ARTICLES

Decriminalization of Homosexuality and Its Effects on Family Rights: A German-US-American Comparison

by Karin M. Linhart[*]

A. Introduction

Socrates, Oscar Wilde, Klaus Mann and many other men in history had one thing in common: they loved men.[1] Some of them were lucky and could live a peaceful life regardless, since they either had the respective social standing or lived in societies where homosexuality was at least tolerated. Most others in history, however, were in a rather unfortunate position. To be gay was to be criminal. A conviction for homosexual conduct resulted in years in prison or worse: even today the death penalty can be imposed upon homosexuals in countries where the Shari'a, the Islamic Criminal Code, is interpreted and applied in a strict and conservative way[2].

Penalization, however, is only the tip of the iceberg. Underlying are millennia of social discrimination and harassment. As far as historians are able to trace, homosexuals, in particular gay men, seem to have been continuously discriminated against.[3] Homosexuality was considered contrary to human nature, abnormal, and at best pathological. The penalization of homosexuality on the one hand reflects the

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[*] Dr. Karin Linhart, LL.M. (Duke), Wissenschaftliche Assistentin, Lehrstuhl für Deutsches und Europäisches sowie Internationales Privatrecht (Prof. Eva-Maria Kieninger), Universität Würzburg, Email: KLinhart@jura.uni-wuerzburg.de.

[1] For a historical perspective on homosexuality see DOVER, GREEK HOMOSEXUALITY (1989) and Müller, ABER IN MEINEM HERZEN SPRACH EINE STIMME SO LAUT. HOMOSEXUELLE AUTOBIOGRAPHIEN UND MEDIZINISCHE PATHOSGRAPHIEN IM 19. JAHRHUNDERT (1991).

2 See e.g. Arts. 108 ff. of the Iranian Islamic Penal Law Against Homosexuals (1991), available at http://www.irvl.net/homosexuality.htm; but see Seema Saifee, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 FORDHAM INT'L L. J. 370 (2003).

[3] For non-legal German perspectives on homosexuality see GIESE, DER HOMOSEXUELLE MANN IN DER WELT (1958); HOHMANN, HOMOSEXUALITÄT UND SUBKULTUR (1976); KLIMMER, DIE HOMOSEXUALITÄT ALS BIOLOGISCH-SOZIOLOGISCHE ZEITFRAGE (1965); HUTTER, DIE GESELLSCHAFTLICHE KONTROLLE DES HOMOSEXUELLEN BEGEHRENS (1992); KÖLLNER, HOMOSEXUALITÄT ALS ANTHROPOLOGISCHE HERAUSFORDERUNG: KONZEPTION EINER HOMOSEXUELLEN ANTHROPOLOGIE (2001).

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respective society's attitude. On the other hand it constitutes the barrier for an overdue change in the minds of individuals and thus a change in society. Such a change would give way for civil rights that every heterosexual enjoys without doubt or further thought. Who would question the right of a (heterosexual) individual to marry the person he or she loves and to raise children? And who would question that (heterosexual) couples, who cannot have children of their own, should have the right to adopt? All over the world - with few exceptions – such basic civil rights do not apply to same-sex couples.

This constitutes a Catch 22: how can gays and lesbians ever get out of the margins of society if they are deprived of a "normal" life, if they have no chance to show how "normal" their sexuality actually is (if what the majority does can be considered as "normal")? Why is it that for so long societies all over the world have seemed to cultivate the status of social outsider for homosexuals by holding on to the penalization of homosexuality? Is there a fear that after breaking this barrier there would be no convincing argument left to still deprive homosexuals of basic civil rights? As a final consequence society would have no further basis for its prejudices, when it is revealed that homosexuals can and in fact do live a life like any heterosexual, as soon as they are given the legal (and social) opportunity to do so. The criminalization of homosexuality only leads to unjustified misery for and humiliation of homosexuals.[4]

Development in the US and in Germany has been quite different in this regard. In Germany we see a slow evolution, with precursors in the Weimar republic, after the Second World War. The situation of homosexual partnerships is today relatively uncontroversial. In the United States, on the other hand, we see a somewhat erratic pendulum swing, and at present the status of same-sex couples is one of the most controversial topics. This article will first briefly describe the former legal basis and reasoning for the penalization of homosexuality in the United States and in Germany and assess how the reasoning and the underlying situation have changed in both countries, changes which sooner or later led to the decriminalization of homosexuality (B). It will then further discuss the basic civil rights for same-sex couples that already exist *de lege lata* in Germany and the United States and the arguments for and against these rights (C). Finally, the influence the decriminalization of homosexuality has on the right for homosexuals to marry and adopt children will be discussed (D).

[4] For Germany see Hanack, *Brennpunkte einer Reform des Sexualstrafrecht*, in: GIESE, 37 (1968).

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B. History of Penalization of Homosexuality and its Decriminalization

The history of the penalization of homosexuality in Europe dates back to the ancient laws of German tribes, the Greeks, and the Romans.[5] Just as the perception of homosexuality changed during the centuries, also its penalization differed.[6]

I. Germany

In Medieval times homosexuality was connected with witchcraft and for that reason homosexuals were burned.[7] The first written Criminal Code applicable in all German territories, the *Constitutio Criminalis Carolina* (CCC) of 1532, also known as *Peinliche Hals- und Gerichtsordnung* of Charles V, abolished several of the practises of past dark centuries, but in its art. 116 CCC changed neither penalization nor punishment for homosexual conduct. With the decline of the Emperor's power, German territories started drafting their own Criminal Codes abolishing the death penalty for homosexual conduct. In the age of enlightenment, all German states have abolished death penalty for homosexual conduct among adults after the French revolution, and only Saxony, Thuringia, Hesse, Baden, Oldenburg and Hamburg did not decriminalize it entirely.[8] Remarkably, the first state entirely decriminalizing simple homosexual conduct was Bavaria in 1813.[9]

The development of the Prussian Criminal Code *(Preußisches Strafgesetzbuch)* of 1851 (PrStGB) took several decades. In the beginning, the discussion about the appropriate attitude toward simple homosexual conduct was influenced by the Bavarian example. The following eight of the ten draft proposals, however, declared it a

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[5] SOMMER, DIE STRAFBARKEIT DER HOMOSEXUALITÄT VON DER KAISERZEIT BIS ZUM NATIONALSOZIALISMUS, 31(1998), with further reference.

[6] For the view of the Catholic Church on homosexuality and its penalization see Böckle, *Sittengesetz und Strafgesetz aus katholischer Sicht*, in 43 BEITRÄGE ZUR SEXUALFORSCHUNG 5 (Bürger-Prinz and Giese, eds.1968); ELLISON, SAME-SEX MARRIAGE?: A CHRISTIAN ETHICAL ANALYSIS (2004); LAUN, HOMOSEXUALITÄT AUS KATHOLISCHER SICHT (2001). See also Hartlieb, *Kann denn Liebe Sünde sein? Zur sexuellen Obsession christlicher Sündenlehre*, GLEICHGESCHLECHTLICHE LEBENSGEMEINSCHAFTEN IN SOZIALETHISCHER PERSPEKTIVE: BEITRÄGE ZUR RECHTLICHEN REGELUNG PLURALER LEBENSFORMEN 99 (KEIL AND HASPEL, EDS., 2000).

[7] SOMMER, DIE STRAFBARKEIT DER HOMOSEXUALITÄT VON DER KAISERZEIT BIS ZUM NATIONALSOZIALISMUS 31 (1998).

[8] SOMMER, DIE STRAFBARKEIT DER HOMOSEXUALITÄT VON DER KAISERZEIT BIS ZUM NATIONALSOZIALISMUS 31 (1998).

[9] Art. 186 et seq. Strafgesetzbuch des Königreich Bayern of 1813 (Criminal Code of the Kingdom of Bavaria), cited after SOMMER, DIE STRAFBARKEIT DER HOMOSEXUALITÄT VON DER KAISERZEIT BIS ZUM NATIONALSOZIALISMUS 32 (1998).

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crime. At the end, § 143 PrStGB prohibited "unnatural sexual relations" ("*widernatürliche Unzucht*") among men. Sexual relations among women have been excluded from § 143 PrStGB.

Due to Prussia's power within the North German Federation (*Norddeutscher Bund*), the predecessor of the Second German Reich, § 143 PrStGB was adopted as § 175 of the new Imperial Criminal Code *(Reichsstrafgesetzbuch* – RStGB) after the unification of Germany in 1871.[10] § 175 RStGB stated: "*Die widernatürliche Unzucht, welche zwischen Personen männlichen Geschlechts, oder von Menschen mit Thieren verübt wird, ist mit Gefängnis bis zu zwei Jahren zu bestrafen*; [...]." ("Sexual conduct contrary to human nature between male persons or between persons and animals shall be punished by up to two years of imprisonment; […].")

In the years of the Weimar Republic (1918-1933) and its libertarian movements, prejudices against homosexuals seemed to diminish significantly. Among others, Magnus Hirschfeld has done extensive research in the field of homosexuality and tried to lead the discussion away from prejudices and ignorance toward scientific argumentation.[11] Several gay organizations emerged.[12] In 1922, the famous German criminal lawyer and legal philosopher Gustav Radbruch directed a petition to the government that contained the abolition of § 175 RStGB.[13] Due to the rapid change of the political and social climate within 1929 and 1933, however, the project could not be realized.

In the course of the following years, the wind changed dramatically and the persecution of homosexuals reached its sad point of culmination when the National So-

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[10] SOMMER, DIE STRAFBARKEIT DER HOMOSEXUALITÄT VON DER KAISERZEIT BIS ZUM NATIONALSOZIALISMUS 35 (1998). See also SIEVERT, DAS ABNORMALE BESTRAFEN 14 (1984). See further about this era LÖWENFELD, HOMOSEXUALITÄT UND STRAFGESETZ. NACH EINEM IN DER KRIMINALISTISCHEN SEKTION DES AKADEMISCH-JURISTISCHEN VEREINS ZU MÜNCHEN AM 17. DEZEMBER 1907 GEHALTENEN VORTRAGE (1908); MICHAELIS, DIE HOMOSEXUALITÄT IN SITTE UND RECHT (1907) and Müller, *Aber in meinem Herzen sprach eine Stimme so laut. Homosexuelle Autobiographien und medizinische Pathosgraphien* im 19. JAHRHUNDERT (1991).

[11] HIRSCHFELD, DIE HOMOSEXUALITÄT DES MANNES UND DES WEIBES (1914). SEE ALSO KARSCH-HAACK, DAS GLEICHGESCHLECHTLICHE LEBEN DER NATURVÖLKER (1911).

[12] See SIEVERT, DAS ABNORMALE BESTRAFEN 24 (1984).

[13] GUSTAV RADBRUCHS ENTWURF EINES ALLGEMEINEN DEUTSCHEN STRAFGESETZBUCHES [1922], Tübingen 1952. See SIEVERT, DAS ABNORMALE BESTRAFEN 52 (1984). See also DES AMTLICHEN ENTWURFS EINES ALLGEMEINEN DEUTSCHEN STRAFGESETZBUCHES "UNZUCHT ZWISCHEN MÄNNERN". Paragraph 267, (MAGNUS HIRSCHFELD, ED.). EINE DENKSCHRIFT, GERICHTET AN DAS REICHSJUSTIZMINISTERIUM VON 1925, 1925, available at http://www.schwulencity.de/Sexus_Paragraph_267.html (last visited April 29, 2005).

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cialists and Adolf Hitler took power in 1933.[14] Homosexuality was seen as a threat to the German "people, state and race" ("*Volk, Staat und Rasse*").[15] In 1935 § 175 StGB was made harsher. Also the persecution of homosexuals was increased and the punishments became harder. Many homosexuals were taken to labor or concentration camps.

After the Second World War, in West Germany the language of § 175 StGB was not changed, even though bills for an amendment were introduced.[16] In 1957, the question of the constitutionality of § 175 StGB was brought before the Federal Constitutional Court *(Bundesverfassungsgericht)*. The Court found that homosexual conduct violated the moral code (*Sittengesetz*) and even simple homosexual conduct needed to be considered a crime.[17] The court's reasoning, however, is relatively striking, using allegations and plain statements rather then developing founded and convincing arguments.[18] It offers arguments that have no logical connection to the conclusion drawn[19] and it violates the principle of proportionality.[20]

[14] See in this context HOMOSEXUALITÄT IN DER NS-ZEIT: DOKUMENTE EINER DISKRIMINIERUNG UND VERFOLGUNG (GRAU ED., 1993) and MANN AND TUCHOLSKI, HOMOSEXUALITÄT UND FASCHISMUS (1981).

[15] KLARE, HOMOSEXUALITÄT UND STRAFRECHT 11 (1937).

[16] See *Deutsche Bundesregierung, Begründung zum Entwurf E-1962 am 04. Oktober 1962, in dem eine Reform des § 175 StGB nicht vorgesehen ist,* in: 100 JAHRE SCHWUL. EINE REVUE (KRAUSHAAR ED.) 118 (1997).

[17] *Bundesverfassungsgericht*, decision of May 10, 1957, BVerfGE 6, 389, also at NEUE JURISTISCHE WOCHENSCHRIFT 865 (1957), also at <http://www.oefre.unibe.ch/law/dfr/bv006389.html> (last visited November 16, 2004). See also Biederich, Gutachten zur Frage der Vereinbarkeit der §§ 175, 175a StGB mit Art. 1, 2 Abs. 1-3 und 25 des Grundgesetzes für die Bundesrepublik Deutschland. Für eine beim Verfassungsgericht abhängige Verfassungsbeschwerde (1952).

[18] E.g. at the beginning of section III.1.b the court states that homosexual conduct "clearly" violates the moral code. To underlay this allegation the court cites the legislative history of the Criminal Code of the North German Federation (*Norddeutscher Bund*) of 1869 as well as the legislative history from 1925. It does not make any effort to assess if the moral sense of the public has changed during the following three decades. It simply rejects anything that was put forth to show that moral understanding has changed, by declaring that anything else is not convincing and does not change what the court has found.

[19] E.g. in section II.2.b. it finds that the principle of equality between man and woman does not apply to the legislative distinction between female and male homosexuality. In the following the court gives examples for differences between men and women (e.g.: "*The physical growth of male and female genitals already indicate their forging and demanding function for men as opposed to a rather accepting and devoted function for women*" – "*Schon die körperliche Bildung der Geschlechtsorgane weist für den Mann auf eine mehr drängende und fordernde, für die Frau auf eine mehr hinnehmende und zur Hingabe bereite Funktion hin*."), but does not show how those differences relate to the criminalization of male homosexuality alone.

[20] E.g. at the end of section III.1.b. the court explains that even as far as homosexual conduct between adults is concerned, the protection of minors plays an evident role, since the decriminalization of homosexuality would lead to an increase of homosexual activities among adults in general which would lead

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After an increase in criminal persecution of homosexuals in the 1950s and almost two decades of discussion, the turning point in Germany appeared in the late 1960s.[21] In the years of the so-called sexual revolution, sexuality was no taboo any more in wide parts of society. In the German Democratic Republic, the simple form of homosexuality was legalized already in 1968.[22] In the Federal Republic of Germany it was decriminalized in 1969, before the European Court for Human Rights in 1984 declared the penalization of homosexuality contrary to human rights.[23]

The protective age in Germany, however, was still the general age of consent– 21 years. Finally, in 1994 the Federal legislator amended § 175 StGB, which still persecuted homosexual conduct with a person under the age of consent (which in the meantime had been lowered to 18) and lowered the protective age to 16.

II. United States

In the United States Criminal Law coexists on both federal and state level. For this reason until June 2003 the legal situation as to the criminalization of homosexuality differed in the various states.

When the Bill of Rights was ratified in 1791, sodomy in all 13 States was either a criminal offense at common law, or prohibited outright via anti-sodomy legislation.[24] By 1986, 24 states had anti-sodomy laws on the books, all of them except Rhode Island and Texas prohibiting not only anal, but also oral sexual intercourse between persons of the same sex.[25] § 16-6-2 of the Georgia Code (1984) for example

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to a higher risk of younger men being seduced. So, - the court states - there is no total lack of public interest that would lead to the conclusion that the legislator goes beyond its constitutional boundaries by upholding § 175 StGB. The court hereby overlooks that this reasoning goes the wrong way around and for that reason violates the principle of proportionality. In order to determine that a certain behavior must be considered a crime the interest at risk on the one side must be proportional to the loss of freedom on the other side. It is not sufficient to assess "some" public interest in order to criminalize a certain behavior.

[21] Throughout the decades, much more decisive than the actual language of the Criminal Code was the question of how strictly or leniently it was interpreted, applied, and enforced.

[22] KOWALSKI, HOMOSEXUALITÄT IN DER DDR: EIN HISTORISCHER ABRIß 35 (1987).

[23] *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. 52 (1981), http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=2511054&skin=hudoc-en&action=request (last visited April 29, 2005).

[24] For further reference see *Bowers v. Hardwick* (Fn. 25) at 192.

[25] See Apasu-Gbotsu, *Survey on the Constitutional Right to Privacy in the context of Homosexual Activity*, 40 U. MIAMI L. REV., 521 at 525 (1986). Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Ken-

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provided: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. […] (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. […]". On first view, most of the state laws, like the Georgia law, do not distinguish between homosexual and heterosexual couples, instead forbidding certain kinds of sexual conduct. This restriction, however, left no room for the ordinary sexual conduct of homosexual couples and that way declared homosexuality a crime.

In 1986, the U.S. Supreme Court, in *Bowers v. Hardwick*[26], overturned the decision of the U.S. Court of Appeal of the 11th Circuit, that had declared the anti-sodomy law of Georgia (O.G.C.A. § 16-6-2) unconstitutional insofar as it regulated consensual sodomy conducted in private. According to the Court of Appeal the 14th Amendment of the U.S. Constitution establishes a fundamental right of privacy beyond the reach of the state. The U.S. Supreme Court, however, argued that the fact that consensual sodomy, especially when conducted in private, has no 'identifiable' victim, does not necessarily mean that it bears no criminal potential. It feared that opening the doors to homosexual conduct could pave the way for other sexual crimes also conducted in the home, like adultery or incest.[27] Also, according to the Court the notion of due process of the 14th Amendment must not be stretched too far, lest the U.S. Supreme Court infringe on the powers actually conferred to the government or the legislator.[28]

The fact that four of the nine Justices in *Bowers* dissented from the majority's decision suggested that a change in this long tradition of criminalizing sodomy was comparatively close. In the course of the 1990s, lower and intermediate state courts issued decisions in favor of granting equal protection to homosexuals and declared anti-sodomy laws contrary to state constitutions that grant further rights to individuals or demand for a justification for any kind of discrimination. In 1992, the Kentucky Supreme Court found in *Commonwealth of Kentucky v. Wasson*[29] that there was no rational basis for the discrimination against homosexuals and for this reason charges against the defendant on the basis of the Kentucky anti-sodomy law had to be dismissed. In 1996, the Court of Appeals of Tennessee ruled in *Campbell v.*

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tucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia.

[26] 478 U.S. 186; 106 S. Ct. 2841; 92 L. Ed. 2d 140.; see also *Stanley v. Georgia*, 394 U.S. 557

[27] *Bowers v. Hardwick* (see Fn. 26), at 195/196.

[28] *Bowers v. Hardwick* (see Fn. 26), at 194/195.

[29] Supreme Court of Kentucky, 842 S.W.2d 487.

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Don Sundquist[30] that the Constitution of Tennessee granted its citizens a right to privacy ("the right to be let alone"), which also included engagement into consensual private homosexual conduct.[31]

Finally, on June 26, 2003, the turning point in the United States concerning the penalization of homosexuality came in the form of the U.S. Supreme Court's decision in *Lawrence v. Texas*[32]. In this case the Court found compelling reasons to overrule *Bowers v. Hardwick*. According to a plurality of the Court the Texas anti-sodomy law (Tex. Penal Code § 21.06[a] [2003]) and with it all other anti-sodomy laws violated the Due Process Clause of the 14th Amendment of the U.S. Constitution and for this reason were held invalid.

III. Comparison of the Reasoning for Decriminalization

Thus, since 1969 in Germany, and most recently since June 2003 in the United States, homosexuality was no longer considered a disease, a sin or a threat to public order. A variety of factors, both in Germany and the US, led to the decriminalization of homosexuality. In the following a closer look shall be given to the reasons for the decriminalization of sodomy in both countries.

1.The value of privacy and the home

In *Lawrence v. Texas* the U.S. Supreme Court expressly found that it had failed to recognize in *Bowers* the extent to which liberty was violated by the anti-sodomy law. The effects of those laws reached far beyond punishment for a particular sexual act, "touching upon the most private human conduct, sexual behavior, and in the most private of places, the home".[33] The Court thus highlighted the importance of privacy with respect to personal liberty and the significance of the home as a place of safety from the omnipresence of the state.[34] The right to privacy is not expressly protected by the U.S. Constitution, but inferred from it. In Germany, the right to privacy and the dignity of the human being are part of the basic rights of the *Grundgesetz*, the German Constitution (art. 2 sec. 1 and art. 1 sec. 1). Those provisions existed long before the time of the decriminalization of homosexuality. That

[30] Tennessee Court of Appeals, 926 S.W.2d 250.

[31] *Campbell v. Don Sundquist* (see Fn. 30), at 266.

[32] 123 S. Ct. 2472; 156 L. Ed. 2d 508 (2003).

[33] *Lawrence v. Texas* (see Fn. 32), at 2478.

[34] *Lawrence v. Texas* (see Fn. 32), at 2478.

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means that the written legal framework did not change. What has changed was the perspective from which the law was interpreted and thus with it the interpretation of the respective Constitutional provisions.

2. Moral Code (Sittengesetz) v. Protection of minorities in a democracy

To understand the change in constitutional interpretation, it is important to understand the change in moral thinking that took place within society. In the past centuries-and to a certain degree still today--sexuality as a whole was a strict taboo. In addition, in the Judeo-Christian tradition, homosexuality was considered highly immoral. Many of the factors that shape moral thinking have changed in the past decades, both in Germany and in the United States. Sexuality is much less a taboo. As a result people talk about it more openly and more rationally, opening the way for information to be communicated and therefore for prejudices to be overcome. Because of rather quiet times, as far as social conditions are concerned, and a rather stable democratic system in both countries, people feel less need to categorize sexuality so stringently. In the United States, however, the new common enemy that approaches from outside seems to worsen the position of homosexuals, since many people in the face of terrorism turn to traditional, conservative ideas again. In Germany, unlike in the United States, the church has significantly lost its influence. Even people who believe and practise their religion tend to question more, instead of simply following what religious leaders claim to be the rule. Homosexuality might still be "different", but it is no longer seen as immoral, even by most religious people[35].

Thus, arguably, the German legislation follows a trend in general societal development, while courts in the United States follow only a partial trend, and fight a backlash from conservatives. Against this background, the U.S. Supreme Court in *Lawrence v. Texas* has found that the question of criminalization is not about morals in the first place, but instead whether the majority can force its views upon everyone else and in particular by the means of criminal law.[36] In contrast to the decision in *Bowers,* this time the answer was, no.[37]

[35] For views of the German Protestant and Catholic churches on the recognition of same-sex couples see Heinz, *Zu gesetzlichen Regelungen gleichgeschlechtlicher Lebenspartnerschaften, Forschungsbericht über die Haltung der katholischen Kirche*, in: DIE RECHTSSTELLUNG GLEICHGESCHLECHTLICHER LEBENSGEMEINSCHAFTEN 277 (BASEDOW/HOPT/KÖTZ/DOPFFEL,EDS. 2000) Keil, *Zur rechtlichen Anerkennung gleichgeschlechtlicher Lebensgemeinschaften aus der Perspektive evangelischer Theologie und Kirche in Europa*, IBID, 309.

[36] *Lawrence v. Texas* (see Fn. 32), at 2480.

[37] This was actually already held in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, at 850; 120 L.Ed. 2d 674; 112 S. Ct. 2791 (1992).

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3. Public order v. Individual Human Rights

During the Third Reich (1933-1945), the prevailing view in Germany was that homosexuality can be transferred, that it was contagious and for this reason the public must be protected against it. Punishment, for that reason, had to be draconic in order to prevent an epidemic.[38] In the course of time more research has been undertaken and sexual orientation is now widely seen as something that cannot be changed and cannot be transferred. This has led to two conclusions: First, since sexual orientation cannot be transferred, there is no threat of an epidemic conversion from homosexual to, heterosexual and therefore there is no need to "protect" heterosexuals. Second, since homosexuals cannot change their orientation even if they wanted to, the persecution and stigmatization violates modern understanding of human rights.

4. Protection of minors

The protection of minors was for a long time one of the leading arguments to hold on to the penalization of homosexual conduct as a whole, both in Germany and in the United States. As can be seen from the decision of the German *Bundesverfassungsgericht* of 1957[39] the question of the criminalization of homosexual conduct between adults was not clearly separated from the issue of the protection of minors. Only when it was understood that homosexuality was not transmissible, that (heterosexual) minors can not become homosexual by way of seduction, the two issues were clearly divided and the discussion became more focused on the decisive question: until what age should children and juveniles be protected by the means of criminal law? This question is not limited to homosexual offenses, but is pertinent to all sexual crimes.

C. Same-Sex Couples and Family Rights

The decriminalization of homosexuality is the necessary first step toward the granting of further rights to homosexual couples that are regularly given to heterosexuals. Starting in the area of family law, those rights reach into almost every other area of law, in particular, law of succession, pension and social security law, asy-

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[38] TILL BASTIAN, HOMOSEXUELLE IM DRITTEN REICH (2000).

[39] Supra (note 15).

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lum law, common property rights, immunity in criminal proceedings, or tax law.[40] What is the connection between the decriminalization of homosexuality and the quality and quantity of further rights granted to homosexual couples? To answer this question this article now focuses on two aspects of family law, the right to marry and the right to adopt children.

I. The right to get married

There are very few countries in the world that enable homosexuals to get married and grant this marriage the same rights as a heterosexual marriage. The right to marry was first granted to homosexual couples in the Netherlands in April 2001.[41] According to one Member of the Dutch Parliament, registered partnerships[42] were not enough, a registered partnership for same-sex couples according to him was "*margarine. It's not real butter*".[43] Belgium followed the Dutch example in February 28, 2003.[44] Since 1999, Canadian same-sex couples can enter into common-law marriage in several provinces; federal legislation is under preparation[45]. In Spain, the lower house of parliament passed a bill introducing same sex marriage in April 2005.

There are numerous countries that allow same-sex couples to register their partnership. The rights that arise out of these registered partnerships vary. In the Netherlands[46] as well as in Belgium,[47] in addition to the right to get married, same-sex

[40] For an even more elaborated list see Puls, *Familienrechtliche Aspekte der Gleichstellung homosexueller Partnerschaften*, in: GLEICHGESCHLECHTLICHE LEBENSGEMEINSCHAFTEN IN SOZIALETHISCHER PERSPEKTIVE: BEITRÄGE ZUR RECHTLICHEN REGELUNG PLURALER LEBENSFORMEN 28, 36 (KEIL & HASPEL, EDS., 2000).

[41] See Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, vol. 4.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (November 2000), at <http://www.ejcl.org/43/art43-1.html> (last visited: November 16, 2004).

[42] See as to registered partnership in the Netherlands HEIDA, GIDS GEREGISTREERD PARTNERSCHAP (2000).

[43] Cited after MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 124 (2002).

[44] *Wet tot openstelling van het huwelijk voor personen van hetzelfde geslacht en tot wijziging van een aantal bepalingen van het Burgerlijk Wetboek* of February 28, 2003 Belgium official gazette (*Belgische Staatsblad*) over <http://www.ejustice.just.fgov.be/doc/rech_n.htm> (last visited November 16, 2004).

[45] For further reference see Grossman, *The Canadian Supreme Court's Same-Sex Marriage Decision* at http://writ.news.findlaw.com/grossman/20041214.html (last visited April 29, 2005) and Merin, EQUALITY FOR SAME-SEX COUPLES – THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 160 (2002).

[46] Title 5a (art. 80a-80e) Dutch Civil Code (*Burgerlijk Wetboek*), introduced by *Wet tot wijziging van Boek 1 van het Burgerlijk Wetboek en van het Wetboek van Burgerlijke Rechtsvordering in verband met opneming daarin van bepalingen voor geregistreerd partnerschap*, *Staatsblad* 324 (1997).

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couples can also only register their partnership. Other countries[48] providing for registration include Denmark[49], Finland[50], France[51], Norway[52], parts of Spain[53], Sweden[54], Switzerland[55], and – to be examined further - Germany.

1. Germany

In some ways similar to the years of the spirit of the Weimar Republic, the 90s in Germany were guided by change and social liberalism. The family image of father–mother–child has made room for other forms of family. A high percentage of children are raised by single parents who either divorced or never married. There is less harassment and stigmatization for families that are "unconventional". Things

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[47] Titre V[bis] (art. 1475-1479) Belgian Code civil, introduced by *Loi sur la cohabitation légale* of November 23, 1998. See BECKER, DAS GESETZ ÜBER DIE GESETZLICHE LEBENSGEMEINSCHAFT IN BELGIEN, MITTEILUNGEN DER RHEINISCHEN NOTAR-KAMMER, 155 (2000); SENAEVE, GEREGISTREERD PARTNERSCHAP: PLEIDOOI VOOR DE INSTITUTIONALISERING VAN DE HOMOSEKSUELE TWEERELATIE (1998).

[48] See also for a general overview BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) and CALÒ, LE CONVIVENZE REGISTRATE IN EUROPA: VERSO UN SECONDO REGIME PATRIMONIALE DELLA FAMIGLIA (2000); LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE (BOELE-WOELKI & ANGELIKA FUCHS, EDS., 2003). For the legislative draft in Luxembourg see *Projet de loi relative aux effet légaux de certains partenariats, dossier parlementaire* No. 4946 of May 23, 2002.

[49] The Danish Registered Partnership Act (*Lov om registered partnerskab* No. 372) of June 7, 1989 was the first of its kind worldwide. See MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 61 (2002); Scherpe, *Zehn Jahre registrierte Partnerschaft in Dänemark*, DEUFAMR 32 (2000).

[50] *Laki rekisteröidystä parisuhteesta* No. 950/2001 of November 9, 2001. See MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 107 (2002).

[51] Titre XII (art. 515-1 till art. 515-8) French *Code civil*, introduced by *Loi No. 99-944 sur le pacte civil de solidarité* of November 15, 1999. See BOUTIN, LE « MARRIAGE » DES HOMOSEXUELS?: CUCS, PIC, PACS ET AUTRES PROJETS LEGISLATIFS (1998) and FERNANDEZ, LE LOUP ET LE CHIEN: UN NOUVEAU CONTRAT SOCIAl (1999).

[52] Barne- og familiedepartementet, The Norwegian Act on Registered Partnerships for Homosexual Couples (1993); Lødrup, *Registered Partnerships in Norway,* in: THE INTERNATIONAL SURVEY OF FAMILY LAW 1994, 387 (BAINHAM ED., 1996).; MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 80 (2002).

[53] See for further reference Dethloff, *Registrierte Partnerschaften in Europa*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 59, 61/62 (2004).

[54] MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 94 (2002).

[55] See Federal Act on registered partnerships of same-sex couples (*Bundesgesetzes über die registrierte Partnerschaft gleichgeschlechtlicher Paare*) at <http://www.ofj.admin.ch/themen/glgpaare/bot-d.pdf> (last visited November 16, 2004).

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have become "normal" that would have been considered "outrageous" only two or three decades before.

As far as marriage is concerned, the German Constitution creates an obstacle for gays and lesbians that is difficult to overcome. Art. 6 sec. 1 *Grundgesetz* (Basic Law, the German Constitution) sets forth the principle that marriage shall enjoy the special protection of the state. Marriage is protected as an institution (*Institutsgarantie*). In 1979 the *Bundesverfassungsgericht* defined marriage in this sense as "the union of a man and a woman".[56] Unless there is concrete evidence of a fundamental change in society as to the point that marriage requires a couple of different sex or unless the Constitution will be amended, this provision bars the introduction of same-sex marriages, because that would violate the "special" protection ordained by the Basic Law[57].

The legislator, however, is not entirely restricted by this decision. He is still free to grant same-sex couples some kind of legal recognition within the limits art. 6 sec. 1 GG sets forth.[58] Thus, in 2001 the Federal legislator passed the Act on the Termination of the Discrimination of Same-Sex Partnerships (LPartDisBG).[59] It entered into force in August 1, 2001. Embedded in art. 1 LPartDisBG is the Act on Same-Sex Partnerships (LPartG).[60] It was modelled after the former Marriage Act (*Ehegesetz*) that is now incorporated into the German Civil Code (BGB). According to the new law two persons of the same sex can enter into a partnership (§ 1 LPartG). Same-sex partners owe care and support to each other (§ 2 LPartG), they are free to chose a common name (§ 3 LPartG) and are bound to also financially support each other (§ 5 LPartG).[61] The partners can amend the statutory matrimonial property regime (§ 6 LPartG) by entering into a life-partnership contract (§ 7 LPartG). According to § 10

[56] *Bundesverfassungsgericht*, decision of February 28, 1980, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 53 at 245.

[57] Pauly, *Sperrwirkung des verfassungsrechtlichen Ehebegriffs*, NEUE JURISTISCHE WOCHENSCHRIFT 1955 (1997).

[58] *Bundesverfassungsgericht*, decision of April 3, 1990, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 82, 15.

[59] *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* (LPartDisBG), BGBl. 2001 I 266. As to the amendments and cancelled provision compared to the initial bill see BT-Drucks. 14/3751 and BT-Drucks 14/4545. In the English language see Levitt, *New Legislation in Germany Concerning Same-Sex Unions*, 7 ILSAJICL 469 (2001).

[60] *Gesetz über Eingetragene Lebenspartnerschaft* (*Lebenspartnerschaftgesetz - LPartG*).

[61] For more information see Dethloff, *Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut*, Neue Juristische Wochenschrift 2598, at 2600 et seq. (2001).

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LPartG one partner becomes the intestate heir of the deceased partner. The fact that one partner becomes a relative of the other partner (§ 11 LPartG) leads to further rights in other areas of law such as criminal procedure, civil procedure, and tax law. The partnership can be terminated upon application of one or both partners (§ 15 LPartG). Even after the termination of the partnership a partner – under certain conditions – is entitled to alimony (§ 16 LPartG).

Proceedings initiated by the governments of Bavaria and Saxony before the *Bundesverfassungsgericht* to have the Act declared unconstitutional failed,[62] and in fact achieved the opposite result. The plaintiff *Länder* had argued that allowing same-sex partnerships would damage the legal fundaments of marriage. The court, however, did not see any disadvantages for the institution of marriage since its legal foundation is not changed by the new law.[63] As a consequence, the legislature felt free to abolish some of the remaining distinctions between partnership and marriage. In June 2004 a draft for the amendment of the LPartG was introduced into the lower house of the German parliament (*Bundestag*) by the government in order to further improve the situation for homosexual registered partnerships.[64] The new law entered into force on January 1, 2005.[65] The situation of same-sex partnerships is now adapted to the law that exists for heterosexual couples in many important areas, such as marital property, alimony, the conditions for "divorce" (separation), pension rights adjustment and even step-child adoption.

2. United States

The change in the United States' legal landscape regarding the penalization of homosexuality is still young, which makes it difficult to draw conclusions as to its impact on the civil rights of gay couples. There is one decision, however, that can be at this early date considered a milestone. In November 2003, the Supreme Court of Massachusetts has decided in *Goodridge v. Department of Public Health*[66] that the ban for homosexual couples to marry violated the Massachusetts constitution.

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[62] See *Bundesverfassungsgericht*, decision of July 17, 2002, Neue Juristische Wochenschrift 2543 (2002). For a discussion of this decision see Braun, *Das Lebenspartnerschaftsgesetz auf dem Prüfstand – BVerfG, NJW 2002, 2543*, Neue Juristische Wochenschrift 21 (2003). As to the delayed enactment of implementing laws in Bavaria see *Bundesverfassungsgericht*, Neue Juristische Wochenschrift 3323 (2001).

[63] *Bundesverfassungsgericht*, decision of July 18, 2001, Neue Juristische Wochenschrift 2457 (2001).

[64] BT-Drucks. 15/3445. See Dethloff, *Adoption durch gleichgeschlechtliche Paare,* ZEITSCHRIFT FÜR RECHTSPOLITIK 195 (2004).

[65] See as to the new law Wellenhofer, *Das neue Recht für eingetragene Lebenspartnerschaften*, NEUE JURISTISCHE WOCHENSCHRIFT 705 (2005).

[66] 440 Mass. 309, 798 N.E.2d 941.

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There had been other states in the US before that granted rights to homosexual couples. For example,"civil unions" between partners of the same sex have been permissible in Vermont since 1999. The decision in *Baker v. State* of the Supreme Court of Vermont paved the way for the first civil union statute in the United States.[67] The Vermont Court ruled that the Vermont Constitution demands the same rights for all its civilians. That meant that the Vermont legislature had to take adequate measures to confer the benefits of marriage to same-sex couples.[68] Since the judgment was based on the state Constitution, it was not subject to revision by the U.S. Supreme Court.[69] In *Baehr v. Lewin,* the Hawaii Supreme Court held that banning same-sex marriages violated the equal protection guarantee of the Hawaii Constitution.[70] Later, however, the state legislature amended the Constitution in a way that extended the right to marriage to heterosexual couples only. In the decision *Hernandez v. Robles*[71] a New York trial court in February 2005 interpreted the New York constitution to permit same-sex marriage. And also in 2005 the General Assembly of Connecticut introduced the institution of Civil Unions, the first state in the United States to do so without pressure from a court decision[72]

The opponents of same-sex marriage, however, did not sit and wait either. Already in 1996 Congress passed the Defense of Marriage Act (DOMA)[73] setting limits to the full faith and credit clause by stating that no State shall be required to recognize any public act respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State. In addition in July 2004 the Marriage Protection Bill passed the House of Representatives. It intends to bar fed-

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[67] 170 Vt. 194; 744 A.2d 864 (1999), available at <http://www.sec.state.vt.us/otherprg/civilunions/civilunionlaw.html> (last visited May 25, 2005).

[68] See STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNION, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS 1 (2000).

[69] STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNION, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS 2 (2000).

[70] 74 Haw. 530; 852 P.2d 44 (1993).

[71] See at http://www.courts.state.ny.us/reporter/3dseries/2005/2005_25057.htm (last visited April 29, 2005).

[72] An Act Concerning Civil Unions, available at <http://www.cga.ct.gov/2005/fc/2005SB-00963-R000379-FC.htm> (last visited May 25, 2005). The statute will be effective October 1, 2005. For a general overview of developments in the US one year after *Goodridge* see Joanna Grossman, *The One-Year Anniversary of Same-Sex Marriage in the United States*, <http://writ.news.findlaw.com/grossman/20050517.html> (last visited May 25, 2005).

[73] 28 U.S.C. § 1738C.

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eral courts from forcing a state to recognize same-sex marriages from another state. President Bush has already moved for an amendment of the U.S. Constitution stating that marriage in the United States shall consist only of the union of a man and a woman. The amendment was proposed in the House of Representatives on September 23, 2004.[74] Similarly, attempts are underway in Massachusetts for a constitutional amendment banning same-sex marriages.

II. The right to adopt children

Often closely linked to the desire to marry is the desire to raise children. The capability of homosexual partners to raise children has frequently been raised as an issue, and even if so, if being raised by two fathers or two mothers would nonetheless cause harm to the child's development. It seems noteworthy that it is rarely discussed whether it is in the best interest of the child to be raised by heterosexual parents, if the girl or boy realizes at an early age that she or he is homosexual and lives in fear of his or her parents' reaction.

By far, more research on the first question is done in the United States than in Germany. Often voices in the legal discussion in Germany refer to US-American studies in support of their argumentation.[75] Studies demonstrate that being raised by homosexual parents is by no means negative for the child's development.[76] There were no indications that children raised by same-sex partners are later confronted with problems within their social and in particular intimate relationships. The only problems that emerged were related to the discrimination gays and lesbians still face, but surprisingly studies showed that even though children suffered to a certain degree under the discrimination their patents have to endure as soon as they are out, children suffer more in situations where the parents keep their homosexuality a secret.[77]

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[74] 108th Congress, 2d Session, H.J. RES. 106.

[75] So did Dethloff, *Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut*, NEUE JURISTISCHE WOCHENSCHRIFT 2598, at 2602 (2001).

[76] Compare Cooper, *Gay and Lesbian Families in the 21st Century*, 42 FAM. CT. REV. 178, at 184 et seq. (2004); Sielert, *Zwei-Väter- und Zwei-Mütter-Familien: Sorgerecht, Adoption, und artifizielle Insemination bei gleichgeschlechtlichen Elternteilen*, in: 51 GLEICHGESCHLECHTLICHE LEBENSGEMEINSCHAFTEN IN SOZIALETHISCHER PERSPEKTIVE: BEITRÄGE ZUR RECHTLICHEN REGELUNG PLURALER LEBENSFORMEN (KEIL & HASPEL, EDS., 2000). For further reference see also Dethloff, *Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut*, NEUE JURISTISCHE WOCHENSCHRIFT 2598, at 2602/2603 (2001).

[77] Sielert, *Zwei-Väter- und Zwei-Mütter-Familien: Sorgerecht, Adoption, und artifizielle Insemination bei gleichgeschlechtlichen Elternteilen*, in: 45 GLEICHGESCHLECHTLICHE LEBENSGEMEINSCHAFTEN IN SOZIALETHISCHER PERSPEKTIVE: BEITRÄGE ZUR RECHTLICHEN REGELUNG PLURALER LEBENSFORMEN (KEIL & HASPEL, EDS., 2000). For a more recent overview of psychological research with essentially the same result see author

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There has been much debate about how a perfect environment for a child should look. The conclusion drawn by Basile already in 1974 was: "The best interests of the child lie with a loving parent, not with a heterosexual parent or a homosexual parent."[78]

1. Germany

Even though the LPartG confers many of rights to same-sex partners that are also granted to married couples, it does not as yet allow the joint adoption of children. According to § 1741 subsec. 2 BGB (German Civil Code) this right is reserved to married couples. One partner of a same-sex partnership could adopt a child on his own, but his or her partner in such a case would not be entitled to adopt his or her stepchild.[79] The situation is different for biological children of one of the partners. To meet the practical needs that arise out of raising children in the same household, the LPartG created in § 9 a so called "small custody" for the other partner, parallel to § 1687b BGB in a case of a new spouse.[80] This solution has been criticized in legal doctrine as contrary to the best interest of the child, since even though the child and the other partner build up a factual parent-child relationship, the child would neither be entitled to child support nor be an intestate heir of his or her stepfather or stepmother[81]. The new law now provides for step-child adoption in its new Art. 9 para. 7.

2. United States

Questions of adoption as a part of family law are regulated by the states. Here the situation on this issue is quite diverse. Some states, like Florida, entirely deny ho-

Charlotte J. Patterson, LESBIAN AND GAY PARENTING (1995), available at http://www.apa.org/pi/parent.html (last visited May 25, 2005).

[78] R.A. Basile, *Lesbian Mothers I*, 2 *Women's Rights Law Reporter* (2, 18; cf. Sielert, *Zwei-Väter- und Zwei-Mütter-Familien: Sorgerecht, Adoption, und artifizielle Insemination bei gleichgeschlechtlichen Elternteilen*, in: 45 GLEICHGESCHLECHTLICHE LEBENSGEMEINSCHAFTEN IN SOZIALETHISCHER PERSPEKTIVE: BEITRÄGE ZUR RECHTLICHEN REGELUNG PLURALER LEBENSFORMEN (KEIL & HASPEL, EDS., 2000).

[79] Criticized by Dethloff, *Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut*, NEUE JURISTISCHE WOCHENSCHRIFT 2602 (2001).

[80] Dethloff, *Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut*, NEUE JURISTISCHE WOCHENSCHRIFT 2602 (2001).

[81] See Dethloff, *Die Eingetragene Lebenspartnerschaft – Ein neues familienrechtliches Institut*, NEUE JURISTISCHE WOCHENSCHRIFT 2602 (2001).

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mosexuals the right to adopt, be it as a single person or as a couple.[82] The Florida Supreme Court upheld the respective statute in the decision *Lofton v. Kearney*, where the plaintiff had raised three children as a foster father for years, but was denied adoption only on the ground that he was gay, even though he had taken such good care of the children that he won the "Outstanding Foster Parent Award".[83] Other states are more liberal and give homosexuals the right to adopt. This is the situation in New Jersey, New York, California, Connecticut, the District of Columbia, Illinois, Massachusetts, New Hampshire, Ohio, Rhode Island, Vermont and Washington.[84] In *re Jacob* a New York court approved the adoption by one partner of a same-sex couple of a biological child of the other partner.[85] A similar precedent was set by a New Jersey court in 1995.[86]

III. Comparison of the Reasoning regarding Family Rights for Same-Sex Couples

1. The traditional notion of marriage

As mentioned before, in 1979 the German *Bundesverfassungsgericht* (Federal Constitutional Court) defined marriage as "*the union of a man and a woman*".[87] This restriction was based on the traditional assumption that only marriage could be the foundation of a family.[88] However, in a decision in 1993 the *Bundesverfassungsgericht* has also expressed that the constitutional notion of marriage can be subject to change, although such a change could not yet be found in society at this time.[89] Scholars also point out that the significance of marriage has increasingly diminished since the second half of the 20th century, so it would even be strengthened if more people (gays and lesbians) were able to join.[90]

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[82] See Cooper, *Gay and Lesbian Families in the 21st Century*, 42 FAM. CT. REV. 178 (2004) with reference to Fla. Stat. ch. 63.042 (2002).

[83] 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

[84] See Cooper, *Gay and Lesbian Families in the 21st Century*, 42 FAM. CT. REV. 178, at 182 (2004).

[85] 86 N.Y.2d 651 (1995).

[86] In re: *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

[87] BVerfGE 10, 59 (at 66); 49, 286 (at 300); 53, 224 (at 245); 62, 323 (at 330).

[88] Pauly, *Sperrwirkung des verfassungsrechtlichen Ehebegriffs*, NEUE JURISTISCHE WOCHENSCHRIFT 1955 (1997).

[89] *Bundesverfassungsgericht*, decision of October 4, 1993, NEUE JURISTISCHE WOCHENSCHRIFT 3058 (1993).

[90] Hark, *Vor dem Gesetz*, in: BUBECK 60 (2000).

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2. Procreation and the role of children living with same-sex partners

Another argument against gay marriage holds that procreation is one of the purposes of marriage and that this purpose could not be reached by gay relationships. The *Bundesverfassungsgericht* did not further elaborate whether in its opinion marriage can be the only foundation of either conception or of raising children, or both. In *Goodridge,* the Massachusetts Supreme Court expressly rejected the idea that the primary purpose of marriage was procreation. The "sine qua non" for a marriage is rather mutual exclusive and permanent commitment of the marriage partners.[91] This, however, is exactly what most homosexual couples have in mind when they decide they want to marry. Also, many same-sex couples have children from former heterosexual relationships or, at least in some states in the US, were able to adopt children. As far as lesbian couples are concerned, they can even get pregnant by means of artificial insemination.

What both courts did not mention, although it also speaks against the idea that procreation should be considered the primary purpose of marriage, is the argument that in such a case only couples that could at least potentially have children were allowed to marry. This would also bar marriages of heterosexual couples in a later stage of life, when the woman has already gone through menopause. Also, the increasing number of children being born outside of marriages, both in Germany and the US, on the one hand shows that marriage is no conditio sine qua non for procreation. The increasing number of marriages that deliberately remain childless indicates that procreation is indeed not necessarily the first and primary purpose of a marriage. That means that already since the 1980s, marriage and procreation have become disconnected. At some point, the argument could be made that marriage served to protect children born out of wedlock from illegitimacy; such a protection would not be necessary for homosexual couples. Yet since such children are no longer treated differently, this argument for distinguishing no longer holds.

Also, there is no causal connection between granting the right to marriage to same-sex couples and the decrease of the number of births, which especially in Germany is posing a severe problem to the social system.[92] There is no doubt that an increase of population would be very desirable, but this situation cannot be improved by denying same-sex couples the right to marry. It seems quite unlikely that a homo-

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[91] *Goodridge* (see Fn. 66).

[92] As to the demographic situation and the role of art. 6 GG in this light see Di Fabio, *Der Schutz von Ehe und Familie: Verfassungsentscheidung für eine vitale Gesellschaft*, NEUE JURISTISCHE WOCHENSCHRIFT 993 (2003).

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sexual man or woman will procreate heterosexually because he or she has been denied the right to marry their same-sex partner.

III. Comparison with other discriminated groups

In *Goodridge* the Supreme Court of Massachusetts refers to the decisions of the California Supreme Court[93] in 1949 and the U.S. Supreme Court[94] in 1967 that declared the bar of interracial marriages unconstitutional. It stresses that the right to marry does not mean much if it does not include the right to marry the person of one's choice. The court points out that what is unconstitutional in the light of the discrimination of race cannot be constitutional in the light of sexual orientation. The only difference is that the understanding of the "invidious quality of the discrimination" has been further developed as to racial discrimination than as to sexual discrimination.[95] Interestingly, a similar argument based on Nazi ban on marriages between Jews and non-Jews and its abolition would have been possible in Germany but does not seem to have had much traction, or, put the other way round, was not necessary.

1. Comparative observations

The Massachusetts court takes a much more active role in the discussion then the German court. Where the German Constitutional Court[96] declares the pro-same-sex registered partnership bills constitutional the Massachusetts court declares the lack of pro-same-sex marriage legislation unconstitutional and instructs the legislator to take adequate measures to enable same-sex couples to marry.

Is American, or rather the Massachusetts society, more open to a change of same-sex rights than German society, which would explain the more progressive role of the Massachusetts court? Polls in Germany in the past few years showed that a significant majority of the German population consider that heterosexual and homosexual partnerships should be granted the exact same rights.[97] Polls undertaken

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[93] *Perez v. Sharp*, 32 Cal.2d 711 (1949).

[94] *Loving v. Virginia*, 388 U.S. 1 (1967).

[95] *Goodridge* (see Fn. 66).

[96] See supra (Fn. 58).

[97] Beck, *Die verfassungsrechtliche Begründung der Eingetragenen Lebenspartnerschaften*, NEUE JURISTISCHE WOCHENSCHRIFT 1894 (2001).

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in the United States by CNN, USA Today and Gallup, however, show that a majority of 61% said that gay marriages should not be recognized as valid by the law.[98]

Maybe the answer can rather be found in the different role courts play in civil law legal orders like Germany and in common law countries like the United States. In Germany it is seen as undesirable if courts take on the role of the legislature, since in civil law systems courts generally only apply and interpret the law rather then create it. For this reason the view of courts in Germany is turned to the past rather than foreseeing the will of society in the near future and preparing the path.[99] In the United States, on the other hand, courts have traditionally been at the forefront of legal development.

D. Conclusion

As far as the decriminalization of homosexuality is concerned there is no difference between Germany and the United States. Simple homosexual conduct is no offense any more in all states of the US as well as all of Germany. The situation is different, however, in regard to family rights. On the one hand in Germany, because of federal statutory law, citizens enjoy the same rights regardless of geography, but the rights that have been granted are not as far-reaching as the rights conferred by the Massachusetts court decision. On the other hand in the US, since family law falls into the power of the states, family rights for homosexuals can only be found in a few states. So here it is all or nothing. Either homosexual couples live in the boundaries of Massachusetts and have more rights than they would in Germany (right to enter into a registered partnership), or they live in other parts of the US and get nothing.

It also seems that in the United States, societal perspectives on these subjects are more polarized than in Germany: On the one hand, groups opposed to same-sex marriage seem to argue in a much more aggressive way than in Germany; on the other hand a court in the United States granted a blank check to gays and lesbians by declaring the bar for same-sex marriage unconstitutional.

What seems to be true for both Germany and the United States is that decriminalization alone is not enough to prepare for a change of society's attitude towards basic family rights for same-sex couples or, as Pauly puts it: "*Decriminalization does*

[98] See <http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling/index.html> (last visited November 16, 2004).

[99] Similar Zuck, *Die schwule Braut*, NEUE JURISTISCHE WOCHENSCHRIFT 176 (1995).

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not necessarily lead to privileges".[100] As far as the relationship between the decriminalization of homosexuality and the granting of family rights to homosexuals is concerned, it is striking that both are apparently less connected than it might seem – although the majority in *Lawrence v. Texas* emphatically denied the connection[101]. The court decisions and academic writing on family rights in Germany as well as in the United States make only little reference to the reasoning that led to the decriminalization of homosexuality. Since the circumstances and the argumentation for the decriminalization of homosexuality differed significantly from the ones for or against granting family rights to homosexuals, it is not possible to draw any conclusions from one to the other. Decriminalization is the point of departure, if not the *conditio sine qua non* for the right to marry and to adopt children, but as can be seen quite well in Germany, it can take a long time for family rights to follow decriminalization. The fact that in the US *Goodridge* was decided only five months after *Lawrence v. Texas* could be, in this regard, a mere coincidence – *Lawrence v. Texas* concerned a conservative, *Goodridge* a liberal state. At the same time, the court in *Goodridge* cites to *Lawrence* frequently enough to make Scalia's fears, and the hopes of civil rights advocates, of a natural development from decriminalization to equal treatment probable.

As to the United States, since criminal law as well as family law is predominantly state law, as far as family law is concerned even exclusively, some states could decide to allow same-sex marriage, whereas others before *Lawrence* could put homosexual intercourse under punishment. This was the situation in 1999, when Vermont had already established the civil union for same-sex couples whereas several other states still enforced their anti-sodomy laws.

As far as the stability of the legal situation is concerned, the freedom for homosexuals gained by the two US-American decisions *Lawrence* and *Goodridge* can be considered less stable than the situation in Germany. In the latter rights are granted by (federal) statutes: the legal ground is confirmed by democratic means. In the United States, however, the situation is weaker in two respects: First, the right to marry is territorially restricted to only one state, Massachusetts, and secondly, the decision is made by a court that can be overruled by either an amendment to the Massachusetts Constitution, or the U.S. Constitution. Indeed, the Governor of Massachusetts has already announced that he is working on a constitutional amendment to over-

[100] Pauly, *Sperrwirkung des verfassungsrechtlichen Ehebegriffs*, NEUE JURISTISCHE WOCHENSCHRIFT 1955 (1997).

[101] *Lawrence v. Texas*, supra n. 32, 578 (J. Kennedy), 585-6 (J. O'Connor), but see ibid. 604-5 (J. Scalia, diss.).

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turn *Goodridge*.[102] This, however, would have to be confirmed by the citizens of Massachusetts and according to the Massachusetts Congressman Barney Frank the vote on the amendment will not take place before 2006. One cannot overlook, however, that opposition to same-sex marriage and partnership in society and political leadership is much more aggressive and active in the US than it is in Germany. The results, achieved for same-sex couples in a few US states are in danger of being negated by the strongest constitutional means, an amendment of the U.S. Constitution, if two-thirds of both houses of Congress vote for their Constitution restricting freedom and thereby frustrating the inherent purpose of a Constitution: to ensure and extend basic rights to the people against intrusion and interference by their government. In Germany, on the other hand, homosexual partnership is now hardly a matter for controversy in society anymore. The gradual development and the creation of a "separate but equal" status have led to a stable situation with relatively wide-reaching rights for same-sex partners, though without full equality.

[102] See <http://www.cnn.com/2003/LAW/11/18/samesex.marriage.ruling/index.html> (last visited November 16, 2004).

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