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THE IMPORTANCE OF PRIVATE INTERNATIONAL LAW FOR FAMILY ISSUES IN AN ERA OF GLOBALIZATION: TWO CASE STUDIES—INTERNATIONAL CHILD ABDUCTION AND SAME-SEX UNIONS

Linda Silberman* and Karin Wolfe**

A continuing theme of the Conference on Marriage, Democracy, and Families has been the role of the state in structuring and regulating family relationships. But like so many areas, in the era of globalization, members of a family unit—or the family itself—may move across national borders. Thus, nationals of different countries may set up the family unit in a particular country, or the family itself may move across national borders. Family units may break up, and regulation of the dissolved family unit may be of concern to more than one state. Thus, on a variety of issues, in the transnational context, the different values that define family structure within particular cultures will come into direct conflict. Private international law (conflict of laws) has much to contribute to the accommodation of these competing interests.

Like so many issues of globalization, regulation of family issues in the transnational context can be addressed through principles of territorial accommodation and/or agreement on universal norms. However, consensus about universal norms may be difficult to achieve given strong governmental interests in the structure of the family and the relationship of family members by respective states. Two topics—cross-border custody disputes and same-sex unions—serve as examples of the more general problem. Each offers an approach incorporating principles of private international law to resolve the tensions.

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I. CROSS-BORDER CUSTODY DISPUTES

Disputes over and about children are some of the hardest issues in the transnational context. First, these issues are so personal and strike such emotional chords that the stakes become quite high. Questions about custody go to the very core of people’s lives, and parties are often willing to go to extraordinary lengths to obtain what they want and need. Second, the traditional judicial process—whether in a common law or civil law regime—is a very poor mechanism for settling the kinds of issues that arise in these disputes. The questions that authorities are asked to resolve in these cases, e.g., what particular custodial arrangements would be in the best interests of a particular child, should a parent be permitted to relocate with a child, when and how should a parent be permitted to exercise rights of access, do not turn on the kinds of fact/law determinations that characterize other types of litigation. Nor is a judicial proceeding, with its formal rules, likely to produce an accurate snapshot of the real family dynamic. Resolution of these matters is part of a value-laden decision-making process that necessarily brings into play differences in culture, attitudes, and moral standards. The classic family law casebook example of this is Painter v. Bannister, where the Iowa Supreme Court found the Bohemian lifestyle of the natural father sufficiently bizarre that it granted custody to the Iowa maternal grandparents after the death of the mother over the strenuous objection of the father. The role of culture and values—and stereotypes—is magnified even more dramatically in the transborder context. Consider, for example, the Bahamian court order that gave custody to a Saudi father rather than an American mother, explaining that the decision was taken in order to avoid the risk of the children becoming “little Americans,” of “losing the cultural heritage of Saudi Arabia,” and of “losing the inheritance of royalty.” How one overcomes these kinds of cultural biases—whether in the United States or elsewhere—is well beyond the scope of this Article or the parameters of this Conference. Nonetheless, legal systems must be sensitive to legitimate cultural norms and values, particularly in disputes involving children. Private international law principles do play an important role here, and two multilateral treaties reflect private international law norms.

1. 140 N.W.2d 152, 155-56 (Iowa 1966) (finding that father would provide child with “unstable, unconventional, arty, Bohemian, and probably intellectually stimulating” lifestyle).
in this area.\(^3\) Similar principles in United States law make the same assessment, although not entirely without criticism.

An example comes from a case that arose in the United States.\(^4\) The mother and father in the case were both Pakistani, and the child was born in Pakistan. When the daughter was eight years old, the mother, Joohi, left the marital home and moved in with her parents in Pakistan. When she realized that her husband, Anwar, had filed custody proceedings in Pakistan, she fled to the United States with her daughter. Nonetheless, the custody case proceeded in the Pakistani court. The mother was represented by counsel but refused to appear in the proceeding; she also refused to obey a court order that the child be produced in Pakistan. The Pakistani judge considered a written statement submitted by the mother detailing certain unsavory aspects of the husband’s character, but nonetheless awarded custody to the father. Using private detectives, the father located the mother and child in Maryland some two years later. The mother then brought suit in Maryland requesting custody while the father sought enforcement of the Pakistani order that had granted him custody.\(^5\) Under United States law—in this case, state law—(and state law today is either the Uniform Child Custody Jurisdiction Act ("UCCJA") or the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")\(^6\)—it is clear that Pakistan would be the "home state" of the child. Under the Uniform Act provisions—as well as general principles of private international law—it is the home state or state of habitual residence that is the appropriate court to hear a custody


5. See id. at 989-90.

jurisdiction case; moreover, under those Acts, the decree of the state or country of habitual residence is entitled to recognition and enforcement. 7

By way of resistance to enforcement, the mother attempted to show that the Pakistani court did not apply the “best interests” of the child test in awarding custody and, thus, that the order of the Pakistani court should not be enforced on public policy grounds. 8 Under the new UCCJEA, now in force in most U.S. states, enforcement of foreign country custody orders is required unless the “child custody law of a foreign country violates fundamental principles of human rights.” 9 The Maryland court held an evidentiary hearing on the substance of child custody law and its application in Pakistan. The evidence showed that Pakistan applied the Guardians and Wards Act of 1890, a statute originally enacted when Pakistan was part of the British Empire and since codified in Pakistani law, governing child custody matters, which specifically requires Pakistani courts to consider the welfare of the minor. 10 But, of course, it is also true that the application of such a standard in Hosain was filtered through the lens of Pakistani culture and values; this “personal law” of Hazanit, which is religious law based on Hinduism and Islam, played an important role in the court’s determination of the child’s welfare. 11 Among the principles of Hazanit claimed to be objectionable were that the mother’s right to her female child up to the age of puberty was lost because she removed the child to the United States where the father was unable to exercise his right to

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7. See UCCJEA, supra note 6, § 105(c). Section 23 of the UCCJEA extended the policies of the Act to international cases, but not all states adopted that section. Section 105 of the UCCJEA makes clear that the jurisdiction and enforcement principles of the Act have international application. See id. § 105(a) (providing that foreign States shall be treated “as if [they] were a State of the United States”); id. § 105(b) (providing that “[e]xcept as otherwise provided in subsection (c), a child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced under [Article] 3”); id. § 105(c) (providing an exception to recognition and enforcement if “the child custody law of a foreign country violates fundamental principles of human rights”).

8. See Hosain, 671 A.2d at 993.

9. UCCJEA, supra note 6, § 105(c). In the actual case, the Maryland court (under the earlier UCCJEA, which did not have an express provision for international cases) applied “comity,” stating that it would recognize the Pakistani decree unless the Pakistani court (1) did not apply the best interests of the child standard when it awarded custody or (2) applied a law “so contrary to Maryland public policy as to undermine confidence in the outcome of the trial.” Hosain, 671 A.2d at 991 (quoting Malik v. Malik, 638 A.2d 1184, 1190 (Md. Ct. Spec. App. 1994)).

10. See Hosain, 671 A.2d at 990-91; see also Pakistan Statutes VIII v.3 p.258.

11. See Hosain, 671 A.2d at 1003-05; see also SYED MUMTAZ ALI, CUSTODY AND GUARDIANSHIP IN ISLAM, at http://muslim-canada.org/guardian.htm (last visited Jan. 4, 2004) (describing the principles pertaining to “Hizanah” or the “guardianship over the rearing and bringing up of” children); Hosain, 671 A.2d at 1001 n.7 (noting that the parties referred to this concept as either “Hazanit” or “Hizanat”).
control as the child’s natural guardian. In addition, the mother was said to have “lost” her rights because she was an apostate (wicked or untrustworthy) and did not promote the religious or secular interests of the child; the fact that the mother had an adulterous relationship and failed to enroll her daughter in a religious school were factors relied upon by the Pakistani court in awarding custody to the father.12

Whether or not some of these factors might also have been relevant in the “best interests” calculus in some courts of the United States, it is undoubtedly true that the “best interests” test as applied and understood in the Pakistani courts was substantially different than it would have been in the hands of an American court. Nonetheless, as the Maryland court explained: “a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of the community and country of which the child and—in this case—her parents were a part, i.e., Pakistan.”13 Thus, the Maryland court refused to rehear the custody issues and enforced the Pakistani judgment. The court believed that to do otherwise would be to encourage circumvention of the laws of the home state through the abduction of children to a place that would award custody on a basis more in harmony with the fugitive’s interests.14

The court’s decision in Hosain adopts a strict rule of deference and enforces the decree of the court of a country that was both the child’s habitual residence and the country of citizenship of all the parties involved. Although one is always moved to take account of the child’s interests and to protect the child at all costs, “best interests” is an amorphous concept filtered through the customs and mores indigenous to a particular society; cultural relativism cannot be completely ignored. Those who would look to the United Nations’ Convention on the Rights of the Child15 for guidance will not find any clear solution. There can be little quarrel with the basic concept of the U.N. Convention—that all actions concerning a child take account of his or her best interests.16 But particular principles of the U.N. Convention are often in tension with others. For example, a child has a right to live with his or her parents, but the Convention recognizes that when the parents live separately a

12. See Hosain, 671 A.2d at 991-92, 1002-05.
13. Id. at 1000.
14. See id. at 998-90, 1010-11.
16. See id., art. 3, at 46 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).
decision must be made regarding where the child should live. The child has the right to maintain contact with both parents, except if it is contrary to the child's best interests.\textsuperscript{17} States are under an obligation to prevent and remedy the kidnapping or retention of children abroad by a parent or third party,\textsuperscript{18} and strong principles of enforcement of other countries' custody decrees serve that end.

Two international conventions negotiated at The Hague Conference on Private International Law have attempted to establish as principles of private international law a similar respect for the custody and access decisions of courts in the country of habitual residence.\textsuperscript{19} The most recent convention, the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children\textsuperscript{20} (sometimes known as the Protection of Children Convention), would give authorities in the state of habitual residence jurisdiction to make decisions about the child—including custody—to the exclusion of other states and would require recognition of those decisions by other countries, subject to a situation where recognition would be "manifestly contrary to public policy ... taking into account the best interests of the child."\textsuperscript{21} The 1980 Hague Convention on the Civil Aspects of International Child Abduction, which has been in operation for over two decades, requires countries to return children to the country of habitual residence in cases where they have been wrongfully removed or retained. The ultimate merits decision about who is entitled to custody is then to be made by the country of habitual residence.\textsuperscript{22} The Abduction Convention includes a number of limited defenses to return, and a bit of cultural imperialism has led to an unwarranted expansion of these defenses.\textsuperscript{23} For example, a

\textsuperscript{17} See id., art. 9, at 47.
\textsuperscript{18} See id., art. 11, at 48.
\textsuperscript{19} See generally Linda Silberman, \textit{The Hague Children's Conventions: The Internationalization of Child Law, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND} 589-617 (Sanford N. Katz et al. eds., 2000).
\textsuperscript{21} See Protection Convention, supra note 3, art. 23(2)(d), 35 I.L.M. at 1399.
\textsuperscript{22} See id. arts. 1, 16, T.I.A.S. No. 11,670 at 4, 8-9, 1343 U.N.T.S. at 101.
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child need not be returned if there is a "grave risk" that return of the child "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." It is difficult for the court of a state that is hearing the return petition not to impose its own values in that situation. Indeed, the Abduction Convention leaves countries with some latitude in that respect, but not without regard to the common objective of contracting states to deter international child abduction. A court with a return petition before it must respect the ability of the courts of other countries to protect children in ways consistent with that country's own values and norms.

The Abduction Convention touches on these cultural issues at numerous points. For example, the Convention provides that a removal or retention of a child is wrongful if "it is in breach of rights of custody attributed to a person . . . under the law of the state in which the child was habitually resident." Rights of custody are in turn defined by the Convention to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Thus, the state of the habitual residence defines through its own laws the respective custodial rights of the parents—within the framework of an autonomous definition provided by the Convention. Therefore, countries must respect the custodial rights as recognized in the state of habitual residence.

A good example of such respect is shown in Whallon v. Lynn, where the Court of Appeals for the First Circuit examined Mexican law to determine custodial rights of unwed parents. In Whallon, the parties were not married, and the mother asserted that the father did not have the requisite rights of custody to invoke the Abduction Convention. The First Circuit emphasized that the relevant provisions of Mexican law were to be interpreted "in light of the Convention's basic principle that a child's country of habitual residence is best placed to decide upon

27. Id. art. 5(a), T.I.A.S. No. 11,670 at 5, 1343 U.N.T.S. at 99. Rights of access "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Id., art. 5(b).
28. 230 F.3d 450 (1st Cir. 2000).
29. See id. at 452, 454, 456-59.
questions of custody and access, unless an exception applies.”

Moreover, in applying the doctrine of patria potestas, a civil law concept incorporated in diluted form in Mexican law (Codigo Civil del Estado de Baja California Sur), the court of appeals noted that “[c]are must be taken to avoid imposing American legal concepts onto another legal culture.” The court then found that Mexican law gave both unwed parents of a child the right to exercise “parental authority” in the absence of a judicial determination or agreement otherwise. Thus, the court held, “the evidence of patria potestas rights under Mexican law leads us to conclude that [the father’s] rights were ‘rights of custody’ under the Convention. While [the mother] had actual custody of [the child], both parents exercised patria potestas rights over [the child].”

Other United States courts have improperly constructed their own parochial definitions of “custody rights” rather than looking to the conferral of rights under the law of habitual residence with reference to the autonomous definition envisioned by the Convention. For example, in Croll v. Croll, the Second Circuit Court of Appeals was faced with the question of whether a ne exeat clause in a custody order of the Hong Kong court conferred “custody rights” on a non-custodial parent with rights of access. Notwithstanding the Convention’s definition of “custody rights”—which specifically mentions the right to determine the child’s place of residence—the Second Circuit instead turned to Webster’s Third and Black’s Law Dictionaries as the source for a definition of custody rights. Relying on those definitions, the court then concluded that “custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual...

30. Id. at 456.
32. Whallon, 230 F.3d at 456.
33. See id. at 456-59, 457.
34. Id. at 459; see also Gil v. Rodriguez, 184 F. Supp. 2d 1221, 1225 (M.D. Fla. 2002) (finding Venezuelan law grants both parents “rights of custody” as defined in Convention through patria potestas); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1358 (M.D. Fla. 2002) (discussing agreement where both parties had “rights of custody” under Argentine law pursuant to patria potestas); Pesin v. Osorio Rodriguez, 77 F. Supp. 2d 1277, 1286 (S.D. Fla. 1999) (finding rights of custody where Venezuelan trial court previously ordered both parents “are vested with the paternal authority until a judicial decision establishes otherwise”); Caro v. Sher, 687 A.2d 354, 357 (N.J. Super. Ct. Ch. Div. 1996) (finding ‘both parents under Spanish law held joint custody of the children . . . under the concept of ’patria potestas,’ with the children’s required residence in Spain. This is more than ‘access’ being the only right retained by the petitioner.”).
35. 229 F.3d 133 (2d Cir. 2000).
36. The clause granted the non-custodial parent “a veto power over any place of residence outside Hong Kong.” Id. at 135.
guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." The court also insisted that the right to prevent a child’s removal from a country does not constitute the right to “determine” the child’s place of residence. The reasoning of the panel majority in *Croll* took precisely the wrong turn that the First Circuit in *Whallon* later warned against: applying American concepts instead of international and Convention norms. As the perceptive dissent of Judge Sotomayor in *Croll* observed: “the construction of an international treaty also requires that we look beyond parochial definitions to the broader meaning of the Convention, and assess the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention’s] object and purpose.’” As she explains, the official history and commentary on the Convention “reflect a notably more expansive conception of custody rights” than United States/English dictionaries. More specifically, she points out that a restriction on removal affects the specific choice as to “whether a child will live in England or Cuba, Hong Kong or the United States, and it is precisely the kind of choice the Convention is designed to protect.”

The Second Circuit’s error in *Croll* has been compounded by other federal courts. Most recently, in *Fawcett v. McRoberts* the Court of Appeals for the Fourth Circuit found not only that a restriction on the custodial father’s removal of the child from Scotland under Scottish law did not create a “right of custody” in the mother, but also that an express

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37. *Id.* at 138-39.
38. *See id.* at 139-40.
40. *Id.* at 146 (Sotomayor, J., dissenting).
41. *Id.* at 147 (Sotomayor, J., dissenting).
42. *See, e.g.,* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003) (denying return of child removed from Scotland by custodial parent on grounds that Scottish law giving non-custodial parents veto power over the child’s removal did not confer custody rights); Gonzalez v. Gutierrez, 311 F.3d 942, 954 (9th Cir. 2002) (holding that a “ne exeat clause . . . does not afford ‘rights of custody’ . . . under the [Abduction Convention]”); *But see Shealy v. Shealy*, 295 F.3d 1117, 1122-23 (10th Cir. 2002) (assuming that violation of ordinary ne exeat clause would constitute a breach of “rights of custody” under the Convention, but finding exception in the clause for military necessity allowing servicewoman mother to move with the child). On the other hand, earlier decisions by state courts found that ne exeat clauses did create a “right of custody” in the parent who retained control as to relocation. *See e.g.,* Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 848-49 (Ky. Ct. App. 1999); David S. v. Zamira S., 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991). Courts in most other countries have held that ne exeat clauses do create a right of custody, and *Croll* has been expressly criticized by the Constitutional Court of South Africa in *Sonderup v. Tondelli*, 2001 (1) SA 1171 (CC). For a more extensive analysis of this issue, see Silberman, *patching up the Abduction Convention, supra* note 25, at 45-48.
undertaking by the father to the Scottish court and recorded by that court did not give the Scottish court a “right of custody” making the removal wrongful under the Abduction Convention and giving rise to an obligation to return the child.\(^\text{43}\) There can be no clearer violation of the Convention’s mandate against wrongful removals than a removal that intentionally violates a court’s absolute interdiction against leaving the jurisdiction. Whatever the merits of the debate over \textit{ne exeat} clauses more generally, the violation of the court’s order in \textit{Fawcett} must be considered a breach of custody rights if the Convention is to have any integrity. In a quite similar scenario, the Canadian Supreme Court, in \textit{Thomson v. Thomson},\(^\text{44}\) held that a custodial mother’s removal of a child from Scotland to Canada in violation of a non-removal clause in an interim custody order was in breach of “custody rights” vested in the Scottish court by reason of ongoing proceedings in Scotland. Justice La Forest’s opinion in \textit{Thomson} emphasized that Article 3 of the Convention provides that “custody rights” can be held by “‘an institution or any other body, either jointly or alone,’” and that a non-removal clause preserves the jurisdiction in the court to decide the merits of custody issues at a later date.\(^\text{45}\)

At other points, courts have shown greater sensitivity to the need to depart from domestic concepts within their own legal traditions when dealing with an international treaty. For example, in determining the critical issue of habitual residence under the Abduction Convention, courts have disclaimed the definitions provided in their domestic family law acts to arrive at concepts more capable of common definition and that will ensure worldwide consistency. Thus in \textit{Chan v. Chow},\(^\text{46}\) the Court of Appeal for British Columbia reversed a lower court’s finding that the child was habitually resident in Canada. Rejecting the definition of habitual residence as it appeared in the provincial Family Relations Act, the Court of Appeal instead relied on English and other international precedents for guidance because otherwise “worldwide consistency in the application of the Convention will be lost.”\(^\text{47}\) Also in

\(^\text{43}\) See \textit{Fawcett}, 326 F.3d at 493, 498-501. The non-custodial mother held a statutory right of veto over the removal of the child from the United Kingdom as a result of the Children (Scotland) Act. See \textit{id.} at 499. The restriction on removal was supplemented by an undertaking made by the father to the Scottish court and recorded by the court. See \textit{id.} at 493.


\(^\text{45}\) \textit{id.} at 589. The Fourth Circuit in \textit{Fawcett} did point out that, in that case, the dispute before the Scottish court was not over a matter of custody, but involved an application to prohibit the father from leaving Scotland. See \textit{Fawcett}, 326 F.3d at 500.


\(^\text{47}\) \textit{id.} at para. 41.
the context of evaluating habitual residence, the Court of Appeals for the Ninth Circuit issued a similar admonition in Mozes v. Mozes: "To achieve the uniformity of application across countries, upon which depends the realization of the Convention's goals, courts must be able to reconcile their decisions with those reached by other courts in similar situations."^{48}

However, in determining issues implicating the actual physical safety of the child, such as the interpretation of the defense of grave risk of physical or psychological harm, the danger of parochialism increases. What constitutes grave risk is determined by the court hearing the petition,^{49} requiring that court to assess the conditions in the state of habitual residence and how the parties relate to one another and to their child. Some courts have continued to emphasize the need to avoid home-state chauvinism. In Friedrich v. Friedrich,^{50} the Court of Appeals for the Sixth Circuit reviewed the mother's contention that returning her son to Germany would cause him psychological harm:

[E]ven if the home of Mr. Friedrich were a grim place to raise a child in comparison to the pretty, peaceful streets of Ironton, Ohio, that fact would be irrelevant to a federal court's obligation under the Convention. We are not to debate the relevant virtues of Batman and Max und Moritz, Wheaties and Milchreis. The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence.^{51}

In dicta, the Sixth Circuit added that "grave risk of harm for the purposes of the Convention can exist in only two situations:[:] 1) when the return would place the child in immediate danger, "e.g., returning the child to a zone of war, famine, or disease," before the underlying custody dispute could be settled; and, 2) "when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection" in "cases of serious abuse or neglect, or extraordinary emotional dependence."^{52}

In hard cases, the temptation to rely on the pervasive and accepted values of one's own society is difficult to resist. In that context, strong

^{48} 239 F.3d 1067, 1072 (9th Cir. 2001).
^{49} See Abduction Convention, supra note 3, art. 13(b), T.I.A.S. No. 11,670 at 8-9, 1343 U.N.T.S. at 101.
^{50} 78 F.3d 1060 (6th Cir. 1996).
^{51} Id. at 1068.
^{52} Id. at 1069.
interests in child protection are likely to outweigh any instinct to embrace cultural relativism. In Danaipour v. McLarey, a Swedish mother, suspecting abuse on the part of the father, removed the children to the United States where she arranged for an evaluation of the children for sexual abuse. The district court ordered return, but imposed conditions—agreed to by the father—that the children would remain with the mother and that he would have no contact with the children until the Swedish authorities had conducted an evaluation of the abuse charges according to established protocols. The Court of Appeals for the First Circuit reversed, holding that the district court should have conducted proceedings to determine whether there had been sexual abuse. The court also expressed doubt about ordering return on the basis of “undertakings” or “conditional orders,” and noted that the condition requiring the Swedish authorities to follow particular procedures in conducting their evaluation was unacceptable to the Swedish court.

The First Circuit can be criticized for its view that the role of the district court was to determine the truth of the abuse allegations; in effect, such a requirement transforms a Hague case into a full-blown custody proceeding and evidences a lack of confidence in the courts of other systems to protect children. On the other hand, the appellate court’s decision reflects its obligation under the Convention to ensure that a child is not placed in an unsafe environment in case of return. If the court had good reason to distrust the authorities in Sweden to carry out a serious evaluation of the abuse allegations, the refusal to return was appropriate. But it would be presumptuous for it to assume that only authorities in the United States have the necessary competence and expertise to make a proper inquiry.

Even courts that have given lip service to the principle that a court faced with a petition for return must examine the “full range of options

53. See, e.g., Walsh v. Walsh, 221 F.3d 204, 218-20 (1st Cir. 2000) (holding that the Abduction Convention does not require immediate threat to child, only a grave risk of harm and that evidence of spousal abuse and violent acts toward unrelated parties sufficed to prove grave risk of harm); Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 459-62 (D. Md. 1999) (finding petitioner’s ongoing physical abuse of child met threshold of grave risk). But see Turner v. Frowein, 752 A.2d 955, 976, 978 (Conn. 2000) (reversing denial of petition for return premised on father’s sexual abuse of child and remanding “for further consideration of the range of placement options and legal remedies that might allow the child to return to Holland with adequate safeguards for his protection, pending a final custody determination in due course by a Dutch court with proper jurisdiction”).
54. 286 F.3d 1 (1st Cir. 2002).
55. See id. at 7, 11.
56. See id. at 19, 21-25.
57. See Abduction Convention, supra note 3, arts. 7(b), (h), T.I.A.S. No. 11,670 at 5-6, 1343 U.N.T.S. at 99.
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that might make possible the safe return of a child to the home country\textsuperscript{58} do not always follow their own mandate. In Blondin v. DuBois, the Court of Appeals for the Second Circuit gave undue weight to the expert testimony of a psychoanalyst in determining that the children would suffer from post-traumatic stress disorder if forced to return to their habitual residence.\textsuperscript{59} A custody hearing in the court of the state of habitual residence is the appropriate place to assess not only who will be the best custodian for the child but also what living arrangements will be most beneficial for the child and whether a parent should be permitted to relocate and live elsewhere.

One of the legitimate reasons for a refusal to return under the 13(b) exception is a concern about conditions in the country to which the child is to be returned. In addition to the 13(b) exception, Article 20 provides that a state may refuse to return a child if return "would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."\textsuperscript{60} Thus, for example, a court could refuse to return a child to a country where fundamental rights cannot be exercised. But it is unlikely that such a country would ever be a treaty partner to the Abduction Convention.\textsuperscript{61}

The situation in Israel has revived interest in the "war zone" example given in Friedrich as a basis for a refusal to return based on the "grave risk" of harm exception. In Silverman v. Silverman,\textsuperscript{62} the parties met in Israel, and each was a dual citizen of Israel and the United States. The parties had lived in both the United States and Israel, most recently relocating to Israel, with the mother then coming to the United States with the two children and failing to return.\textsuperscript{63} In ruling on the Hague application filed by the father, the district court in Silverman found that

\textsuperscript{58} Blondin v. DuBois, 238 F.3d 153, 163 n.11 (2d Cir. 2001).
\textsuperscript{59} See id. at 163. Even the diagnosis of "post-traumatic stress disorder" has been criticized as enormously subjective and lacking specificity, and its utility as a psychiatric category has been questioned. See, e.g., Derek Summerfield, The Invention of Post-Traumatic Stress Disorder and the Social Usefulness of a Psychiatric Category, 322 BRIT. MED. J. 95 (2001). In the context of the Abduction Convention, it is particularly inappropriate because it is the abduction itself that has created the context for the potential harm.
\textsuperscript{60} Abduction Convention, supra note 3, art. 20, T.I.A.S. No. 11,670 at 9, 1343 U.N.T.S. at 101.
\textsuperscript{61} Countries that were members of the Hague Conference at the time of the adoption of the Convention can sign and ratify the Convention; other countries may accede to the Convention but their accession must be accepted by the other States individually. See Abduction Convention, supra note 3, arts. 37, 38, T.I.A.S. No. 11,670 at 13-14, 1343 U.N.T.S. at 104.
\textsuperscript{62} 2002 WL 971808 (D. Minn. 2002) [hereinafter Silverman I], aff'd 312 F.3d 914 (8th Cir. 2002) [hereinafter Silverman II], rev'd en banc 338 F.3d 886 (8th Cir. 2003) [hereinafter Silverman III].
\textsuperscript{63} See Silverman III, 338 F.3d at 889-90.
the habitual residence of the children never changed from the United States to Israel and thus, that the children were not wrongfully retained. The district court also indicated that it would refuse to return the children in any event because Israel was too dangerous. The Court of Appeals for the Eighth Circuit initially affirmed the district court, basing review on a standard of "clear error" and thus deferring to the district court's factual findings on the question of habitual residence and not reaching the zone of war issue. On rehearing en banc, however, the court of appeals, using the broader standard of de novo review, first held that Israel was the state of habitual residence of the children. That required the court to then determine whether the defense of "grave risk" was met. In rejecting that defense, the court of appeals found the mother could make no particularized showing of grave risk to the children aside from "general regional violence . . . that threaten[s] everyone in Israel." In the absence of "any evidence that these children are in any more specific danger living in Israel than they were when their mother voluntarily moved them there in 1999," the court of appeals found no grave risk to the children inherent in their return to Israel.

The objective of a common understanding of the norms of the Abduction Convention is difficult to reach in the absence of a supranational authority. But a first important step is a recognition that the Convention transcends national concepts and invites the development of autonomous standards of interpretation and implementation. A second is to develop mechanisms to ensure that decisions ordering return of children under the Convention are carried

64. See Silverman I, WL 971808 at *6.

65. See id. at *8. That determination of danger was based on a finding that "Israel is currently in a state of turmoil. Although, as plaintiff testified, Israel has always been a country at conflict to some extent, it is clear that the intifada has escalated dramatically in recent months." Id. at *8-9. But see Mozes v. Mozes, 239 F.3d 1067, 1086 n.58 (9th Cir. 2001) (holding that when trial court evaluates grave risk of harm defense on remand it "must be mindful that it is not deciding the ultimate question of custody . . . [It] must determine only whether returning the children to Israel for long enough for the Israeli courts to make the custody determination will be physically or psychologically risky to them."); Freier v. Freier, 969 F. Supp. 436, 443 (E.D. Mich. 1996) (rejecting contention that Israel was a "zone of war" and assertion of grave risk defense, finding "that the fighting is limited to certain areas and does not directly involve the city where the child resides").

66. See Silverman II, 312 F.3d at 916-17.


68. Id. at 901.

69. Id.
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out. 70 Two recent rulings by the European Court of Human Rights have found violations of the European Convention on Human Rights and awarded damages against countries for failure of their authorities to enforce final orders of return made under the Abduction Convention by their courts. 71 International law has come to recognize the obligation of states to make accommodations of nationalist interests in service of principles of universal importance—preventing the abduction of children—in a globalized world.

II. SAME-SEX UNIONS

Another area where principles of private international law accommodate competing values as regards family relationships is with respect to same-sex marriage and/or analogous models of registered domestic partnership. The issue has a domestic analogue in the United States when a state is asked to honor a same-sex marriage or partnership arrangement entered into in a sister state. 72 When a state makes the social and legal decision to bestow a special status of “marriage” or “partnership” on a particular relationship, it is making a statement about its set of values for a particular community. A state or country makes that judgment, not for the world at large, but for a relevant community in which it has an interest. In looking at private international law rules with respect to marriage more generally, it is interesting that many civil law countries adopt a “personal law” standard. In effect, the substantive requirements for contracting a marriage are determined for each person by the law of nationality, or in some cases habitual residence or domicile. Persons of foreign nationality, or in some cases habitual residence or domicile, may not contract a marriage before they have presented a certificate from their state of origin showing that there are no impediments to the marriage according to the laws of that state. 73 Such


73. See, e.g., § 1309 Bürgerliches Gesetzbuch [BGB] (F.R.G.).
requirements are not usually imposed by states in the United States, although there are exceptions. Wyoming, for example, makes it the duty of the clerk issuing the marriage license to inquire "whether there is any legal impediment to the parties entering into the marriage contract according to the laws of the state of their residence."\(^7\) Massachusetts has a similar rule prohibiting the marriage of "a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction" and declaring any such marriage "null and void."\(^7\) A related provision of Massachusetts law requires the official issuing the marriage license to "satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides."\(^7\) The requirements of such a domiciliary nexus reflect a respect for the regulatory interests and values of the community of which each member of the couple is a part. It also reduces the likelihood that the validity of the marriage will be called into question at a future time.\(^7\)

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\(^7\) WYO. STAT. ANN. § 20-1-103(b) (Michie 1977). If one or both of the parties cannot meet this requirement, he or she may apply for a judicial waiver. See WYO. STAT. ANN. § 20-1-105(a) (Michie 1975).

\(^7\) MASS. GEN. LAWS ch. 207, § 11 (1998); see also 750 ILL. COMP. STAT. 5/217 (1977); N.H. REV. STAT. § 457:44 (1979).

\(^7\) MASS. GEN. LAWS ch. 207, § 12 (1998); see also 750 ILL. COMP. STAT. 5/218 (1977). Sections 11 and 12 are to "be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact like legislation." MASS. GEN. LAWS ch. 207, § 13 (1998). Should an official issue a marriage license with the knowledge that one or both of the parties could not marry in his or her home jurisdiction, he or she "shall be punished by a fine of not less than one hundred or more than five hundred dollars or by imprisonment for not more than one year, or both." MASS. GEN. LAWS ch. 207, § 50 (1998). In light of recent decisions by the Supreme Judicial Court of Massachusetts, discussed infra, these statutes have taken on new meaning.

\(^7\) The law on recognition of marriage in many European countries also incorporates elements of nationality. See, e.g., Bundesgesetz über das Internationale Privatrecht, Loi fédéral sur le droit international privé, Legge federale sul diritto internazionale privato [Federal Law on Private International Law] art. 45(2), 291 SR 101, 291 RS 101, 291 RS 101 (Switz. 1987) (stating that foreign marriage where one party is a Swiss citizen, or where both parties are Swiss domiciliaries, is recognized unless marriage was performed abroad to evade Swiss law), available at http://www.admin.ch/ch/d/sr/c29l.html, and reprinted in PIERRE A. KARRER & KARL W. ARNOLD, SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE 66 (1989) (English translation); Codice Civile [C.C.], art. 27 (Italy) (stating that validity of "process" is governed by the laws of the place where such "process" was performed), available at http://www.jus.unil.ch/cardozo/Obiter_Dictum/codciv/Pres.htm; Art. 13 Einführungsgesetz zum Bürgerlichen Gesetzbuche (F.R.G.). For a general survey on marriage recognition rules, see Special Symposium on International Marriage and Divorce Regulation and Recognition, 29 FAM. L.Q. 495 (1995). Without consideration of the impediments to marriage under the law of the nationality of the parties, a marriage of a national may not be recognized by a State that imposed an impediment to marriage by that individual. See MINISTRY OF JUSTICE, SWEDEN, FAMILY LAW: INFORMATION ON THE RULES 9-10 (2000) (stating "that the consideration of impediments to marriage will have taken place in accordance with Swedish law" and that therefore "there is a risk that such a marriage may be invalid in the country
A. The European Experience

The recent expansion of laws with respect to same-sex partnerships in Europe reflect similar limitations in looking to the "community" affected by these new arrangements. For example, both Belgium (as of 2003) and the Netherlands (as of 2001) have expanded their definition of marriage to include same-sex couples and now permit formal marriages between members of the same sex. In the Netherlands, only one of the spouses must be a citizen or resident (residency requires formal registration) of the Netherlands, whereas Belgium requires that such marriages be allowed by the national law of each partner. Thus, at this point in time, the Belgian law permits same-sex marriage only between Belgians or between a Belgian and a Dutch national. As discussed in Section B(3), infra, Canadians may soon be added to that list. One can see in these "private international rules" an attempt to accommodate competing views of different communities about the appropriateness of a same-sex marriage. In the context of heterosexual marriage, the multilateral treaty on marriage—the Hague Convention on Celebration and Recognition of the Validity of Marriage—includes provisions that reflect the need to accommodate different social norms about marriage that may exist in various countries. The particular legal regime and

where the foreigner is a citizen or in another country"), available at http://www.justitie.regeringen.se/inenglish/pressinfo/pdf/famlaw.pdf.
80. See Convention on Celebration and Recognition of the Validity of Marriages, March 14, 1978, arts. 3, 11, 14, 16 I.L.M. 18. Only six States have joined the Convention, possibly because some of the provisions seem overly complex. See Hague Conference on Private International Law, Full Status Report Convention #26, available at http://www.hcch.net/e/status/stat26e.html (last modified Nov. 28, 1998). Article 3 of the Convention imposes the following requirements as to where a marriage "shall be celebrated": "(1) where the future spouses meet the substantive requirements of the internal law of the State of celebration and one of them has the nationality of that State or habitually resides there, or (2) where each of the future spouses meets the substantive
status for a relationship is appropriate for those with strong ties—here reflected through residency or citizenship requirements—to the community that sanctions them.

The same sensitivities emerge in many of the laws in Europe establishing registered domestic partnerships. The domestic partnership laws do not create rights coextensive with those of married couples, and the laws of the different countries on this subject vary in particular ways. For example, rights under the Netherlands domestic partnership law are broader than those under the new German domestic partnership law, which grants certain rights to same-sex “life partners” but is more limited than those granted to married couples. Domestic partners in Germany cannot adopt unrelated children as a couple whereas they now can do so in the Netherlands (though only children who have their normal residence in the Netherlands). The Danish Registered

requirements of the internal law designated by the choice of law rules of the State of celebration.” Under Article 11, a “Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State,” impediments to the marriage existed. Those impediments include a prior marriage, certain consanguinity/affinity relationships, age restrictions, lack of mental capacity, and lack of consent. Under Article 14, a State can also “refuse to recognize the validity of a marriage where such recognition is manifestly incompatible with its public policy.”


83. See Lebenspartnerschaftsgesetz, supra note 82, art. 1, § 9, BGBI. I at 267; § 1741 II BGB (providing that unmarried persons can only adopt individually and that, generally, married persons can only adopt jointly); see also BUNDESMINISTERIUM DER JUSTIZ, LEGISLATION ON SAME SEX PARTNERSHIPS—THE NEW LAWS ON REGISTERED PARTNERSHIPS (2003) (stating that although “matrimonial law provisions ... created in view of joint children ... could not serve as ... a model” for registered partnerships, “[a] parent’s sexual orientation is of no relevance” to adopting children; gays and lesbians can, as “unmarried [men] or [women,] adopt a child when the usual requirements of adoption law ... are fulfilled”), at http://www.bmj.bund.de/eng/themes/family_law/10000146 (last visited Jan. 6, 2003).

84. See MARRIAGE, REGISTERED PARTNERSHIP AND COHABITATION, supra note 79, at 12 (stating that “couples of the same sex or different sexes can adopt a child that is habitually resident in the Netherlands ... regardless of whether the couple are married, registered partners or living together”); Arjan Schippers, Wedding Bells for Dutch Gay Couples, RADIO NETH.
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Partnership Act, which also applies only to same-sex relationships, establishes most of the same rights and responsibilities between domestic partners as for spouses; the notable exception is the right to adopt.  

Procreation is often cited as a primary reason for marriage, and the extension of the right to adopt to same-sex couples is a touchstone for the further evolution of domestic partnership laws. When enacted in 1989 as the first law of its kind, the Danish Registered Partnership Act precluded same-sex couples from adopting children. Effective July 1, 1999, however, the law was amended to allow adoption by one partner of the other partner's child. Children may still not be adopted by registered partners as a couple. In addition, a domestic partner cannot adopt the child of his or her domestic partner if that child was originally


86. See, e.g., BUNDESMINISTERIUM DER JUSTIZ, supra note 83 (“Marriage constitutes a long-term relationship between a man and a woman involving sexual relations, one of the purposes of this institution being to have children and bring them up.”) available at http://www.bmj.bund.de/eng/themes/family_law/10000146. When asked why the Lebenspartnerschaftsgesetz does not make provision for the adoption of children by registered domestic partners, Herta Dähler-Gmelin, then Minister of Justice for the Federal Republic of Germany, explained that registered partnerships were conceived of as a separate legal institution and were not intended to detract from marriage. As such, the laws governing adoption, custody, and visitation, unless otherwise provided by the Lebenspartnerschaftsgesetz, do not apply. See Eine Stufenregelung ist vernünftig, HINNERK (Germany) (Jan. 2000), available at http://www.bmj.bund.de/frames/ger/themen/familienrecht/10000148/index.html?sid=3eac3d905d6ef6f178dc2ea196964913. In most European countries, lesbian registered partners are precluded from access to artificial insemination. See, e.g., Lag om registerat parter [Law on registered partnerships], ch. 3, § 2 (Swed. 1994) [hereinafter Swedish Registered Partnership Act], reprinted in 1994 Svensk författningssamling [SFS] 1117, available at http://www.riksdagen.se/debatt/sfst/index.asp; MINISTRY OF JUSTICE, SWEDEN, supra note 77, at 27; MINISTRY OF CHILDREN AND FAMILY AFFAIRS, NORWAY, REGISTERED PARTNERSHIP: ACT NO. 40 OF 30 APRIL 1993 RELATING TO REGISTERED PARTNERSHIP 7 (2001), available at http://odin.dep.no/archive/bfbbilder/01/03/Partn011.pdf. A discussion of access to artificial insemination is beyond the scope of this article, however.

87. See Danish Registered Partnership Act, supra note 85, § 4(1); see also The Danish Adoption (Consolidation) Act, § 5(2) (stating that “[o]nly legally married couples may adopt together.”), available at http://www.civildir.dk/regler/danish_adoption_act.htm.
adopted from a foreign country.\textsuperscript{88} The second domestic partnership registration law, the Norwegian “Act No. 40 of 30 April 1993 Relating to Registered Partnership” also originally precluded any joint or individual adoption by registered partners but was amended effective January 1, 2002 to allow one domestic partner to adopt the child of the other.\textsuperscript{89} Sweden followed suit, and the Swedish Registered Partnership Act, which took effect on January 1, 1995, also precluded registered partners from “jointly [or] individually adopting children.”\textsuperscript{90} In June of 2002, Swedish legislators approved a bill to allow registered partners to adopt each other’s children and also jointly to adopt children, who have their habitual residence in Sweden or abroad.\textsuperscript{91} Being the first country to allow registered partners to adopt children jointly did not come without consequence, however. As a result, effective January 4, 2003,\textsuperscript{92} Sweden withdrew from the European Convention on the Adoption of Children which provides that “[t]he law shall not permit a child to be adopted except by either two persons married to each other . . . or by one person.”\textsuperscript{93}

Countries thus make different judgments about the role of legal status and rights of same-sex relationships, and the way to accommodate the value judgments inherent in the legal status is to think seriously about the nature of the community in which they should apply. In the Netherlands, the Dutch registered partnership law was amended from requiring both partners to be Dutch citizens or residents to allow registration if only one partner is a Dutch resident or citizen.\textsuperscript{94} The

\textsuperscript{88} See Amended Danish Registered Partnership Act, supra note 85, § 4(1) (amending Danish Registered Partnership Act to allow one partner to “adopt the other partner’s child unless it is an adopted child from another country”).

\textsuperscript{89} MINISTRY OF CHILDREN AND FAMILY AFFAIRS, NORWAY, supra note 86, at 6.


\textsuperscript{91} See Kim Gamel, Sweden’s Parliament Approves Proposal Letting Same-Sex Couples Adopt Children, ASSOCIATED PRESS NEWSWIRES, June 5, 2002.


\textsuperscript{93} European Convention on the Adoption of Children, Apr. 24, 1967, art. 6(1), No. 58, 1 Europ. T.S. 692, 694.

\textsuperscript{94} See Wet van 21 december 2000 [Law of Dec. 21, 2000], 2001 Stb. 11 (2001); see also Kees Waaldijk, Latest News About Same-Sex Marriage in the Netherlands (discussing the
Danish law originally provided that "both or one of the parties [had to have] his permanent residence in Denmark and [be] of Danish nationality." Effective July 1, 1999, the law was amended to allow non-citizen partners to register if both partners resided in Denmark for the preceding two years. If one partner is a citizen and a resident, the partners can also register as before. Moreover, citizens of countries with laws similar to Denmark are treated as having the equivalent of Danish citizenship for the purpose of determining eligibility to enter into a registered domestic partnership in Denmark. The French Pacte Civil de Solidarité ("PaCS")—a partnership arrangement which applies to both same-sex and opposite-sex couples—requires both parties to be residents of France for eligibility. The German law forms a notable exception to this general trend as it does not require German nationality, residence, or
domicile of one or both the same-sex partners, who wish to register.98 The German conflict of laws rules provide that the law of the state where the partnership was registered governs, including the formation and dissolution of the partnership.99 Thus, as long as the same-sex partners are eligible under the Lebenspartnerschaftsgesetz, they may register in Germany regardless of whether their countries of nationality, residence, or domicile allow same-sex registered partnerships or would have allowed these particular partners to register.100 Of course, the German law cannot ensure recognition outside of Germany.

When communities have similar values, one can expect the kind of result that has occurred among the Nordic countries—agreement for mutual recognition of registered partnerships.101 These states recognize, however, that other states may not share the values expressed in their domestic partnership legislation.102 For example, even after the 1999

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99. See EGBGB, art. 17b (1).

100. See Mankowski, supra note 98, at Rn. 2-3; Weltenhofer-Klein, supra note 98. Such an approach is in marked contrast to the provisions governing marriages of foreigners in Germany, which emphasize the personal law model. See supra notes 73, 77. This shift is explained by the practical impossibility of a foreign national being able to produce a certificate of eligibility to enter into a registered domestic partnership from a State that does not have or recognize the institution of registered domestic partnerships. Weltenhofer-Klein, supra note 98.

101. Finland was the last of the Nordic countries to approve a registered domestic partnership law, and the law entered into force on March 1, 2002. See No Rush for Finnish Partnership Registration, NORDIC BUS. REP. Feb. 18, 2002, available at 2002 WL 3646481. Finland's residency requirement is like that of several other Nordic countries: at least one of the parties must be a Finnish citizen and a habitual resident in Finland or both parties must have been a habitual resident in Finland for two years immediately before the registration. See Act on Registered Partnerships, § 10(1) [hereinafter Finnish Registered Partnership Act], available at http://www.finlex.fi/pdf/saadkaan/E0010950.PDF (unofficial English translation). Also, like other Nordic countries, citizenship in a foreign State whose legislation allows for registration of domestic partnerships is equivalent to Finnish citizenship for the purpose of establishing eligibility to enter into a registered domestic partnership in Finland. See Finnish Registered Partnership Act, supra, § 10(2); see also MINISTRY OF CHILDREN AND FAMILY AFFAIRS, NORWAY, supra note 86, § 2(1) (providing that a couple may register if "one of the parties is a Norwegian national and one of them is resident in Norway" and that "[b]eing a national of Denmark, Iceland or Sweden is considered equivalent to being a Norwegian national"). See also discussion of Danish provision, supra note 96. The Finnish legislation includes a unique provision with respect to recognition of foreign domestic partnerships. A foreign domestic partnership will be recognized in Finland if it is valid in the State where it was registered. See Finnish Registered Partnership Act, supra, § 12. The recognition provision is consistent with both the parties' expectations and the interests of the relevant communities in that most domestic partnership laws require a residency nexus by one or both of the parties. An interesting issue would be presented if the registered partnership were valid in the State where registered but that State had no residency requirement, such as Germany.

102. For example, the Swedish Ministry of Justice advises its citizens as follows:

A partnership that is registered in Sweden may [as of October 1, 1998] not be expected
revisions, the Danish Registered Partnership Act continues to provide that “[p]rovisions of international treaties shall not apply to registered partnerships unless this is accepted by the other contracting parties.”

When the Netherlands opened marriage to same-sex couples, the Dutch parliament warned that “married Dutch gays should not assume that their unions would be recognized abroad, since the notion of marriage is usually interpreted in international treaties as uniting a man and a woman.” In Germany, the conflict of laws rules provide that same-sex partnerships registered outside of Germany will not be given any greater to have full legal effect outside Sweden, Denmark, Norway, Iceland and the Netherlands. However, one cannot exclude the possibility that authorities and courts in a country where there are no corresponding provisions may, in an individual matter, take the legal effects of a registered partnership into account, in any case to the extent that there is no opposing interest claimed. . . . It is also important for the parties to be aware of the risk of a registered partnership being ignored abroad.

MINISTRY OF JUSTICE, SWEDEN, supra note 77, at 27. Where the host country does not oppose it, however, “Swedish citizens will be able to register for same-sex partnerships” at Swedish embassies. Assoc. Press, Sweden Allows Same-Sex Marriages To Be Performed At Three of Its Embassies, May 28, 2003 available at http://www.gmax.co.za/look/archivedstories/2003/0528-sweden.html. The Norwegian Ministry of Children and Family Affairs is even more blunt as to the legal status of registered partners abroad: “A registered partnership contracted in Norway is not normally recognized in countries which do not have comparable legislation. A registered partnership therefore has no legal consequences outside Norway.” MINISTRY OF CHILDREN AND FAMILY AFFAIRS, NORWAY, supra note 86, at 9. A recent case before the European Court of Justice illustrates this point. In D. v. Council, the ECJ upheld the Council of the European Union’s refusal to recognize the registered partner of a Swedish official of the Council of the European Union for the purpose of awarding a household allowance over protests by Sweden, Denmark, and the Netherlands. See Case C-122/99 P, D. v. Council, ¶ 39 (ECJ 2001) (“It follows that the fact that, in a limited number of Member States, a registered Partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term "married [sic] official as used in the Staff Regulations.”), available at http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=C-122%2F99+P&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100. Decisions such as D. v. Council may be short-lived if the European Parliament’s recent recommendation is ever put into effect. “In its annual report on human rights, the European Parliament recommended that gays be allowed to marry and adopt children.” World Briefing: Europe: European Parliament Supports Gay Marriage, N.Y. TIMES, Sept. 5, 2003, at A10.

103. Amended Danish Registered Partnership Act, supra note 85, § 4(4); see also Pedersen, supra note 95, at 290 (explaining that this “provision[] require[s] the other country’s approval of a registered partnership or the parties in a registered partnership will not be placed on an equal footing with spouses.”). In the same vein, the Danish Act was not automatically applicable to Greenland and the Faroe Islands “but may by Royal Decree be made effective in whole or in part for these provinces subject to such deviations as are dictated by the special circumstances of Greenland and the Faroe Islands.” Amended Danish Registered Partnership Act, supra note 85, § 7.

effect than that foreseen by the German Civil Code and the Lebenspartnerschaftsgesetz itself.105

One further aspect of registered partnership law that raises questions about the role of an “interested” community comes in the context of the dissolution of a registered partnership. In the Nordic and German schemes, the place where the partnership was registered retains an interest in the partnership and provides a forum for dissolution.106 Thus, partners, who wish to dissolve their partnership, always have a jurisdiction in which to do so.

B. The Vermont Civil Union

In the United States, currently only one state—Vermont—has legislation authorizing civil unions. The backdrop for the Vermont statute was a decision by the Vermont Supreme Court that same-sex couples were entitled to a right to marry or its equivalent;107 to meet that

105. See EGBGB, art. 17b (4); see also MANKOWSKI, supra note 98, at Rn. 22-23, 83-86 (explaining that, for example, same-sex marriage pursuant to Dutch law would be treated not as marriage but as having same effect as German registered domestic partnership in Germany).

106. See, e.g., Amended Danish Registered Partnership Act, supra note 85, § 5(3); Finnish Registered Partnership Act, supra note 101, ch. 4, § 13(1), (2) (providing also that “dissolution of a [foreign] registered partnership may be ruled admissible in Finland, if: . . . the partner has such a connection to Finland that a Finnish court would have jurisdiction in divorce proceedings”); Swedish Registered Partnership Act, supra note 86, ch. 2, § 4; MINISTRY OF CHILDREN AND FAMILY AFFAIRS, NORWAY, supra note 86, at 2; EGBGB, art. 17b (1) (providing that law of registering State governs partnership’s dissolution), § 661 Nr. (3)(1) Zivilprozeßordnung [ZPO] (F.R.G.) (providing that German courts have jurisdiction to dissolve registered partnerships if one partner is habitually resident in or partnership itself was registered in Germany). The California Domestic Partner Rights and Responsibilities Act of 2003, which takes effect on January 1, 2005, takes a different approach. In addition to imposing the requirement that the partners share a common residence, each must declare that he or she consents to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of partners in the domestic partnership, or for any other proceeding related to the partners’ rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, this state.

mandate, the Vermont legislature proceeded to enact a statute authorizing civil unions. The Vermont statute does not require residency or domicile of one or both of the parties for the registration of a civil union. However, like most divorce/dissolution statutes in the United States, Vermont’s imposes a residency requirement to bring such a proceeding. Vermont will only take jurisdiction over such an action if either party to the marriage [or civil union] has resided within the state for a period of six months or more, but a divorce shall not be decreed for any cause, unless the plaintiff or the defendant has resided in the state one year next preceding the date of final hearing.

These limitations may leave the parties in limbo and their rights uncertain. In *Rosengarten v. Downes*, the parties entered into a civil union in Vermont on New Year’s Eve 2000 even though neither party was or is a resident of Vermont. Six months later, plaintiff brought an action to dissolve the civil union in his state of residence, Connecticut. Defendant no longer resided in Connecticut and was believed to be in New York. The Connecticut trial court dismissed the action for lack of subject matter jurisdiction and the appellate court aptly captured the
issue: “If Connecticut does not recognize the validity of such a union, then there is no res to address and dissolve.”113 Although acknowledging that plaintiff had “a significant set of contacts with [Connecticut],” the appellate court affirmed the trial court, holding “that a civil union is not a family relations matter” and that the Connecticut court “had no subject matter jurisdiction to dissolve the civil union.” 114 The Connecticut Supreme Court certified the question of whether “the [a]ppellate [c]ourt properly conclu[d]e[d] that the trial court had no subject matter jurisdiction to dissolve a civil union entered into pursuant to the laws of Vermont.”115 The issue of jurisdiction over the dissolution abated at plaintiff’s death,116 but the question of inheritance rights—the very reason the plaintiff initiated the dissolution action117—may still be the subject of further litigation.118

Rosengarten will not be the last example of a litigant left without a forum for dissolution. Of the 5,378 civil unions entered into in Vermont as of March 2003, fourteen have been dissolved in Vermont.119 In situations where the parties were and are not residents of Vermont, rulings like Rosengarten are even more likely in states that have adopted state “defense of marriage” acts.120 Domicile of one or both of the parties

113. Id. at 172-73, 175.
114. Id. at 178-79, 184. The appellate court also found that Connecticut public policy does not “favor[] the recognition of civil unions and the right to dissolve them.” Id. at 179.
117. The Vermont civil union statute expressly provides that parties to a civil union receive spousal benefits such as rights of survivorship, waiver of will, and intestacy. VT. STAT. ANN. tit. 15, § 1204(e)(1) (2002). The plaintiff explained that he brought the dissolution action because “I was concerned for my heirs, for my three children . . . and I want to get some kind of closure.”” Cheryl Wetzstein, Legal Problems Raised When Civil Unions Sour; Recognition Outside Vermont New Battleground for Gay Rights, WASH. TIMES, Aug. 6, 2002, at A04 (quoting Glen Rosengarten) (ellipsis in original).
118. Notwithstanding the lack of jurisdiction over the dissolution proceeding in Connecticut, a probate court in Connecticut or some other state where decedent’s property is located will have to consider whether or not to respect the rights of inheritance granted by the Vermont law. See infra text accompanying notes 122-24.
120. In response to fears that individual states would authorize same-sex marriage and that other states would be required to honor them, Congress enacted the Defense of Marriage Act (“DOMA”), Pub. L. No. 104-199, 110 Stat. 2419 (1996). The first provision, 28 U.S.C. § 1738(c), provides that [n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.
is a usual basis for jurisdiction over divorce/dissolution actions, but a state with such an act would be even more likely to follow the approach of *Rosengarten* in finding that there is no relationship to dissolve.\(^{121}\)

The second provision, 1 U.S.C. § 7, defines "marriage" and "spouse" in any congressional act, federal statute, regulation, or ruling as "only a legal union between one man and one woman as husband and wife" and "only ... a person of the opposite sex," respectively. For more on the Defense of Marriage Act, see Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL’Y REV. 169, 188-98 (2003) (discussing various state models for avoiding recognition of same-sex unions); Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363 (2002); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996). Subsequently, the majority of states enacted their own legislative versions, some of which are even more restrictive as to the effect to be given to same-sex marriages. For example, the Nebraska DOMA provides that "[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." *NEB. CONST. art. I, § 29*; see generally Christopher Rizzo, *Banning State Recognition of Same-sex Relationships: Constitutional Implications of Nebraska’s Initiative 416*, 11 J.L. & POL’Y 1 (2002). Some states utilized legislation to recast the conflict of laws rule and then define public policy. For example, the Idaho version of DOMA provides generally that marriages are valid in Idaho if valid in the place of celebration "unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages." *IDAHO CODE § 32-209* (Michie 2000). The Georgia statute is perhaps the most explicit:

(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties’ respective rights arising as a result of or in connection with such marriage.


Of course, courts may or may not recognize civil unions for purposes other than dissolution. As *Rosengarten* itself indicates, the effect to be given a civil union becomes important for inheritance, wrongful death, pension rights, and other issues. In the absence of private, municipal arrangements, or specific state legislation that may grant a particular benefit, the right to benefits will turn on a state’s decision of whether or not to recognize the relationship.\(^\text{122}\) In *Langan v.*

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\(^{(a)}\) In this section, “civil union” means any relationship status other than marriage that:

1. is intended as an alternative to marriage or applies primarily to cohabitating persons; and

2. grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

\(^{(b)}\) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

\(^{(c)}\) The state or an agency or political subdivision of the state may not give effect to a:

1. public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

2. right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

TEX. FAM. CODE ANN., supra, § 6.204.

\(^{122}\) State and municipal regulations may take several forms, and many are not restricted to same-sex couples. See *generally*, William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961 (2001). For example, same-sex and opposite-sex couples are eligible to register as domestic partners under New York City’s Administrative Code, provided, among other things, that “both persons are residents of the city of New York or . . . at least one partner is employed by the city of New York on the date of registration.” ADMIN. CODE § 3-241(1)(a)-(b) (2002); see also D.C. CODE ANN. § 32-702(a)(1)-(3) (2003) (allowing parties who are “at least 18 years old and competent to contract” and who are “the sole domestic partner of the other” and “not married” to register as domestic partners). Such regulations are not immune from challenge. See, e.g., Slattery v. City of New York, 266 A.D.2d 24, 24-26 (N.Y. App. Div. 1999) (upholding Domestic Partners Law against challenges that municipal government “impermissibly legislat[ed] in the area of marriage” and that it “transformed the domestic partnership into a form of common law marriage”). In addition to the civil union and reciprocal beneficiaries statute enacted in Vermont, other states have sought to provide protections to couples, who cannot or choose not to marry. California merged the concepts of a domestic partnership registry with a reciprocal beneficiaries law designed primarily for health benefits and medical decision-making into one statute:

\(^{(a)}\) Domestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.

\(^{(b)}\) A domestic partnership shall be established in California when all of the following requirements are met:

1. Both persons have a common residence.

2. Both persons agree to be jointly responsible for each other’s basic living expenses incurred during the domestic partnership.

3. Neither person is married or a member of another domestic partnership.

4. The two persons are not related by blood in a way that would prevent them from being married to each other in this state.

5. Both persons are at least 18 years of age.
St. Vincent's Hospital of New York, a New York trial court found “that New York’s public policy does not preclude recognition of a same-sex union entered into in a sister state” and held a same-sex partner pursuant to a Vermont civil union to have the same rights as a spouse under the New York wrongful death statute. The New York decision is not unlike a much earlier New York Court of Appeals decision, In re May’s Estate, which used a choice of law analysis and applied the law of the

(6) Either of the following:
(A) Both persons are members of the same sex.
(B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.

(7) Both persons are capable of consenting to the domestic partnership.

(8) Neither person has previously filed a Declaration of Domestic Partnership with the Secretary of State pursuant to this division that has not been terminated under Section 299.

(9) Both file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division.
place of celebration to uphold a husband’s right to administer the estate of his wife. The thirty-five year marriage between the uncle and his niece in May’s Estate was valid under the law of Rhode Island, where the marriage was celebrated, but invalid under New York law, where the parties were domiciled from the time of the marriage. Although it may be tempting to view cases like May’s Estate as enshrining the place of celebration rule with respect to the validity of a marriage (or same-sex union), the conflict of laws issues are considerably more complex. In many of the cases that apply the place of celebration rule, the issues at stake do not implicate strong state interests. In other cases such as May’s Estate, where more important regulatory interests are apparent, courts have been willing to adopt a place of celebration rule to uphold the relationship with respect to an incident of the marriage because invalidating the relationship at that particular point in time has little relationship to the real concerns behind the other state’s invalidity rule. Other courts have found that denying a benefit—even at a later point in time—is a particularly effective way of enforcing its marriage regulatory policy. In particular, states with their own “defense of marriage” acts are unlikely to recognize civil unions for any purpose, particularly when

126. See In re May’s Estate, 114 N.E.2d at 5-7.
127. Even the first Restatement of Conflict of Laws provided that “[a] marriage which is against the law of the state of domicile of either party,” even if valid where celebrated, would be invalid everywhere when the issue of validity involved polygamy, incest, or similarly “void” marriages. RESTATEMENT OF CONFLICT OF LAWS § 132 (1934). The Restatement (Second) of Conflict of Laws was even more explicit in stating that “[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971). For a more extensive discussion of these issues, see Brian H. Bix, Choice of Law and Marriage: A Proposal, 36 FAM. L.Q. 255, 256-62 (2002); Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 TEX. L. REV. 921, 962-88 (1998); Silberman, supra note 72, at 196-99. New York City adopted a middle ground by extending “all the rights and benefits available to domestic partners registered pursuant to [the Administrative Code]” to “[m]embers of a marriage that is not recognized by the state of New York, a domestic partnership, or a civil union, lawfully entered into in another jurisdiction” unless such a marriage violates the proscriptions of the New York Domestic Relations Law section 5 (incestuous marriages) or section 6 (bigamous marriages). ADMIN. CODE § 3-245 (1998). This approach is similar to that taken by the German Lebenspartnerschaftsgesetz. See supra text accompanying notes 98-100, 105.
128. Many of the issues involved matters of formalities such as licensing requirements; even more substantial restrictions involved age requirements where the differences in state regulation were relatively minor. See Silberman, supra note 72, at 196-97.
129. See, e.g., Catalano v. Catalano, 170 A.2d 726, 727, 728-29 (Conn. 1961) (holding that plaintiff could not qualify for a “widow’s allowance” as surviving spouse to decedent, her uncle, as “[t]he marriage of the plaintiff and Fred Catalano, though valid in Italy under its laws, was not valid in Connecticut because it contravened the public policy of this state”).
their own residents or domiciliaries have left the state to contract a civil union.\textsuperscript{130}

Residency or domicile requirements for civil unions could ultimately have advantages for same-sex couples. Those same-sex couples, who are resident in Vermont at the time of their civil union, have the strongest claim for recognition of their relationship. The interest of Vermont in protecting and upholding the relationship of its residents is entitled to great weight even should the couple move at a later point in time. As we have suggested elsewhere, as a normative matter, the law of the parties' residence/domicile at the time of marriage is the appropriate reference for the determination of the validity of the particular relationship.\textsuperscript{131} Of course, states with "defense of marriage" acts may nonetheless deny recognition even to those (true Vermont) couples who later move to their state, but their claim for doing so is substantially weakened.

\section*{C. The Recent Decision in Canada and its Aftermath}

A recent decision of the Ontario Court of Appeal in Canada, \textit{Halpern v. Toronto},\textsuperscript{132} has attracted enormous attention by extending full marriage rights to same-sex couples.\textsuperscript{133} Several same-sex couples sought

\begin{itemize}
\item \textsuperscript{130} In \textit{Burns v. Burns}, 560 S.E.2d 47 (Ga. Ct. App. 2002), for example, the Georgia Court of Appeals held a mother violated her custodial agreement with her ex-husband by living with an unrelated adult even though she was living with her partner with whom she had concluded a civil union in Vermont. See id. at 48-49. In so doing, the court first found that a civil union was not a marriage and that therefore the mother violated the visitation order, which provided that visitation would not take place "during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom party is not related within the second degree." Id. at 48. Second, the court held that "even if Vermont had purported to legalize same-sex marriages, such would not be recognized in Georgia, the place where the consent decree was ordered and agreed to by both parties (both of whom are Georgia residents), and more importantly the place where the present action is brought." Id. at 49 (quoting Georgia’s DOMA, supra note 120). The Supreme Court of Georgia denied the mother’s petition for certiorari. 2002 LEXIS 626 (Ga. 2002).
\item \textsuperscript{131} See Silberman, supra note 72, at 203-04.
\item \textsuperscript{132} [2003] 65 O.R.3d 161.
\item \textsuperscript{133} Some have suggested that the recent United States Supreme Court decision in \textit{Lawrence v. Texas}, 123 S. Ct. 2472 (2003), in which the Court overturned \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), and held that a Texas statute criminalizing sodomy between two members of the same-sex violated the Fourteenth Amendment, see \textit{Lawrence}, 123 S. Ct. at 2484, signals a possible move in the same direction in the United States. See generally Sarah Kershaw, \textit{Adversaries on Gay Rights Vow State-By-State Fight}, N.Y. TIMES, July 6, 2003, § 1, at 8; Dean E. Murphy, \textit{Gays Celebrate, and Plan Campaign for Broader Rights}, N.Y. TIMES, June 27, 2003, at A20; Sheryl Gay Stolberg, \textit{Democratic Candidates Split on Issue of Gay Marriages}, N.Y. TIMES, July 16, 2003, at A14. Although Justice Scalia, writing the dissent in which Chief Justice Rehnquist and Justice Thomas joined, bemoaned that the majority’s holding paves the way for the recognition of same-sex
\end{itemize}
marriage licenses in Toronto, and the Clerk of the City of Toronto and the couples turned to the courts for direction as to whether or not the licenses could be granted. Relying on section 15(1) of Canadian Charter of Rights and Freedoms, which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability," the Court of Appeal found the common law definition of marriage as between one man and one woman violated the couples' equality rights. The Ontario court corrected this "inconsistency" in the treatment of same-sex and opposite-sex couples by "declar[ing] invalid the existing definition of marriage to

134. Halpern, 65 O.R.3d 161, ¶ 9 n.1, ¶¶ 59, 144.
the extent that it refers to ‘one man and one woman’, [sic] and ... reformulat[ing] the definition of marriage as ‘the voluntary union for life of two persons to the exclusion of all others.’”

The Ontario decision followed the enactment in other Canadian provinces of legislation based on earlier less sweeping rulings, and the stage has been set for further legislative action in Canada on a national level. Although such legislation seems likely to pass, the ultimate dénouement in Canada may be more difficult to predict. A decision of

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135. Id. ¶ 148; see also Colin Nickerson, Ontario Court OK’s Same-Sex Marriage, BOSTON GLOBE, June 11, 2003, at A1.

136. In response to the Supreme Court of Québec’s decision in Hendricks v. Québec, 2002 R.J.Q. 2506, Québec created civil unions “for couples of the opposite or the same sex who wish to make a public commitment to live together as a couple and to uphold the rights and obligations stemming from such status.” An Act Instituting Civil Unions and Establishing New Rules of Filiation, Explanatory Notes, 2002 S.Q. c. 6 (2002), available at http://www.publicationsduquebec.gouv.qc.ca/home.php. Attorney General Paul Bégin of Québec described the civil unions as “just like marriage for heterosexuals.” Québec Plans to Legalize Same-Sex Unions, N.Y. TIMES, Apr. 27, 2002, at A2. Nova Scotia established registered domestic partnerships for both same-sex and opposite-sex couples, granting those who register “entitlements such as spousal support, protection under the Matrimonial Property Act and the right to see their partners’ medical records and make medical decisions in an emergency.” Alison Auld, First in Canada to Legally Register Same-Sex Relationship: Nova Scotia Couple Makes History, WINNIPEG FREE PRESS, June 5, 2001, at B1, available at 2001 WL 21095169. Following Halpern, the British Columbia Court of Appeal found the common law bar to same-sex marriage violated the Canadian Charter and amended the common law definition of marriage to be “the lawful union of two persons to the exclusion of all others,” but suspended the relief until July 12, 2004 “to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision.” EGALE Canada Inc. v. Canada, [2003] 13 B.C.L.R.4th 1, ¶¶ 158-59, 161; see also Colin Nickerson, British Columbia Approves Gay, Lesbian Marriages, BOSTON GLOBE, July 9, 2003, at A6, available at 2003 WL 3407234.

137. Notably, Justice Minister Martin Cauchon did not seek an immediate stay of the ruling. See Jeffrey Hodgson & Randall Palmer, Toronto Issues Gay Marriage Licenses After Ruling, REUTERS, June 10, 2003. After the Ontario Court’s ruling and the decision not to appeal, then Prime Minister Jean Chrétien announced that his government would propose federal legislation to expand the definition of marriage to include same-sex couples. See Clifford Krauss, Canadian Leaders Agree to Propose Gay Marriage Law, N.Y. TIMES, June 18, 2003, at A1; Colin Nickerson, Canada to Draft a Law Recognizing Gay Marriages, BOSTON GLOBE, June 18, 2003, at A1, available at 2003 WL 3402419. In an effort to insulate the new legislation from potential challenges by more conservative provinces, then Prime Minister Chrétien stated that he would give the proposed bill to the Canadian Supreme Court first for a constitutionality review and then submit it to Parliament for a vote. See Social Policy in Canada: Judges Come Out for Gays, ECONOMIST, June 21, 2003, at 32.

138. Support for same-sex marriage is far from universal in Canada. Mr. Chrétien’s successor, Prime Minister Paul Martin, stated that he supported “eliminating any form of discrimination against gays,” Associated Press, Canada Gets a New Prime Minister, N.Y. TIMES, Dec. 13, 2003, but also that “he would ask the Supreme Court for its opinion on whether granting gay and lesbian couples civil union rights rather than full marriage rights would be constitutional.” Clifford Krauss, New Prime Minister Is Steering Canada Cautiously to the Right, N.Y. TIMES, Dec. 20, 2003, at A9. Prime Minister Martin has since asked the Supreme Court whether the definition of marriage as between a man and a woman violates the Canadian Charter of Rights and Freedoms, citing divided
similar magnitude was rendered by the Hawaiian Supreme Court in *Baehr v. Lewin* in 1993, but a later amendment to the Hawaiian public opinion. The Supreme Court had scheduled a hearing for April 16, 2004 on the issue of same-sex marriage, but the hearing will likely be postponed. See *Canada's Debate on Gay Marriage Could be Delayed*, AGENCE FRANCE PRESSE, Jan. 29, 2004, available at 2004 WL 67485180; see also Howard Williams, *Canadian Government Increases Hints of May Election*, AGENCE FRANCE PRESSE, Feb. 5, 2004, available at 2004 WL 68826803 (stating that "[t]he federal government promised to introduce nationwide legislation after the Supreme Court answers questions on the constitutionality of same-sex marriages"). At least one legislator from Alberta has threatened to challenge the new legislation, see Krauss, *Canadian Leaders*, supra, and members of Chrétien's own party have expressed concern that such legislation could cost the party seats in coming elections. See *Canada Vows to Push Ahead with Gay Marriage Law*, N.Y. TIMES, Aug. 21, 2003. One member of Parliament was severely beaten by a constituent for his support of same-sex marriage. See *Monday's Canada Briefs: New Brunswick MP Andy Scott Says Beating Hasn't Weakened His Political Resolve*, N.Y. TIMES, Dec. 1, 2003. Representatives of the Catholic Church have also spoken out against the planned legislation. See *Tuesday's Canada Brief: PM Ignores Threats of Damnation Regarding Gay Marriage Law*, N.Y. TIMES, Aug. 13, 2003; Clifford Krauss, *Canada's Push to Legalize Gay Marriage Draws Bishops' Ire*, N.Y. TIMES, Aug. 10, 2003. Commentators have attributed the provincial and federal governments' seeming lack of opposition to the perception that the general public supports gay marriage. See *Toronto Issues Gay Marriage Licenses*, supra (quoting Deputy Prime Minister John Manley as saying, "'I think it's time for us to recognize that same-sex marriages are part of our societal norm'"); Clifford Krauss, *News Analysis: Canada's Gay Marriage Plan*, N.Y. TIMES, June 19, 2003 (discussing opinion poll "results that show a majority of Canadians support expanding marriage to gay couples"). Interestingly, a Gallup opinion poll conducted in May 2003 revealed that sixty percent of the American public believes that intimate relations between consenting same-sex adults should be legal, eighty-eight percent believe gays and lesbians should not be discriminated against by employers, and fifty percent believe same-sex couples should be able to marry and to adopt. See *Gay Kiss: Business as Usual*, N.Y. TIMES, June 22, 2003; see also Robin Toner, *Opposition to Gay Marriage Is Declining*, Study Finds, N.Y. TIMES, July 25, 2003. But see Susan Page, *Poll Shows Backlash on Gay Issues*, USA TODAY, July 28, 2003 (reporting July 2003 USA Today/CNN/Gallup poll where forty-six percent felt same-sex relations between consenting adults should not be legal and fifty-seven percent opposed civil unions for same-sex couples); Katharine Q. Seelye & Janet Elder, *Strong Support Is Found for Ban on Gay Marriage*, N.Y. TIMES, Dec. 21, 2003 (reporting December 2003 New York Times/CBS News poll where, of fifty-three percent who said marriage was religious matter, seventy-one percent opposed gay marriage and of thirty-three percent who said marriage was legal matter, fifty-five percent supported gay marriage).

139. 852 P.2d 44 (Haw. 1993) (finding that, under Hawaii Constitution, strict scrutiny applied to sex-based classification of state marriage statute), *reh'g granted in part*, 875 P.2d 225 (Haw. 1993), *appeal after remand*, Baehr v. Miike, 910 P.2d 112 (Haw. 1996), *remanded to Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997). A same-sex couple brought a similar case under the Alaska Constitution, challenging the constitutionality of the state's refusal to grant them a marriage license and the constitutionality of the Alaska statute providing that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage" under both the state and federal constitutions. Brause v. State, 21 P.3d 357, 358 (Alaska 2001) (quoting ALASKA STAT. § 25.05.013(b) (Michie 2002)). During the pendency of the litigation, the first two claims were mooted by an amendment to the Alaska Constitution, providing that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman." ALASKA CONST. art. I, § 25. The Alaskan Supreme Court dismissed the third claim on the ground that it was not ripe for review after finding the plaintiffs failed to "assert[] that
Constitution reserved the legislature’s power to limit marriage to couples of the opposite sex, which was restated as a legislative finding “that the people of Hawaii choose to preserve the tradition of marriage as a unique social institution based upon the committed union of one man and one woman.” As part of the legislative compromise, Hawaii also adopted a reciprocal beneficiaries statute, which extended certain benefits, such as the right to designate a beneficiary for inheritance, medical insurance, or hospital visits, to people who are ineligible to marry.

Similar challenges to state marriage license requirements were recently decided in Massachusetts, Arizona, and New Jersey. In Goodridge v. Department of Health, the Supreme Judicial Court of Massachusetts applied a rational basis test to the state’s refusal to issue marriage licenses to same-sex couples and found that “[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violated the basic premises of individual liberty and equality under the law protected by the Massachusetts Constitution.” The court cited the remedy in Halpern with approval, but restricted itself to the relief requested by plaintiffs—a declaration “that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” The court remanded the matter for entry of judgment consistent with its opinion, but stayed the entry of that judgment for six months “to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” To clarify the court’s decision, the Massachusetts Senate asked the court if a proposed bill creating civil unions for same-sex couples satisfied its mandate. In response, the court reiterated its holding in Goodridge “that group classifications based on unsupportable distinctions, such as that embodied in the proposed [civil union] bill, are invalid under the Massachusetts Constitution.” Finding the proposed civil union bill

they have been or in their current circumstances that they will be denied rights that are available to married partners.” Brause, 21 P.3d at 360.

140. See HAW. CONST. art. 1, § 23.
141. HAW. REV. STAT. § 572C-2 (Supp. 2001).
142. See id. §§ 572C-1 to -7 (Supp. 2001); see also Mark Strasser, Baehr Mysteries, Retroactivity, and the Concept of Law, 41 SANTA CLARA L. REV. 161, 176 n.74 (2000).
143. 798 N.E.2d 941, 968 (Mass. 2003).
144. Id. at 969.
145. Id. at 969-70.
146. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569. The decision was again a 4-3 split.
unconstitutional, the court held that Goodridge served not only to extend the rights, protections, and benefits of marriage to same-sex couples, but also to eliminate the second-class status created by denying same-sex couples access to civil marriage.  

The Massachusetts decisions may have a more limited impact nationwide. First, recognition remains a central problem. As the court itself admonished in Goodridge, “[w]e would not presume to dictate how another state should respond to [our] decision.” In its response to the senate’s query, the court stressed that its decision was based on “the strong protection of individual rights guaranteed by the Massachusetts Constitution” even though “those rights may not be acknowledged elsewhere.” The court reiterated that “We do not resolve, nor would we attempt to, the consequences of our holding in other jurisdictions.”

Second, as discussed supra, were same-sex marriage legalized in Massachusetts, the statutes governing the issuance of marriage licenses would preclude couples, who could not marry in their home jurisdictions, from marrying in Massachusetts. Of course, nothing would prevent Massachusetts residents, who marry in Massachusetts, from moving to another state and seeking to have their marital status recognized there. Finally, the Massachusetts legislators convened a constitutional convention to consider several alternate amendments to the Massachusetts Constitution, which would define marriage as between one man and one woman. Although the convention was adjourned for one month without a vote on the amendments, the issue remains very much alive. Due to the requirement of a second vote before the legislature and a public referendum, the earliest any constitutional amendment could take effect is November 2006. This raises the question of what will happen to couples who marry after the court’s deadline of May 17, 2003, but before the Massachusetts Constitution is amended. One proposed solution would be to downgrade

147. Id. at 569-71.
148. Goodridge, 798 N.E.2d at 967.
149. Opinions, 2004 WL 202184 at 571.
150. Id.
151. See text accompanying notes 75-76; see also Goodridge, 798 N.E.2d at 972 n.4 (Ganey, J., concurring) (noting that Massachusetts law would preclude the use of legalization of same-sex marriage in Massachusetts “as a tool to obtain recognition of a marriage in [another] State that is otherwise unlawful.”) (citing MASS. GEN. LAWS ch. 207, §§ 11, 12, 13 (1998)).
153. See MASS. CONST. art. 48(IV).
those same-sex marriages to civil unions after an amendment takes effect.\textsuperscript{154}

In Arizona, an intermediate appellate court applied a similar analysis pursuant to the Arizona and federal constitutions but came to a different result in \textit{Standhardt v. Superior Court ex rel. County of Maricopa}.\textsuperscript{155} Finding no fundamental right to marry a same-sex partner sounding in the due process clauses of the Arizona and federal constitutions or in the privacy provisions of the Arizona Constitution, the court applied a rational basis test and found "that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest."\textsuperscript{156} A New Jersey trial court reached a similar conclusion in \textit{Lewis v. Harris} after rejecting claims of a fundamental right to marry a same-sex partner and privacy under the New Jersey and federal constitutions.\textsuperscript{157} The court found that the state had "articulated more than adequate reasons to support the public need for such restriction [on marriage]" in that the state "has an interest in fostering and facilitating the traditional notions of family" and being in

\textsuperscript{154} See Pam Belluck, \textit{Massachusetts Weighs a Deal on Marriages Between Gays}, N.Y. TIMES, Feb. 11, 2004. Same-sex couples who marry in San Francisco may face a similar problem. In a unilateral act, the mayor of San Francisco decreed that the city, which is also its own county, would issue marriage licenses to same-sex couples. At the time of writing, over 3,400 same-sex couples had wed in San Francisco since the first ceremony was performed on February 12, 2004. Although neither the trial court nor the California Supreme Court granted requests for preliminary injunctions, challenges to the mayor’s power to issue such a decree remain pending. \textit{See Associated Press, Calif. Court Won’t Stop Gay Marriages}, N.Y. TIMES, Feb. 28, 2004; Dean E. Murphy & Carolyn Marshall, \textit{Gay Weddings Continue in San Francisco as Lawyers Argue}, N.Y. TIMES, Feb. 18, 2004; Carolyn Marshall, \textit{More Than 50 Gay Couples Are Married in San Francisco}, N.Y. TIMES, Feb. 13, 2004. A mini-DOMA is in effect in California, \textit{see supra} note 120, and the marriages would not appear to be valid even in California until that law is successfully challenged. The mayor of New Paltz, New York had married over twenty-four same-sex couples at the time of writing despite the town clerk’s refusal to grant the marriage licenses. \textit{See Marc Santora & Thomas Crampton, Gay Marriage Debate Shifts to Small New York Township}, N.Y. TIMES, Feb. 27, 2004. Although New York has not enacted a mini-DOMA, it is questionable whether these marriages will be recognized even within the township of New Paltz. As the Attorney General of New York noted, "[t]he validity of the marriages and the legality of the mayor’s action will be determined in due course in the courts." \textit{Associated Press, More Gay Couples to Marry in N.Y.}, N.Y. TIMES, Feb. 28, 2004.


\textsuperscript{156} \textit{Id.} at 460-61, 463-64. The court also rejected the petitioners’ equal protection argument based on a rational relationship analysis. \textit{See id.} at 465. At the time of writing, petitioners were seeking review of the decision before the Arizona Supreme Court. \textit{See Judy Nichols, Same-Sex Marriage Advances; Mass. Ruling May Aid Ariz. Couple’s Appeal}, ARIZ. REPUBLIC, Nov. 19, 2003, A1.

harmony with other states.\textsuperscript{158} Citing the "magnitude" of the social change sought, the court concluded by commending the state legislature "to carefully examine and consider the expanded rights afforded to same-sex couples in other jurisdictions" as the "appropriate avenue for a change in the meaning of marriage is the Legislature."\textsuperscript{159}

In the wake of that decision, New Jersey enacted the Domestic Partnership Act,\textsuperscript{160} which "creates a mechanism, through the establishment of domestic partnerships, for New Jersey to recognize and support the many adult individuals in this State who share an important personal, emotional and committed relationship with another adult."\textsuperscript{161} Pursuant to the Act, both same-sex partners and opposite-sex couples aged sixty-two years or more may join in a registered partnership.\textsuperscript{162} The inclusion of the older, opposite-sex couples reflects the state’s primary purpose in enacting the legislation—the recognition of "familial relationships, which ... assist the State by their establishment of a private network of support for the financial, physical and emotional health of their participants."\textsuperscript{163} Indeed, to be eligible to join in a domestic partnership, the potential partners must show some indicia of being jointly responsible for each other's common welfare through joint ownership and "agree to be jointly responsible for each other's basic living expenses during the domestic partnership."\textsuperscript{164} The Act is less like a civil union and more like a reciprocal beneficiaries law in that it extends only limited rights to partners, including pension and other tax-related benefits, medical decision-making rights, and the extension of statutory protections against discrimination.\textsuperscript{165} Significantly, eligibility to enter into such a domestic partnership is restricted to partners who have a common residence in New Jersey or who have a common residence elsewhere and one partner is a member of a state-sponsored retirement plan.\textsuperscript{166} The Act also provides that a "domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which

\textsuperscript{158} Id. at 58.
\textsuperscript{159} Id. at 69.
\textsuperscript{161} Legislative Statement to Assembly Bill, No. 3743 (Dec. 11, 2003), available at http://www.njleg.state.nj.us/bills/BillView.asp.
\textsuperscript{162} See Domestic Partnership Act § 4(b).
\textsuperscript{163} Id. § 2(b).
\textsuperscript{164} Id. § 4(b)(1), (2), Sec. 3.
\textsuperscript{165} See id. § 2(c), (d), (e).
\textsuperscript{166} See id. § 3.
the partnership was created, shall be valid in this State." It will be interesting to see what effect this statutory policy has for recognition of same-sex marriages in New Jersey. On the one hand, the Act makes no mention of same-sex marriage; on the other, New Jersey has not enacted a defense of marriage statute.

Under the Ontario ruling, same-sex couples can and have already married. Indeed several same-sex couples in the United States have secured marriage licenses in Toronto, Ottawa, and Windsor, taking advantage of the absence of a residency requirement. But as noted above, couples from the United States who try to take advantage of the liberalized Canadian regimes for celebration of a marriage may gain very little upon return to the United States. States in the United States—with or without "defense of marriage" acts—may decide not to give effect to the panoply of rights that come with marriage, though some courts may choose to recognize the marriage and its effects. As the Canadian Parliament contemplates enacting federal marriage or civil union legislation in the aftermath of this decision, the central question is to whom such legislation should apply. The use of residency requirements (as in the Netherlands) or prohibitions against same-sex marriages or civil unions if prohibited by the state of a party's nationality or residence (as in Belgium or in Massachusetts) are possible

167. See id. § 6(c).
168. Although New Jersey Governor James McGreevey signed the Domestic Partnership Act into law and characterized the legislation as "a matter of fundamental decency," he has also stated that "he would not support legislation that would amend the state's marriage laws to include same-sex partners." Associated Press, "N.J. OKs Benefits for Same-Sex Partners," N.Y. TIMES, Jan. 12, 2004.
169. See Hodgson, supra note 137 (discussing immediate effect of Ontario court's ruling). In recognition of Gay Pride Week, the Toronto clerk's office remained open over the weekend to accommodate those seeking licenses. See Toronto Dash to Gay Unions, N.Y. TIMES, June 24, 2003, at A6.
170. See Clifford Krauss, A Few Gay Americans Tie the Knot in Canada, N.Y. TIMES, June 28, 2003, at A2; Sarah Robertson, Journeys: Mining the Gold in Gay Nuptials, N.Y. TIMES, Dec. 19, 2003 ("The number of couples from the United States who have gone to Canada to get married is still relatively small—356 in Toronto (through December 16) and 729 in British Columbia (through the end of November), according to government records."). The number of non-Canadians marrying in Toronto is significant, however. See Steve Fairbaim, Seven American Same-Sex Couples Exchange Wedding Vows in Toronto, CANADIAN PRESS, Feb. 14, 2004, available at 2004 WL 69754222 (reporting that 14,700 gays and lesbians married in Toronto from July 2003 through year's end, of whom 6,800 were non-Canadians).
models. Either would enable Canada to incorporate the values and social norms that Canada holds for its own community without interfering with the interests of other communities. At the same time, should Canadian couples relocate at some point in the future, giving effect to the rights and obligations that flow from relationships that were established and endured in Canada would reflect a similar regard for the social norms of the most relevant community.

III. CONCLUSION

Marital and family issues reflect important values and social norms in particular communities. Rules of private international law go a long way in respecting the competing norms that are vying in a complex global society.