	RI	MD	PA	MA	UT	CO
8	WI	WI	PA (tie)	NJ	OK	OK	MD	UT
9	CO	PA	WI (tie)	PA	RI	MD	RI	PA
10	OK	FL	FL	OK	WI	WI	AR	OK
11	MS	TN	ND	RI	MA	AR (tie)	ND (tie)	WI
12	AR	ND	OK	FL	CO	PA (tie)	PA (tie)	TN (tie)
13	UT	OK	TN	TN	WA	TN	WI (tie)	AR (tie)
14	RI	AR	MS	AR	UT	MS	TN	ND
15	ND	MS	AR	MS	ND	ND	MS	MS

Table 3: States Ranked by Adding All Rankings in Individual Categories²⁶⁸

	Total Score	Rank	Rank by Income	Education Composite	Rank by Education	Heterogeneity Composite	Rank by Heterogeneity
NJ	30	1	1	111.9	6	46.9	2
MA	40	2	3	118	2	26.7	7
CO	43	3	4	119.6	1	32.3	5
WA	44	4	5	114.8	4	24.7	8
MD	45	5	2	115.2	3	44	3
FL	46	6	10	102.2	11	50.5	1
UT	63	7	6	113.8	5	19	12
RI	65	8	7	103.6	10	29.3	6
PA	69	9	9	104.3	9	18.5	13
WI	73	10	8	107.5	7	14.1	14
OK	75	11	13	100.9	12	21.1	11
TN	88.5	12	11	95.5	13	22.5	10
AR	97	13	14	92	14	23	9
ND	103	14	12	105.9	8	4.9	15
MS	104	15	15	89.8	15	39.8	4

²⁶⁸ The “total score” in this table is the result of adding together the number value for the state’s rank in each of the individual categories in Table 2. Thus, for NJ, $3+1+4+8+6+3+4+1 = 30$. Each 1 in the last four columns of Table 1 also added one to the total score. “Rank by income” is the state’s rank in the category, “Median Household Income.” “Education Composite” and “Heterogeneity Composite” are the result of adding together the percentage of population for the state in the relevant individual categories, percent college and percent high school graduates for education, percent African-American, Hispanic, mixed race, and foreign born for heterogeneity.