

# Same-sex Marriage Legalization and the Stigmas of LGBT Co-parenting in Taiwan

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*In 2019, Taiwan became the first country in Asia to legalize same-sex marriage. Celebrated as a victory for global lesbian, gay, bisexual, and transgender (LGBT) rights, Taiwan's 2019 law privileges marriage and biological parent-child ties as the foundation for LGBT family rights and (co-)parental recognition. This article contributes to sociolegal debates about the benefits and limitations of marriage equality by asking how restrictive legal approaches to legitimating LGBT parenthood may harm LGBT families, with consequences both for families ostensibly protected under the new laws and for those denied newly bestowed rights and protections. Drawing from legal and ethnographic research on Taiwan's same-sex marriage law and the family formation strategies of Taiwanese LGBT parents, we interrogate how marriage equality interacts with related legal domains and prevailing stigmas of illegitimacy, adoption, and homosexuality in Taiwan. Encoded in, and reproduced through, the substance and implementation of law, these stigmas narrow the scope of legal rights and foster potentially discriminatory forms of recognition. The article shows how progressive laws may reduce LGBT family stigma for some, while also creating new stigma interactions that devalue diverse forms of LGBT parenthood.*

## INTRODUCTION

On May 24, 2017, Taiwan's Constitutional Court rendered a landmark decision that declared it unconstitutional to deny same-sex couples the freedom to

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## 2 LAW & SOCIAL INQUIRY

marry.<sup>1</sup> Two years later, facing the deadline imposed by the court decision, the legislature passed the Act for Implementation of J.Y. Interpretation no. 748 (748 Act), granting same-sex couples the right to register a marriage and allowing stepparent adoption of a same-sex spouse's biological child.<sup>2</sup> The 748 Act was celebrated widely as a "first in Asia" and a victory for global lesbian, gay, bisexual, and transgender (LGBT) rights (Haynes 2019; L. Kuo 2019). Yet the 748 Act is only one step in efforts to secure a broad range of LGBT rights in Taiwan that protect diverse family forms, intimate relationships, and gender and sexual identities.

The emphasis on marriage equality in LGBT-rights movements worldwide has sparked debates about the consequences of privileging the right to marry. Certainly, many LGBT couples have married once it became legally possible to do so in their jurisdictions, and they enjoy considerable benefits as a result. Nonetheless, some scholars and activists caution that legal marriage falls short of resolving all inequalities and forms of discrimination faced by LGBT couples and families (Bernstein and Taylor 2013; Murray 2016; Polikoff 2016). Some argue that the focus on LGBT marriage rights glorifies marriage and delegitimizes non marital relationships (Warner 1999; Duggan 2004; Strauss 2018), potentially deepening exclusions from core citizenship rights that are mediated through marriage and intersecting structural inequalities (Patton-Imani 2020). Others point to non-US legal contexts that locate dignity not in the marital institution itself but, rather, in the "autonomy to choose whether to marry," legally recognizing multiple intimate relationship options deserving of respect (Lau 2017, 2618; Cahn and Carbone 2019). Looking beyond marriage to parental rights, legal scholars such as Nancy Polikoff (2016, 141) caution against the "misleading focus on marriage equality as the way to recognize a child's two parents." Douglas NeJaime (2016, 1265; emphasis in original), by contrast, contends that marriage equality potentially destabilizes family norms that privilege biological, hetero-gendered parenting and that thereby "constrict familial possibilities for *all families*, both in and out of marriage" (see also Joslin 2016, 2018). NeJaime's (2018, 34) more sanguine assessment of marriage equality's transformative effects, which he later termed "transformation through assimilation," rests on the US legal context where same-sex parental rights preceded marital rights and where some states have recognized intentional and functional parenthood principles in both marital and non marital relationships.

This article contributes to sociolegal debates about the benefits and limitations of marriage equality by focusing on the Taiwan case where legal marriage constitutes the foundation for LGBT family rights and (co-)parental recognition. We ask how narrow legal approaches to legitimating LGBT parenthood that privilege marital status and biological parenthood may harm LGBT families, with consequences both for families ostensibly protected under the new laws and for those excluded from newly bestowed rights and protections. We argue that stigma is a key mechanism for producing such harms. Stigmatization functions subtly and explicitly to delegitimize non-normative intimacies and families. Both encoded in, and reproduced through, the substance and implementation of law, stigma narrows how law grants rights and recognition,

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1. 司法院釋字第 748 號 (Judicial Yuan Interpretation no. 748) (2017) (Taiwan).

2. 司法院釋字第七四八號解釋施行法 (Act for Implementation of J.Y. Interpretation no. 748), promulgated May 22, 2019, effective May 24, 2019 (Taiwan) (748 Act).

and it limits the form that such rights take. Inspired by developments in theories of stigma since Erving Goffman's (1963) classic study, we examine how law and stigma interact to generate both symbolic and substantive harms that devalue marked groups (Dowd 1997) or exclude them altogether from the law's protections (Patton-Imani 2020). Without denying the power of stigma to foster social prejudice and internalized shame, we nonetheless emphasize stigma's structural origins and effects (Fiske 1998; Link and Phelan 2001), drawing attention to how hierarchies of sexual and gendered legitimacy permeate legal categories, modes of recognition, and implementation mechanisms, even in marriage equality laws designed to redress discrimination. In short, stigmas against non-normative families are enacted and reproduced through law in sometimes unexpected ways (Abrams 2015; Robertson 2015). Although legal changes may enable some LGBT families to resist stigma, such laws may simultaneously stigmatize in new ways that harm those whose family-formation strategies and identities remain unprotected by heteronormative legal frameworks.

Taiwan's legal system is deeply heteronormative in orientation, entrenched in soci-legal principles that privilege marriage, "natural" biological reproduction, and patrilineal descent. Given this prevailing legal orientation, we examine the 748 Act's consequences for diverse ways of becoming or being recognized as a (co-)parent. We argue that the Act, despite its overarching aim of redressing inequality, interacts with related domains of family, adoption, and household registration law to reproduce existing stigmas against non-normative families and create new forms of stigmatization for LGBT parents. Closely attuned to the complex interactions among different legal domains and types of stigma, our analysis interrogates three interacting stigmas prevalent in Taiwan: the stigma of non-marital birth (illegitimacy), non-biological parenthood (adoption), and non-heterosexual identities and intimacies (homosexuality). We document how the stigmas of illegitimacy and adoption emerged first in cases of heterosexual parentage and adoption, how they became associated with the stigma of homosexuality for LGBT parents unable or unwilling to "cover" their sexuality (Yoshino 2006), and how the 748 Act simultaneously reaffirms and transforms long-standing stigmatization against non-normative parenthood. For instance, although many families benefit from the new legal entitlement to stepparent adoption, parents may simultaneously experience the demand that they marry first, adopt their "own child," and agree to a parental fitness evaluation as deeply stigmatizing. Others face discriminatory exclusions due to the provisions of the 748 Act itself, its complex interactions with other laws, and how these legal interactions produce and entrench stigmas that LGBT parents themselves sometimes reaffirm as they seek new legal protections. In sum, we show how ostensibly progressive laws may reduce LGBT family stigma for some, while also producing stigmatizing effects that devalue LGBT parenthood and narrow the scope of legally recognizable family formation strategies.

## A Note on Legal Context and Methodology

Unlike many countries in North America and Europe, Taiwan offered no options for LGBT co-parental rights before the 748 Act went into effect. Second-parent adoption has never been a legal option in Taiwan, and both stepparent adoption and joint

#### 4 LAW & SOCIAL INQUIRY

adoption of a nonrelative child were denied to LGBT couples because the adopting parents had to be legally married. Although a LGBT couple might jointly care for their children, only the birth/biological parent or single adoptive parent enjoyed legal parental status. The co-parent could not make medical, financial, or educational decisions on the child's behalf or claim the child as a dependent for tax or other purposes. Nor did the co-parent have any claim to the child should the legal parent deny access, become incapacitated, or die.

The substantive exclusions faced by LGBT co-parent families were materialized through the administrative legacies of Japanese colonialism and postwar authoritarian rule in Taiwan: the household registration system and national identification (ID) card. Together, these documentation systems have served as the basis for citizenship inclusion and the mechanism for establishing legal spousal or parental status (a birth certificate is required for registering a birth in the household registry, but it does not officially establish legal parentage). Every citizen must be part of a household registry, and every citizen aged fourteen or older is required to obtain a national ID card that includes personal information such as gender, parentage, marital status, spouse's name, and a unique ID number. Prior to the 748 Act, Taiwan did not acknowledge citizens' same-sex marriages performed abroad, nor could such couples register a marriage in Taiwan. Taiwan also did not recognize two same-sex parents listed on a birth certificate of a child born abroad either to a surrogate or a lesbian mother. Only the birth mother, biological father, or adoptive parent was able to register the child in the household registry as a single parent whose same-sex couple relationship or co-parenting status was unintelligible to the registry's heteronormative categories. Put simply, the household registry channeled full citizenship rights exclusively through heterosexual marriage and parental status.

The 748 Act made a limited intervention in this restrictive legal landscape by granting some same-sex couples the right to register a marriage and by creating access to legal co-parentage only for couples that first married and then pursued stepparent adoption of one spouse's biological child. It denied marriage rights to transnational same-sex couples in which the non-Taiwanese partner hailed from a country that did not recognize same-sex marriage. It also banned joint adoption of a nonrelative child by married same-sex couples, making Taiwan one of only two jurisdictions worldwide to legislate such an exclusion (Lau 2020). In short, the 748 Act denied shared parentage to couples unable to marry or without a biological child, and it limited the mechanism for pursuing co-parental rights to stepparent adoption, thereby likening a same-sex union to a subsequent heterosexual marriage that follows upon divorce or death of a previous spouse.

Despite privileging biological children in its narrow recognition of co-parental rights, the 748 Act made no change to the associated laws that restrict LGBT child-bearing in the first place. For instance, Taiwan's 2007 Assisted Reproduction Act limits assisted reproductive technology (ART) access exclusively to infertile, opposite-sex married couples.<sup>3</sup> To date, lesbians and gay men who desire biological children must travel abroad for costly ART treatment or pursue legally unprotected arrangements

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3. 人工生殖法 (Assisted Reproduction Act), promulgated and effective March 21, 2007, amended January 3, 2018 (Taiwan).

at home, such as donor insemination, contractual marriages, or informal surrogacy (surrogacy remains illegal in Taiwan). Lesbian mothers have utilized ART services in Thailand, Cambodia, Japan, the United States, Canada, and Australia, with destinations shifting in response to changing ART access regulations and costs. Gay fathers who seek to conceive through ART face the considerable expense of egg donation and surrogacy, coupled with restrictive laws that limit potential ART destinations. The legal protections for surrogacy in the United States enhance its popularity among those who can afford the high costs, with Thailand and Russia providing cheaper, but legally insecure, options. Overall, the resources required to engage successfully in international ART use place it out of reach for many. By ignoring the exclusionary consequences of unequal ART access in Taiwan, the 748 Act enhanced LGBT parenthood stigma through differential treatment in law (Chen 2019b).

Our analysis builds collaboratively on our respective research concerning Taiwan's legalization of same-sex marriage (Chen) and the family formation and recognition strategies of Taiwanese LGBT parents (Friedman). Throughout the article, we also refer to LGBT parents as gay and lesbian or *tongzhi* parents, the latter term of identification widely used by Chinese-speaking, LGBT communities. In addition to reviewing existing laws, adoption evaluation policies, and court adoption decisions involving heterosexual and LGBT families,<sup>4</sup> we derive our findings from participant observation and ethnographic interviews with LGBT parents, LGBT rights activists, social workers, and government officials. Our discussion of the 748 Act's consequences draws primarily from taped interviews with sixty-three LGBT-parent families conducted from July 2017 to July 2020, representing gay fathers (one-third) and lesbian mothers (two-thirds) who became parents before the Constitutional Court decision, in the intervening period before the Act was passed, and after the Act went into effect. During the latter phase, we collected court documents from eleven same-sex stepparent adoption cases, all of which were ultimately approved, two following appeal (as of March 2022, 111 children had been adopted through same-sex stepparent adoption).<sup>5</sup> Given that these adoption documents are not publicly available and are shared only with the petitioners themselves (who agreed to share them with us), they provide valuable insights into how adoption gatekeepers assessed LGBT parenthood in this new legal domain.

Our interviewees ranged in age from their twenties to fifties, with the majority in their thirties and forties. They clustered primarily in western Taiwan's urban and peri-urban areas, in communities they characterized along a spectrum from socially liberal to conservative. They hailed from a broad swath of Taiwan's majority Han society (only a few were Indigenous), with rural and urban family backgrounds that varied by class, geographic locale, ethnic affiliation, and religious orientation. The vast majority had one to two children conceived through intentional childbearing that involved diverse ART strategies, self-insemination, or contractual marriage and reproductive arrangements. The remainder had children in prior heterosexual unions or adopted a nonrelative child. Many resided in two-parent, nuclear households, but others were single parents, had flexible living situations with same-sex partners, or lived

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4. We reviewed adoption decisions available in the Judicial Yuan legal database and LawBank, <https://law.judicial.gov.tw/FJUD/default.aspx>; <https://fyjud.lawbank.com.tw/index.aspx>.

5. Statistics on file with the authors.

with extended kin or hired caregivers who assisted with childcare. Interviews lasted from one to three hours and took place in homes and public spaces (parks, coffee shops, offices, and restaurants) across Taiwan. Repeat interviews and participant observation were conducted with a subset of interviewees. The article integrates insights from ethnographic and legal sources with sociolegal, anthropological, gender, and sexuality scholarship to illuminate how the specific provisions of the 748 Act interact with related legal domains to both reduce and reproduce existing stigmas, generating various forms of recognition, non-recognition, and misrecognition that may create symbolic and substantive harms for LGBT families.

## THE STIGMAS OF UNMARRIED AND “UNNATURAL” PARENTING BEFORE THE 748 ACT

In Taiwan, parenting outside of marriage or through adoption is widely seen as a stigmatized practice whose harms beset both heterosexual and tongzhi parents. Laws and courts have often remedied these stigmas for heterosexual parents by creating a privileged family unit with two, opposite-sex married parents. For LGBT parents before the 748 Act, however, the double stigma of illegitimacy and adoption combined with the stigma of homosexuality to deny their family legitimacy, devaluing their family status and blocking access to the rights and privileges enjoyed by “normative” families. Understanding how sexuality mediated the interacting stigmas of illegitimacy and adoption before the 748 Act will help us understand the Act’s contradictory effects on tongzhi couples’ struggles for legal co-parentage.

The law of legitimacy prevails in Taiwan by dividing children into two unequally valued groups according to their birth mother’s relationship with their biological father. The law affirms that procreation “should” take place within the institution of marriage, and it thereby stigmatizes non-marital children by labeling them as “illegitimate” or “non-marital.” Taiwanese law explicitly identifies illegitimacy with fatherlessness, enabling men to escape the costs of reproducing outside of marriage and creating both symbolic and material harms for the child: an illegitimate child is deemed socially inferior and is legally denied support and inheritance from the biological father. The stigmatization of illegitimacy is enhanced by the comparative “abnormality” of unwed motherhood and fatherlessness. Taiwan’s non-marital birth rate increased only slightly from 2.07 percent in 1990 to 3.83 percent in 2020, an incidence that reflects persistent social preferences for childbearing within marriage (Cheng and Yang 2021).<sup>6</sup>

Although illegitimacy is defined by family law, its stigma is enacted through interactions between family laws and Taiwan’s household registration law. An “illegitimate” child’s fatherlessness is materialized in the household registry and on the national identity card. Whereas access to information documented in the registry is limited to registry members or a legal party of concern, the information on the national ID is revealed on a daily basis as citizens use it to establish their identity for a wide range of mundane and official purposes. Illegitimacy manifests through the ID entry for a father’s name, which,

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6. Department of Household Registration, Ministry of the Interior, “Population Statistics Data,” Accessed January 7, 2021, <https://www.ris.gov.tw/app/portal/346>.

prior to 2008, publicly circulated the shameful stigma of illegitimacy through the characters “father unknown.” Although the term has since been removed from official documents, the stigma of illegitimacy continues to be reenacted in daily life through the simple dash that now occupies the father’s name slot on the ID.<sup>7</sup>

Heterosexual parents have two options to resolve or conceal the stigma of a non-marital birth. The first option is through the birth mother’s post-birth marriage to the biological father or to a man she claims is the biological father. The second option is paternal acknowledgment without marriage. A birth father can “legitimate” a child without marrying the mother by voluntarily acknowledging the child or by *de facto* acknowledgment through child support. A single mother can remain unmarried and legitimate her child through forcing the birth father to acknowledge the child, should she be able to prove paternity. Given the heteronormative orientation of Taiwanese society and the prevailing stigmatization of non-marital birth, family members and friends in some instances have agreed to serve as a fake husband or father to protect a child from the harm of illegitimacy, despite the risk of criminal prosecution. Taiwanese courts, like courts in the United States (Maldonado 2013), have acknowledged “illegitimacy-as-harm” by finding that fatherlessness damages both the mother’s and the child’s reputations. In one case, the court permitted paternity establishment even after the putative father’s death to remedy the child’s many years of suffering.<sup>8</sup>

Adoption provides another resource for heterosexual parents seeking to resolve the stigma of illegitimacy. Yet it bears its own stigma due to its association with infertility, abandonment, divorce, and abuse. Although Taiwanese law no longer distinguishes between an adoptive child and a “natural” child in most circumstances, societal norms devalue adoptive relationships as less authentic and “not natural,” a second-best alternative to create families (Chen and Chen 2017; see also March 1995). The social stigmatization of adoption is enhanced by the low overall adoption rate in Taiwan and the very small number of children available to adopt.

Taiwanese law permits three types of adoption to establish a parental relationship: adoption by a genealogically close blood relative, stepparent adoption, and adoption by a single person or married heterosexual couple who are not the child’s blood relatives. Stepparent and close-relative adoption constitute roughly 80 percent of all adoptions in Taiwan, with stepparent adoption being the most common category (Li, Qiu, and Bai 2017, 279). Joint adoption of a nonrelative child is an entitlement reserved and mandated for married heterosexual couples only.<sup>9</sup> Consequently, a married person cannot adopt as a single person, and two unmarried persons cannot jointly adopt a child. Understood this way, adoption law resembles the law of legitimacy by privileging heterosexual marriage and excluding tongzhi couples and all unmarried couples from legitimating a two-parent adoptive family.

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7. 國民身分證及戶口名簿格式內容製發相片影像檔建置管理辦法 (Regulations for Format, Content, Issuance and Management of Photo Files of National Identification Card and Household Certificate), promulgated and effective December 24, 2008, amended December 25, 2020 (Taiwan), subpara. 8, para. 1, Art. 9.

8. 新北地方法院103家調裁字第10號民事裁定 (New Taipei District Court, Civil Division), 103 Jia Diao Cai Zi no. 10 (2014) (Taiwan).

9. 民法 (Civil Code), promulgated December 26, 1930, effective in Taiwan October 25, 1945, amended June 20, 2021 (Taiwan), para 1, Arts. 1074, 1075.

Taiwan's current adoption law requires court intervention and designated roles for adoption agencies and social workers to establish a legal adoptive relationship. A minor's adoption must be decided according to the "best interests of the child," a vague principle shot through with gendered ideologies that endorse heteronormative family roles and responsibilities (Fineman 1995; Richman 2009; Scott and Emery 2014; Chen 2016). Adoption gatekeepers may apply this principle in ways that stigmatize parents as "unfit," an outcome that potentially besets both heterosexual and LGBT adoptive parents (Richman 2009, 77). But the two groups face different challenges during the adoption process given its orientation toward ensuring an "ideal" heterosexual co-parenthood.

Two evaluation metrics for parental fitness in heterosexual stepparent adoptions are relevant for comparison with LGBT stepparent adoption in the post-748 Act era. Social workers use marital duration to assess the stability of the couple's relationship and the likelihood that they will provide a lasting family environment for the child.<sup>10</sup> Although social workers generally rely on a baseline of two years for this evaluation metric, some courts have approved a shorter marital duration when coupled with premarital cohabitation or a positive assessment of the child's interaction with the adopting parent. Statistics on approved heterosexual stepparent adoption cases from 2012–17 confirm considerable variation in how this metric is applied: 18.5 percent of couples had been married for less than six months at the time of adoption, 19.6 percent for between six months and one year, 24.2 percent for one to three years, and 15.4 percent for three to six years.<sup>11</sup> Thus, despite social workers' emphasis on marital stability, the courts do not appear to set a high bar when it comes to heterosexual couples petitioning for stepparent adoption.

A second parental fitness criterion is the adoptive parents' willingness to disclose the adoption given a child's constitutional right to know their familial origins. The working assumption behind the disclosure assessment is that the adoption will otherwise be kept secret, a not unreasonable position given Taiwanese preference for closed adoption and heterosexual stepparents' general unwillingness to disclose the adoption (Li, Qiu, and Bai 2017). Despite disclosure expectations, courts have approved heterosexual stepparent adoption in cases where the adoptive parent was reluctant or even refused to disclose the child's origins but had established a stable relationship with the child, arguing that approving the adoption was still in the child's best interest. In other cases, the court approved the adoption but ordered the adopter to receive education on adoption disclosure and to prepare a plan. These outcomes suggest that this parental fitness metric is not a determining factor for courts when approving an adoption that will legitimate the status quo by providing the child with a marital heterosexual family. Educating parents on the merits of disclosure is considered more desirable than rejecting the adoption petition altogether.

For heterosexual parents, therefore, stepparent adoption enables them to cure the stigma of illegitimacy and potentially to conceal the stigma of adoption. Again, the information about one's parents on personal legal documents contributes to activating or avoiding stigma. In the past, adoption was noted on one's household registration

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10. Interview with author, June 10, 2020.

11. Statistics on file with authors.

and national ID card, and an adoptive parent was identified by adding the character “adoptive” to the character for mother or father. Only in 1995 did the government permit heterosexual adoptive parents to conceal the adoptive relationship in their household registry by requesting removal of the “adoptive” character, an option that has since been made automatic with legal amendments that bar its inclusion in the household registry and on the child’s national ID card. By concealing the adoptive relationship in personal legal documents, the amended law aided heterosexual parents who wished to pass as “natural” by covering the adoption and enabling an adopted child to pass as a natural child.

In the pre-748 Act era, tongzhi co-parents did not face the same stigma of adoption because they were denied access to legal co-parentage through either joint or stepparent adoption. They could only adopt as a single person, ostensibly without regard to sexual orientation. A few successfully navigated the legal availability of single adoption without concealing their identity as transgender or tongzhi. As early as 2001, a Taiwan court approved a trans woman’s adoption petition, and, in 2014, an openly lesbian woman successfully petitioned for adoption (Wang, Hsu, and Ilu 2017, 291–92). Yet the determination of the best interests of the child could easily discriminate against single adopters, and single stigma could also stand in for the stigmatization of homosexuality or non-normative gender, conflating marital status and sexual orientation discrimination to create significant barriers for tongzhi seeking to adopt.

An iconic adoption case in 2007 proved how high these adoption barriers were given Taiwan’s heteronormative sociolegal environment. A woman in a lesbian relationship petitioned to adopt her sister’s child as a single adopter, but the court rejected her petition on the basis that the child would be teased, bullied, and discriminated against as a result of the adoptive mother’s sexual orientation (otherwise known as the stigmatization argument).<sup>12</sup> As Helen Reece (1996, 495–96) forcefully argues in her analysis of early British LGBT adoption cases, the stigmatization argument is flawed because it denies societal responsibility for creating a discriminatory environment and instead puts the burden of redressing potential bullying on the parent(s), thus justifying the court’s adoption denial. When lesbian mothers and gay fathers in the United States began to seek child custody through the courts in the late twentieth century, they rejected the logic of this argument, drawing on the US Supreme Court’s 1984 decision in *Palmore v. Sidoti* to argue, in some cases successfully, that social prejudice should play no role in custody decisions (Cain 2000).<sup>13</sup> Despite strong criticism of the stigmatization argument from Taiwan’s LGBT community and feminist legal scholars (Chen 2010; S. Kuo 2010; Lin 2013), it became a recognized legal basis for rejecting subsequent LGBT co-parent adoption petitions (Jin and He 2015).

In a series of pre-748 Act test cases in the mid-2010s, lesbian co-mothers who had conceived via ART abroad or donor insemination in Taiwan applied for stepparent adoption as *de facto* spouses. Although, as Nancy Polikoff (2009, 205–6) argues, stepparent adoption is a poor fit for lesbian co-mothers who “plan for a child together,”

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12. 桃園地方法院96養聲字第81號裁定 (Taoyuan District Court, Civil Division), 96 Yang Sheng Zi no. 81 (2007).

13. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

these Taiwanese couples were willing to accept this poor fit to legitimate their families. Court after court rejected their claims, however, invoking both the stigmatization argument and judicial restraint (even after JY 748 was announced).<sup>14</sup> The courts argued that cohabiting tongzhi couples were treated the same as unmarried cohabiting heterosexual couples, ultimately finding that marriage, not heterosexuality, justified stepparent adoption.

Once again, the stigmatization argument worked against tongzhi parents even when they were willing to present themselves as *de facto* husband and wife for the court. Simply put, adoption as a cure to legitimate parenthood was denied for tongzhi co-parents but allowed for married heterosexual couples to resolve the stigma of illegitimacy. This differential treatment suggests that the stigma of homosexuality was so dominating that courts chose to ignore the stigma of illegitimacy or treat it as irrelevant to tongzhi families. From the courts' point of view, adoption could cure the stigma of illegitimacy if it produced married, opposite-sex parents, but not if it resulted in two parents of the same sex.

## THE 748 ACT AS STIGMA CURE AND CATALYST

The mixed record of tongzhi parents' efforts to legitimate their families through adoption in the pre-748 Act era supports Kimberly Richman's (2009) thesis that the indeterminacy of family law is a double-edged sword that can be used to pursue progressive goals or enforce bias against LGBT parents. The 748 Act advanced equality by granting legal recognition to some same-sex couples and family units. By creating a narrow path to legal co-parenting rights for LGBT couples, however, the Act established three key differences between LGBT and heterosexual parents: the requirement that marriage precede co-parentage recognition, the limiting of legal co-parentage only to couples with a biological child, and the designation of stepparent adoption as the sole mechanism for establishing co-parental rights. This section addresses each of these differences to examine how they generate discriminatory consequences through renewing intersecting stigmas surrounding illegitimacy, adoption, and homosexuality. Although we acknowledge that the 748 Act resolves the challenges faced by some LGBT families, we address new symbolic and substantive harms experienced by those covered by, and excluded from, the law's limited protections.

### The New Illegitimacy

By making same-sex marriage registration the precondition for legal co-parentage, the 748 Act creates a "new illegitimacy" for LGBT parents by privileging valued marital choices and marginalizing non-marital intimate bonds and family structures

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14. 士林地方法院103司養聲字第126號 (Shilin District Court, Civil Division), 103 Si Sheng Yang Zi no. 126 (2014); 士林地方法院104年家聲抗字第31號 (Shilin District Court, Civil Division), 104 Jia Sheng Kang Zi no. 31 (2015); 臺北地方法院106年家聲抗字第13 號民事裁定 (Taipei District Court, Civil Division), 106 Jia Sheng Kang Zi no. 13 (2017).

(Grossman 2012; Murray 2012; Polikoff 2012).<sup>15</sup> In Taiwan, moreover, the marital demand has also revitalized the stigma of homosexuality by outing tongzhi parents socially and bureaucratically through the inclusion of a same-gender spouse's name on their identification documents. When combined with the retention of the qualifying character "adoptive" for tongzhi stepparents only, this documentary treatment affirms how the new illegitimacy in Taiwan is defined by the stigma of homosexuality more than the racialized structural inequalities relevant to analyses of renewed illegitimacy stigmas in the United States: marriage remains "elusive or undesirable for many" (Murray 2012, 436) through interactions between the 748 Act and Taiwan's household registration laws and identification policies. Tongzhi parents must weigh the outing of their sexuality against the demand that they "opt in" to same-sex marriage registration before becoming eligible to petition for stepparent adoption. Legitimation as a family comes at a price—no state regulation/intervention, no recognition—but state recognition invites anew the stigma of homosexuality.

As discussed above, non-marital childbearing carries a broad social stigma across Taiwanese society. LGBT parents may themselves internalize the stigma of illegitimacy or may fear its anticipated effects on extended family members or in social or bureaucratic encounters. Many tongzhi parents described how their own parents expressed opposition to their childbearing plans because they were not married, ignoring the presence of their same-sex partner. The gendered dimensions of this opposition functioned differently for gay fathers and lesbian mothers due to societal anxieties about unmarried mothers and familial expectations that sons continue the patrilineal family line—in some instances, regardless of how they did so (Brainer 2019). Gay fathers faced concerns about the child's "lack" of a mother and a man's ability to perform childcare that is traditionally gendered female (Boyer 2007, 230); motherlessness in these cases functioned less as a marker of illegitimacy and more as a potential threat to the child's well-being.<sup>16</sup> Intending mothers, on the other hand, experienced moral and social condemnation associated with unmarried pregnancy and their own parents' anxieties about how a child's fatherlessness would harm the family's reputation through the stain of illegitimacy.

For some tongzhi parents, family members' resistance to their childbearing plans reflects how the stigma of illegitimacy interacts with the stigma attached to homosexuality, creating exclusion from familial support networks that is enhanced by legal discrimination. A'mei, a birth mother who became pregnant before the 748 Act went into effect, related how her father had firmly opposed her plan to have a child together with her girlfriend due to her unmarried status, itself a consequence of the unrecognized standing of LGBT intimate relationships. Father-daughter relations grew so strained that A'mei did not visit her parents throughout her entire pregnancy and felt she could not count on their support when she gave birth. Thinking back on that period, A'mei admitted that she was lucky because the 748 Act went into effect two months before her daughter was born, and she married her partner immediately. "Otherwise, I would have

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15. There were last-ditch efforts before the 748 Act was passed to create alternative forms of legal co-parentage distinct from marriage, such as parent-child registration for a same-sex partner, but these local political initiatives ultimately failed at the central government level. Falu tzu no. 10803503890 letter, Ministry of Justice, April 2, 2019.

16. Interview with author, February 27, 2020.

been on my own [at the birth], with no one to sign documents for me or anything else.” A’mei’s father only softened his opposition and visited her once his granddaughter had entered the world.<sup>17</sup> Although A’mei’s experience attests to the legal and social benefits of same-sex marriage, it also affirms the significance of the child’s birth for prompting greater acceptance from senior generations.

Tongzhi parents who themselves endorse the stigma of illegitimacy may view the marital requirement as an additional tool to protect their children from societal discrimination. Some expecting couples in the pre-748 Act era held unofficial wedding ceremonies prior to a child’s birth to affirm their status as parents prepared to create a family.<sup>18</sup> The stigmatizing consequences of illegitimacy also appeared in some post-Act stepparent adoption petitions—for instance, two lesbian co-mother couples specifically wrote that stepparent adoption would protect their child from the stigma of “father unknown.” These couples used the 748 Act to legitimate their family by curing the stigma of fatherlessness without the presence of a father, revising the illegitimacy argument so that tongzhi couples could benefit from the destigmatizing effect of legal marriage enjoyed by their heterosexual counterparts. In so doing, however, these couples reaffirmed the concept of “illegitimacy as injury,” deploying a rights-seeking strategy that Polikoff (2012, 722) critiques as a “win backwards” for reviving “the discredited distinction between ‘legitimate’ and ‘illegitimate’ children.”

The “illegitimacy as injury” argument was widely used in the US movement for same-sex marriage and parental rights and was acknowledged in *Obergefell v. Hodges*, despite criticism from feminist legal scholars (Murray 2012; Polikoff 2012, 2016).<sup>19</sup> Yet it was not as prominent in Taiwan’s marriage equality movement, evidence of divisions within the tongzhi community over prioritizing legal marriage in rights struggles (Liu 2015; Lee 2017; Chen 2019a, 2019b; Ho 2019; Kuan 2019). Despite recognizing the social and material value of marriage and intergenerational kinship in Taiwanese society (Chao 2005; Hu 2017; Brainer 2019), tongzhi remain divided about whether marriage should precede parenting and legal co-parental rights. A 2016 survey found that roughly half of LGBT interviewees believed legal same-sex marriage should come before co-parental adoption, while one-third objected to requiring marriage as the first step (Child Welfare League Foundation 2017, 23). This diversity of perspectives is reflected in the current marital landscape, where some LGBT parents resist or delay marrying, despite their desire for both partners to enjoy legal recognition as parents. Our interviews suggest that legal co-motherhood is currently more common than legal co-fatherhood, in part a reflection of a higher incidence of co-parenting among lesbian couples and in part, as discussed below, a consequence of the social and professional challenges faced by gay men who openly disclose their sexual orientation. This finding is also consistent with the fact that lesbian marriages have significantly outnumbered gay marriages since the 748 Act’s enactment in 2019.<sup>20</sup>

17. Interview with author, July 25, 2020. All personal names used in the article are pseudonyms.

18. Interviews with author, January 21, 2018; March 1, 2020.

19. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

20. Ministry of the Interior, “Number of Same-sex Marriages and Divorces,” last modified January 20, 2022, [https://www.gender ey.gov.tw/gecodb/Stat\\_Statistics\\_DetailData.aspx?sn=c6qMv7W9Ye0PiAP9dVE8gA%40%40&d=m9ww9odNZAz2Rc5Ooj%24wIQ%40%40](https://www.gender ey.gov.tw/gecodb/Stat_Statistics_DetailData.aspx?sn=c6qMv7W9Ye0PiAP9dVE8gA%40%40&d=m9ww9odNZAz2Rc5Ooj%24wIQ%40%40).

Tingting, a well-educated, professional lesbian mother from central Taiwan, criticized the tongzhi community for upholding traditional norms that bonded childbearing to marriage. Yet, over the course of two in-depth interviews, Tingting gradually revealed her own ambivalent history of marriage. After Tingting became pregnant through reciprocal in-vitro fertilization (IVF) in Japan, she and her partner traveled to the United States in 2018 to marry and give birth to their son, a decision motivated partly by their desire for his birth certificate to include both of their names. The birth certificate was merely a symbolic statement of their shared parentage, however, for it, like their US marriage, lacked legal validity in Taiwan at the time. Although passage of the 748 Act allowed them finally to register their marriage in Taiwan, the couple had yet to do so even two years later, an outcome that Tingting attributed to mounting tensions in their couple relationship and opposition from her own parents. These challenges had deepened Tingting's ambivalence about the value of marriage, despite her strong commitment to LGBT family rights and her partner's parental recognition. Nonetheless, she acknowledged the stigma of her unmarried mother status, having been labeled as a "high risk family" by her local public health bureau because, on paper, she appeared to be a single mother and had failed to follow a regular immunization schedule for her toddler.<sup>21</sup>

Tingting's example represents a couple with choices, in that she and her partner could marry and embark on the stepparent adoption process if they so chose. Their concerns echo those of other parents who put off marrying to protect their intimate relationship from what they see as legal entanglements that potentially introduce competing interests and calculations into an otherwise emotional bond. Despite acknowledging how this decision has rendered their family vulnerable, such couples prefer to remain "strangers in law" rather than invite the state into their intimate lives, making the so-called "freedom to choose" a Faustian bargain for those profoundly uncertain about the emotional and social costs of state recognition (Patton-Imani 2020; Friedman and Chen 2021).<sup>22</sup> Other couples assert that, by requiring marriage as a precondition for co-parental rights, the 748 Act diminishes the value of marriage itself by making it simply one more element that parents must acquire to legitimate their families. One adoptive co-mother made this very point when reflecting on the impact of her marriage: "Speaking honestly, our relationship is the same after marrying, nothing has changed. The benefit of marriage is that I could adopt [my son]."<sup>23</sup> Using the couple relationship to secure the co-parent's legal relationship to the child effectively devalues both the parent-child bond and marriage, for neither has legal worth in itself (Polikoff 2009). As the 2016 survey of LGBT attitudes toward same-sex marriage shows, and interviews with tongzhi parents have confirmed, a significant proportion of parents might be unlikely to marry were it not required for the stepparent adoption process, despite the hard-fought struggle to win marriage rights.

By tethering parental rights to marriage, the 748 Act also affirms how basic citizenship claims are channeled through legal marriage, thereby creating fundamental inequalities for those unable to marry (Patton-Imani 2020, 45). The 748 Act's marital

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21. Interviews with author, May 31, 2019; February 13, 2020.

22. Interviews with author, May 22, 2019; February 25, 2020.

23. Interview with author, April 20, 2020.

requirement disadvantages couples that feel incapable of exercising their legal right to marry (as opposed to reluctant) and denies core citizenship rights to those formally barred from marrying under the current law. Not only do these two groups experience different degrees of harm, but they also face different temporal horizons of exclusion extending from the denial of basic rights in the present to the potential future risk of parental vulnerability. This future risk is balanced against the more immediate consequences of having one's sexuality made public by registering a marriage that will be noted in the household registry and on one's national ID card and potentially reported to one's workplace. Consequently, LGBT parents who are unable to marry continue to suffer the double stigma of illegitimacy and homosexuality.

Gay fathers predominate among parents who feel unable to marry despite being legally eligible. Gay men are more likely not to be fully out to their family of origin and thus fear the interpersonal, emotional, and, in some cases, financial consequences of being outed to their families once the marriage appears in the family's household registration (if they have not established a separate registry) and their spouse's name is added to their national ID card. Initially, a same-sex married couple's household registration identified their union specifically as a "same-sex marriage," but the government subsequently removed the term "same-sex" following objections that it violated privacy. Nonetheless, most tongzhi couples emphasized that the spouse's name alone, by indicating gender, will out them to their families. Such concerns echo long-standing critiques of including marital status on the national ID card that underscore its unjustified invasion of privacy and potential to facilitate marital status discrimination. Although these critiques focused on heterosexual marriage, they suggest how this documentation makes some couples, especially gay men, more vulnerable to existing societal stigmas against homosexuality.

Ming was a thirty-something father of two children biologically related to his partner, James, who conceived through egg donation and surrogacy in the United States. Ming had kept his gay identity, relationship with James, and the children a secret from his parents and brother. Although both partners lived in Taipei, Ming resided with his parents during the week and spent the weekends with James and the children. Ming knew that marrying James would have the "added value" of enabling him to formalize his parental status through adoption, but he hesitated to come out to his mother after keeping his sexuality secret for so long, only doing so almost two years after the 748 Act went into effect.<sup>24</sup>

Ming's perceived inability to marry also stemmed from professional pressures. Like many gay fathers employed in socially conservative workplaces or professions that required regular disclosure of close family members, Ming feared losing his job or being shunned by coworkers should his marriage become public knowledge (despite statutory prohibitions against employment discrimination based on sexual orientation and marital status in place since 2007). The twenty-seven gay fathers we interviewed worked in a diverse range of employment sectors, but the vast majority remained closeted at work. Although some claimed not to worry about disclosing their sexual orientation or marriage, others had been warned by senior management to be discreet or were uncertain about the professional consequences of coming out, having witnessed

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24. Interviews with author, July 12, 2017; May 16, 2020.

homophobic comments from colleagues and managers (especially during the fall 2018 lead up to the nationwide referendum on legalizing same-sex marriage).<sup>25</sup> The stigma of homosexuality encoded in workplace discrimination and coming out anxieties combines with the 748 Act's marital requirement to enhance the legal vulnerability of co-fathers who feel unable to marry. Granted a "choice" they cannot risk making, fathers such as Ming lack legal protection as a parent despite their substantive care work.

The exclusions enacted by the marriage requirement weigh even more heavily on transnational couples legally barred from marrying in Taiwan because the non-Taiwanese partner hails from a country where same-sex marriage is not legal. Derived from the 748 Act's interaction with laws and policies regulating international mobility and legal affairs, the marriage ban reaffirms the stigma of cross-border intimacies, especially those with foreign partners who come from presumably "less progressive" countries elsewhere in Asia (Friedman 2017). Most affected couples include partners from Southeast Asia; China, Hong Kong, and Macau; or Japan and Korea. The legal barriers to marriage stem from either Taiwan's international private law or, for citizens of China, from the administrative regulations governing cross-Strait marriages.<sup>26</sup> Unable to marry in Taiwan, transnational couples with children face additional barriers to legalizing the non-birth parent's parental rights and resolving the foreign partner's vulnerable immigration status. The plight of transnational same-sex couples has sparked several impact litigation cases that have achieved some individual successes in court, but legal reforms that would resolve the transnational same-sex marriage ban altogether still languish under legislative review.

Of the four transnational couples with children in our interview sample, two were blocked from marrying under the 748 Act and therefore lacked guaranteed rights to live together and be recognized as a family unit. The experience of a Taiwanese lesbian co-mother who was separated from her partner and son for nearly a year due to the COVID-19 pandemic's travel restrictions is illustrative. This woman's partner resided in Taiwan on a student visa and was outside the country with their son when Taiwan closed its borders in 2020 to all except citizens and foreigners with residency status. Although their son was a Taiwanese citizen, as a minor, he had no one to accompany him back to Taiwan. Making an ironic analogy to the global pandemic, this mother mused aloud that she and her partner have always lived in an endless state of waiting due to her partner's insecure immigration status and her own lack of a legal tie to her son. Once other same-sex couples began marrying, she acutely felt the burden of her second-class citizenship, deprived of fundamental family protections now enjoyed by others.<sup>27</sup> The 748 Act's marriage requirement, therefore, deepens divisions within the LGBT community on the basis of legal and social marriageability. Only those who are entitled, willing, and can afford to marry enjoy the family benefits of the newly available marriage cure.

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25. Interviews with author, February 8, 2020; February 27, 2020.

26. 涉外民事法律適用法 (Act Governing the Choice of Law in Civil Matters Involving Foreign Elements), promulgated June 6, 1953, effective June 8, 1953, amended May 26, 2016 (Taiwan), Art. 46.

27. Interviews with author, January 26, 2018; April 27, 2020.

## The Supremacy of “Natural” Parenthood

The second potentially stigmatizing effect of the 748 Act is its limiting of LGBT co-parental rights only to couples with biological children, explicitly barring same-sex spouses from jointly adopting a nonrelative child and denying stepparent adoption rights to a co-parent of a spouse’s previously adopted child (foreclosing an outcome that resembles joint adoption).<sup>28</sup> These adoption restrictions represent legislators’ response to pressure from anti-same-sex marriage groups who subscribe to the stigmatization argument that children will suffer as a consequence of their parents’ sexuality, while they simultaneously uphold the supremacy of “natural” (that is, biological) parenthood. The ban on joint adoption has the added effect of reaffirming societal stigmatization of adoption in general and enhancing its undesirability among tongzhi seeking to become parents.

The joint adoption ban produces several negative consequences for LGBT parents. Given the high costs of pursuing biological parenthood through ART use abroad, adoption is a more economically feasible path to parenthood for many LGBT individuals and couples. In fact, studies of LGBT family formation in England and the United States have documented a strong willingness to consider adoption instead of prioritizing biological parenthood (Lewin 2009; Rivers 2013; Costa and Tasker 2018). Yet prevailing stigmas against adoption and concerns about unequal treatment in the adoption process have made Taiwanese LGBT (intending) parents more likely to use ART or donor insemination to have biological children or to raise a child from a previous heterosexual relationship (only three of the families interviewed included an adopted nonrelative child). The 748 Act’s bans on joint adoption and stepparent adoption of a spouse’s adopted child further deepen LGBT adoption reluctance by making the long-fought-for right to marry a source of legal vulnerability. Marriage now blocks a tongzhi co-parent of an adopted child from seeking legal parental rights through stepparent adoption, and it bars the couple from both joint and single nonrelative adoption. These restrictions effectively undermine diverse pathways to becoming parents by denying recognition to two-parent adoptive LGBT families, thereby affirming the double stigma of adoption and LGBT parenthood (Boyer 2007).

Given the recent passage of the 748 Act, adoption reluctance in Taiwan’s LGBT community derives from more than legal bans on joint and stepparent adoption of a nonrelative child: equally relevant are widespread concerns that an openly gay or lesbian petitioner will not be treated fairly by adoption agencies, social workers, or the courts (Hong 2019). Indeed, studies of same-sex parent adoption in other countries have shown that LGBT parents face greater obstacles to adopting than their heterosexual counterparts (Boyer 2007; Farr and Goldberg 2018). The three LGBT adoptive parents in our interview sample all described long waiting periods to be matched with a child, required adoption classes that fit poorly with their family circumstances, and demands for multiple court appearances. Yet, by the time these parents embarked on the adoption process, adoption agencies and social workers had received anti-discrimination training regarding same-sex parenthood and family diversity. A government-commissioned study found that, although social workers supported

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28. 748 Act, Art. 20; *Judicial Yuan Gazette* 108, no. 48 (2019): 580–81.

LGBT adoption in principle, they worried that adoption agencies and child welfare institutions would treat tongzhi adopters more strictly out of concerns about the child's potential "double labeling" as an adopted child and a child of LGBT parents (Child Welfare League Foundation 2017, 15–16, 34). The report, therefore, confirms LGBT parents' anxieties about differential treatment (anticipated stigma) while also revealing more progressive views among some adoption gatekeepers (Hong 2019).

Although the LGBT adoptive parents in our interview sample had finalized their adoptions before or shortly after the 748 Act went into effect, two parents were already co-residing with same-sex partners despite pursuing adoption as a single person, and one couple had waited to move in together until after the adoption was finalized. The 748 Act's ban on joint adoption created a significant dilemma for these couples by freighting the decision to marry with the substantive consequence of barring the non-adoptive parent from legal parental rights, thereby rendering all family members vulnerable to potential future harm. An adopted child might enjoy the care of two parents in daily life, but has only one legal parent, creating legal uncertainty should something happen to the legal parent, an outcome that contravenes the best interests of the child principle guiding adoption itself. The legal adoptive parent, moreover, must shoulder sole responsibility for the child should the non-adoptive parent walk away. Finally, the non-adoptive parent has no legal custody remedy should the legal parent become incapacitated or die or should the couple separate and the legal parent deny his or her parental status. These potential harms reproduce for adoptive families the insecure status faced by all LGBT families prior to the 748 Act's passage. Although a successful case in early 2022 recognized the best interests of the child as the basis for approving a co-father's petition to adopt his spouse's previously adopted child (Huang 2022), a comprehensive legal response to the joint adoption ban awaits legislative reform or review by the Constitutional Court.<sup>29</sup> Thus, all other tongzhi adoptive families continue to suffer exclusion from the Act's protections regarding co-parental rights for an adopted child.

### The Poor Fit of Stepparent Adoption

Given that a majority of Taiwan's LGBT families are formed through intentional childbearing and include children conceived through assisted reproductive technologies and donor insemination, the 748 Act's reliance on stepparent adoption to establish legal co-parentage provokes the greatest concern among tongzhi parents. The stepparent adoption requirement stigmatizes the non-birth/biological parent who, despite participating in the planning for, birth of, and care of the child, must petition for adoption to become a legal parent instead of being granted presumptive or automatic parentage at birth. Moreover, the specific type of adoption used to confer legal parentage—stepparent adoption—presumes the model of a "reconstituted family" created following divorce and remarriage, which applies in only a small number of cases

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29. At the time of this writing in June 2022, a proposal to amend the 748 Act had recently passed Judicial Committee review and awaited party negotiation in the legislature. The proposal requires that the laws regulating adoption by married opposite-sex couples be applied *mutatis mutandis* to married same-sex couples.

where a tongzhi couple meets after the child is conceived or born. The “conceptual flaw in analogizing same-sex couples to a step-family,” as Polikoff (2009, 205) contends, enhances tongzhi co-parents’ experience of both non-recognition and misrecognition: they are denied recognition as a legitimate parent from the child’s conception and/or birth, and they are misrecognized as a stigmatized “stepparent,” the latter status creating an ostensibly less legitimate family unit (formed through adoption, presumably following divorce and remarriage).

Despite the longer history of LGBT second-parent rights in North America, existing literature consistently finds that many LGBT parents experience the second-parent adoption process as a discriminatory misfit with their own family formation pathways, describing it as intrusive, lengthy, and often financially unfeasible (Connolly 2002; Polikoff 2009; Park, Kazyak, and Slauson-Blevin 2016, 128; Feinberg 2017, 79–82; Gash and Raiskin 2018, 94–96; Patton-Imani 2020). The step-parent adoption requirements enshrined in the 748 Act provoke similar responses from Taiwanese LGBT co-parents with a biological child, many of whom react angrily to “misapplied requirements” (Gash and Raiskin 2018) and the time and effort required to obtain “extra things” needed to secure basic protections taken for granted by heterosexual married parents (Patton-Imani 2020). In Taiwan, the adoption process does not typically require legal representation, which reduces the financial burden on LGBT co-parents pursuing stepparent adoption when compared to their US counterparts. Even without burdensome financial costs, however, the adoption process stigmatizes co-parents who have planned their parenthood together because it denies their experience as a parent from birth.

Lena, a Taiwanese lesbian co-mother, posted the following statement after the court approved her stepparent adoption petition in 2020:

Just received the court-issued adoption approval, [I’ve] finally become C’s legal mother. My child was not born my child. Because of this we have dashed about for so long, hoping over these years that C would see that human rights do not fall from the sky. They accumulate over a previous lifetime, interwoven from the blood, sweat, and tears of many. My dear child, born into this imperfect world, remember forever this moment of fearless abandon. #5 years 5 months (Facebook post, August 17, 2020).

By the time Lena wrote this post, she had been partnered with her child’s birth mother for nine years, had planned for the child’s conception at a fertility clinic in Thailand, and had cared for her daughter since her birth in 2015. Although a mother in everyday life, Lena was a stranger to her child in the eyes of the law and was barred from acting as a parent in any official capacity. As she poignantly describes her situation, “my child was not born my child.” Only with the passage of the 748 Act, her subsequent marriage to her partner, and her successful stepparent adoption petition would Lena finally be recognized as a legal parent. Yet, as a consequence of how the Act created co-parental rights, that long-desired status came with the cost, in her eyes, of legal identification as a “lesser” adoptive mother.<sup>30</sup> Lena’s reference to an “imperfect world” acknowledges

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30. Interviews with author, April 28, 2018; May 26, 2019.

the long struggle for LGBT rights in Taiwan that produced this legal compromise, a result of “the blood, sweat, and tears of many.”

In interviews, lesbian co-mothers consistently expressed outrage about how the label of “adoptive” parent misrepresented them and their original co-parenting role, echoing Katie Acosta’s (2021, 202) account of a US lesbian co-mother who experienced the term “stepmother” as “an insult rather than an affirmation.” These objections expose both the ill fit of stepparent adoption to a couple’s childbearing trajectory and the stigma attached to adoption as a family-formation practice. Whereas a lesbian adoptive mother of a nonrelative child might intentionally identify herself as such to create a positive identity for her adopted child, lesbian co-mothers of a biological child contend that identification as an adoptive mother devalues their maternal role.<sup>31</sup> Gay fathers who conceived via surrogacy abroad may be less likely to object to the stepparent adoption requirement, having already gone through onerous bureaucratic procedures to recognize the birth father’s paternity and secure the child’s Taiwanese citizenship. Yet they nonetheless face often greater challenges proving their parental fitness when the co-father petitions for stepparent adoption.

Adoption stigma is exacerbated by documentation requirements that out tongzhi stepparents by distinguishing them from their heterosexual counterparts. A tongzhi co-parent’s successful stepparent adoption is documented in the household registry and later on the child’s ID card by adding the character “adoptive” to the character for mother or father, a practice mandated by the government after the 748 Act took effect, despite being barred in heterosexual stepparent adoption cases. This differential treatment of tongzhi parenthood in key identification systems extends beyond the documentation of the stepparent adoption itself. For instance, when married LGBT couples that have secured co-parental rights subsequently create a shared household registry, the status of the parent identified as “household head” determines whether the children are listed simply by gender and birth order (eldest son/daughter) or as “adopted” daughter/son. Once again, LGBT co-parents reject this label because it differentiates them from heterosexual families and misrecognizes their shared parental experience, reaffirming double discrimination as both a tongzhi and an adoptive family.<sup>32</sup> The parent who is required to adopt experiences misrecognition as a stepparent rather than an intending parent from the beginning. The child is mischaracterized as having only one primary parent, leading to the subsequent stigma of stepparent adoption. Tongzhi parents’ inability to cover the adoption enacts the stigma of adoption to enforce the stigma of homosexuality and vice versa. This differential treatment enhances a sense of inferiority and inequality that may foster adoption reluctance among some LGBT parents.

The procedural requirements of stepparent adoption deepen these stigmatizing effects, especially the demand that parents subject their home, personal history, and family life to the gaze of a social worker or court investigator charged with assessing the adopter’s parental “fitness.” Precisely because tongzhi co-parents of a biological child do not perceive themselves as adoptive parents, they reject the basic premise that the state should have the right to investigate an already existing family household to grant

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31. Interview with author, June 7, 2020.

32. Interview with author, March 24, 2020.

legal recognition. Having invested considerable effort and resources to have and raise a child, many respond angrily to the suggestion that they may not be fit parents, and they associate assumptions of unfitness with bias against their sexuality. Although heterosexual adoptive parents face the same fitness assessment demand from the state, their presumed unfitness bears no relationship to their heterosexuality, nor does it negate a planned childbearing trajectory.

The specific evaluation metrics used by social workers and court actors to assess stepparent adoptions fit awkwardly with most tongzhi parents' relationship and child-bearing histories. When LGBT co-parents decide to pursue stepparent adoption, therefore, they risk both symbolic and substantive harms as a consequence of being assessed on terms they find deeply stigmatizing due to the mismatch between their intentional childbearing and the "reconstituted family" at the heart of stepparent adoption evaluations. With regard to the marital duration criterion, our interviewees were unable to meet social workers' ideal two-year threshold for heterosexual parents because they could only marry legally in Taiwan beginning on May 24, 2019. Our interviews and perusal of the legislative and judicial records found that, instead of strictly applying this criterion, social workers and courts often use other means to evaluate the couple's relationship commitment (although see the appealed case discussed later in this article).<sup>33</sup> These include registering as same-sex partners (available nationwide in 2017), holding an informal wedding ceremony, marrying abroad, participating in couple's counseling, and providing evidence of a shared life. We might view these alternative metrics as a variation on the cohabitation standard applied to heterosexual couples, although they diversify the bases for evaluating relationship commitment and parental fitness. Nonetheless, LGBT co-parents take issue with the demand that they document their relationship stability in the first place; for many, this evaluation metric calls into question the legitimacy of their already existing family unit.

Second, courts and social workers use the child's age as another basis for assessing familial stability, parental fitness, and the "need" for adoption. Heterosexual stepparent adoption cases involving an infant, for example, may provoke concern about the adoptive parent's commitment to, and familiarity with, the child, calling into question the future stability of the parent-child bond. For LGBT co-parents whose intent to parent dates to planning for the child's conception, however, the application of this metric denies their original parenting experience and investments (financial and emotional).

A lesbian co-mother's adoption petition that was initially denied by the court but granted on appeal offers some insights into both the discriminatory ill fit of stepparent adoption procedures and the potential for courts to recognize both the intent to parent and functional parenthood.<sup>34</sup> The couple's daughter was born shortly after their 2019 marriage, and they filed adoption paperwork before the child was one month old. The court denied the adoption petition on the basis of a short marital duration (despite evidence provided by the couple that they had lived together since 2010 and had married abroad in 2015) and the young age of the child (ignoring the couple's collective decision to have a child and both parents' participation in the process of getting pregnant and caring for the child from birth). Although admittedly a rare example of a court

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33. *Legislative Yuan Gazette* 109, no. 11 (2020): 138.

34. Interview with author, July 25, 2020.

strictly applying the marital duration and child's age criteria, this ruling underscores how easily Taiwanese courts may dismiss the legitimacy of same-sex relationships and intentional childbearing.

Shocked by their rejection, the couple secured legal representation and successfully appealed the first ruling. The appeal court ultimately approved the adoption in June 2020 by distinguishing it from a heterosexual stepparent adoption case, identifying the child as "originally and directly born into and raised in a same-sex family." As a result, the appeal court rejected the lower court's assessment of the child's need to be adopted and instead evaluated the child's right to be raised by both parents and to be treated as the child of two parents under the law.<sup>35</sup> This is the first instance that we have found of a court acknowledging the poor fit of stepparent adoption to tongzhi parenting circumstances and implicitly calling upon the legal system to distinguish between the two types of adoption. The appeal court's rationale for approving the adoption, however, ultimately upheld the ideal two-parent family as emblematic of the child's best interests.

The third evaluation metric used by social workers and courts is how adoptive parents plan to teach a child about his or her origins, a response, as discussed above, to the societal stigmatization of adoption and the practice among some heterosexual couples of concealing the adoption from the child. Clearly, most LGBT co-parents who engage in intentional childbearing lack the option to "hide" behind the screen of heterosexual reproduction and "natural" parenthood, although we did encounter two cases of contractual marriage between a lesbian and gay man in which the couple did not disclose their sexuality to their children or other family members. In most cases, how LGBT parents explain sperm or egg donors, surrogates, or the process of assisted reproduction in general all constitute evidence of the degree to which they have shared (or intend to share) the story of the child's conception and biological origins.

For tongzhi stepparent adoptions, however, adoption disclosure evaluations enhance the combined stigmas of adoption and homosexuality because they simultaneously assess the parents' degree of being out to their families of origin. Given the strong family orientation of Taiwanese society, social workers and courts pay particular attention to cases where parents might not be fully open about their sexuality or where family members "know but don't talk about it," expressing concern that either the parent might refuse to share a full origin story with the child or might require that the child not disclose details to extended kin (a concern absent from heterosexual stepparent adoption cases). To protect the child's "best interests," courts and social workers might evaluate such a situation negatively for the burdens that it imposes on the child and the comparative absence of an affirming living environment. Parents, by contrast, may challenge the court's demand that they be "fully out," a response more common among gay fathers and parents who have limited contact with their families of origin.<sup>36</sup> If they can demonstrate alternative social support networks, such parents may be able to counter the expectation that they be fully open with their families. After all, as discussed above, courts sometimes grant heterosexual stepparent adoption petitions despite

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35. 桃園地方法院108家聲抗字第90號民事裁定 (Taoyuan District Court, Civil Division), 108 Jia Sheng Kang Zi no. 90 (2019).

36. Interview with author, July 12, 2020.

the parents' reluctance to disclose the adoption. In keeping with this precedent, courts could opt to approve LGBT stepparent adoptions under these circumstances by ordering the parents to receive additional training on adoption disclosure.

The potentially discriminatory consequences of this murky assessment category appear in a stepparent adoption case involving two mothers with a preschool-age son.<sup>37</sup> Despite living in a socially conservative city, the mothers claimed to be open with their son about his origins (even bringing him to Thailand to show him where he had been conceived), and they introduced him to other LGBT families through children's books and social interactions. They described their respective families of origin as supportive of their relationship and parenthood. But, during the home assessment visit, the son ostensibly confessed to the social worker that he did not know how to explain his family to his preschool classmates. This statement led the social worker to recommend delaying the adoption until the son turned seven (presumably school age), and the court requested supplementary documentation from the parents before deciding on the case. Flummoxed by the vague request for more documentation, the parents sought guidance from the tongzhi parent community and advocacy organizations. In the end, the parents and the child together visited a family therapist and evidence of that visit appeared sufficient for the court to ultimately approve the adoption.

The co-mothers in this case felt deeply stigmatized by the adoption experience, evidence of how the legal process itself may trigger both internalized stigma and denied recognition as a legitimate family. The burden of resolving the stigma of non-heteronormative parenting is shifted onto LGBT parents who must demonstrate that they have successfully inculcated self-esteem and familial acceptance in their child, both features heralded under the mantle of "best interests of the child" but rationalized as necessary to prepare the child for a discriminatory social environment. Ironically, earlier research on US LGBT adoptive families has found that LGBT couples may be better suited to raising healthy, resilient children because "the very stigmas that make parenthood more difficult for lesbian and gay couples have allowed them to develop the resilience and coping skills necessary to succeed in this difficult task" (Boyer 2007, 238). Yet, for tongzhi parents in Taiwan, court inquiries into their ability to cope with societal stigma may intensify their own feelings of insecurity about how their sexuality devalues their parental fitness.

A final potential consequence of the stepparent adoption requirement relates specifically to lesbian co-mothers who engage in a recognized adaptation of IVF known as reception of oocytes from partner (ROPA) (Haydon 1995; Mamo 2007). ROPA enables couples to distribute motherhood by using eggs from one partner to create an embryo that is implanted in the womb of the other partner, who is recognized by law as the birth mother. Yet stepparent adoption in Taiwan mandates that the adopting parent is not a direct lineal blood relative of the adoptee, creating a potential legal dilemma for couples that have practiced ROPA because the adopting parent is also the genetic mother. The precise legal consequences for co-mothers who have conceived via ROPA remain uncertain. One social worker we interviewed claimed that some couples do admit to using ROPA during the home visit and she described one case where the social worker included that information in her home study report to the

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37. Interview with author, April 20, 2020.

court, with no discernable impact on the adoption decision (although it is unclear how carefully court officials review such documents).<sup>38</sup>

In early 2020, however, a district court in central Taiwan deliberating on a tongzhi stepparent adoption case required a DNA test from the lesbian birth mother, ostensibly to counteract uncertainty about ART procedural standards abroad and the source of the egg used to create the embryo. News of this unprecedented court demand spread rapidly through the tongzhi parent community, exacerbating anxieties among lesbian co-mothers considering stepparent adoption after ROPA. The adopting co-mother in the case, outraged by the DNA test requirement, challenged the couple's differential treatment in her written response to the court, asking: "Would the court require an opposite-sex couple to provide a DNA test when they petition for adoption?"<sup>39</sup> The DNA test demand affirms that tongzhi parents must prove or disprove their biological connection to their child, whereas a heterosexual father can establish paternity (true or false) simply by indicating intent. The co-mother's angry retort echoes Susan Appleton's (2006, 270–71) critique that, if a genetic relationship is the *sine qua non* of original legal parentage, courts should require genetic tests of all children at birth.

Some co-mothers who conceived via ROPA subsequently delayed their stepparent adoption plans for fear that their case would be rejected should the DNA test become a required part of the tongzhi adoption process. One irony of this outcome is that it derives from a reproductive strategy intended to enhance the security of non-birth mothers before legal co-parentage rights became possible (Friedman and Chen 2021). Yet the families created through ROPA may be legally unrecognizable today because the legal ground has shifted beneath their feet to delegitimize distributed motherhood. For these co-mothers, the resulting harm of not being able to secure legal parentage through adoption is perhaps the greatest burden of all.

To date, if courts know of the presence of ROPA, they have chosen to disregard the inconvenient fact that the adoptive mother shares a genetic tie with the child. Although the current legal risk may be low, it remains to be seen whether these court decisions will ease co-mothers' anxieties enough to proceed with adoption and whether couples will continue to choose ROPA as a shared reproductive strategy. Moreover, the legal parental rights secured in cases of ROPA could face potential challenges should the co-mothers' relationship turn contentious. The birth mother could contest the adoption on the grounds that a genetic mother cannot be an adoptive mother under Taiwanese law. Conversely, the genetic mother could use a DNA test to deny the birth mother's parental rights, a legal challenge to birth mother status yet to be pursued in Taiwan's courts. Finally, should one mother's new partner want to pursue stepparent adoption, courts might have to consider a scenario in which a child has more than two legal parents.<sup>40</sup> In sum, the

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38. Interview with author, June 10, 2020.

39. Interviews with author, March 21, 2020; July 3, 2020.

40. The possibility of recognizing three legal parents has appeared in only one tongzhi stepparent adoption case to date. First denied and then approved on appeal, the case involved the current wife of the birth mother who petitioned for stepparent adoption despite the child's acknowledgment that she had three mothers, the third being the birth mother's original partner with whom she conceived the child using ROPA. The former partner contested the adoption as a party of concern. Although acknowledging the former partner's genetic contribution and parenting role, the appeal ruling denied her legal parental status and associated right to oppose the adoption.

748 Act's route to legitimizing co-parenthood through stepparent adoption creates the additional harm of potentially unstable legal recognition for lesbian mothers who practice distributed motherhood.

## CONCLUSION

Taiwan is not alone in granting LGBT rights and recognition without fully redressing the heteronormative foundations of society (Moreira 2019). Moreover, it follows the path of LGBT movements globally by prioritizing marriage as the first step to securing diverse familial ties. By calling attention to the exclusionary effects of the 748 Act's narrow legal framing, we underscore how emancipatory laws potentially reproduce existing stigmas and create new stigma interactions that devalue LGBT parenthood. The 748 Act reinforces the double stigma of adoption and homosexuality by denying tongzhi couples' access to joint adoption, and it creates new illegitimacies by making marriage and stepparent adoption of a biological child the sole path to tongzhi co-parenthood. Both of these consequences reproduce long-standing stigmas associated with non-marital parenthood and adoption, thereby reinforcing a normative family ideal premised on two opposite-sex, married parents and their biological child(ren).

However, we also acknowledge the opportunity that the 748 Act provides for tongzhi parents to legitimate their family and challenge the stigmas originally associated with non-heteronormative parenting. Ironically, it is tongzhi parents' engagement with the law that introduces new means of devaluing LGBT parenthood through marriage and adoption requirements and their unequal documentation procedures, while also enabling some parents themselves to reaffirm the stigmas of illegitimacy and adoption. Our research demonstrates how legal changes intended to reduce stigma may simultaneously introduce new stigmas or combine existing stigmas in unprecedented ways. This finding explains the illusion of choice among parents ostensibly eligible to benefit from the 748 Act's protections, many of whom face social and structural constraints that foreclose those choices.

We conclude by summarizing several outcomes of the models used to legalize same-sex marriage and parental rights in Taiwan, with particular attention to their stigmatizing and marginalizing consequences. Despite the promise of legalization, the 748 Act effectively delegitimizes diverse family forms and intimate relationships that fall outside its parameters. For instance, transnational couples (with or without children) excluded from the Act feel even more marginalized and vulnerable, especially as they witness other LGBT couples registering their marriages and enjoying the benefits of legal recognition. The diverse parenting possibilities made available through assisted reproductive technologies are also restricted under the Act by falling outside the scope of legal recognition (that is, how ROPA contravenes the ban on a stepparent adopting a direct lineal blood relation). Moreover, the 748 Act's denial of joint adoption rights for same-sex spouses further stigmatizes adoption as a family-formation practice and discriminates against couples that co-parent an adopted child. Nor does the 748 Act currently offer any recognition to families with more than two parents, including lesbian and gay couples that may aspire to joint childbearing and parenting arrangements without the cover of contractual marriage.

Certainly, some LGBT parents find the 748 Act simply irrelevant to them and their families, partly because their stigmatization enjoys no cure in current law. The most common examples are those individuals who choose to parent as singles, including single gay fathers who pursue surrogacy abroad and single lesbian mothers who become pregnant through self-insemination using a known donor but do not want to share parental rights. Parents who have conceived children in a prior heterosexual relationship may also not find the 748 Act germane to their life circumstances unless they subsequently marry a same-sex partner who desires to adopt their child(ren).<sup>41</sup> These examples raise the question of how the law might expand in scope and orientation so that it not only challenges stigma but also introduces the principles needed to justify affirmative support for diverse family forms (Dowd 1997, 146).

This leads us back to the contested place of marriage as a precursor to parental rights and recognition. In addition to transnational couples barred from marrying under the 748 Act, there are couples that choose not to or feel unable to marry and, thus, who cannot enjoy the parental rights contingent upon marriage. The stigma consequences of the marriage requirement for LGBT co-parenthood are many—from discriminating against non-marital parents by reinforcing the distinction between so-called legitimate and illegitimate children to devaluing intimate relationships that lack the legal imprimatur of marriage and demanding that LGBT spouses “out” themselves through various bureaucratic procedures and identification requirements. Moreover, the privileging of marriage also empowers social workers and courts to evaluate marital quality and duration as part of the assessment of stepparent adoption petitions, broadening the potential scope for state scrutiny of LGBT families.

Finally, the use of stepparent adoption to recognize co-parental status renders same-sex parent families visible to the law primarily when they conform to heterosexual models of marriage and family. Tensions surrounding how protocols for assessing stepparent adoption petitions are applied to same-sex parent families create contradictory pressures on tongzhi parents: they must recognize their difference from a presumed heterosexual norm (for example, by managing a child’s potential experiences of stigmatization), while, at the same time, they must conform to the model of a reconstituted heterosexual family enshrined in stepparent adoption itself. To legitimate their families, tongzhi parents are required simultaneously to be the same as, and different from, heterosexual married couples. Those who refuse these contradictory demands, rejecting their demeaning and discriminatory features, may find themselves excluded from the protected domain of legal recognition.

We end by pointing to key issues for future concern with the hope that proposed law and policy changes will further destigmatize LGBT parenthood and family formation. First is the need to correct the 748 Act’s differential treatment of LGBT couples by recognizing joint adoption and marriage rights regardless of national origin. Second is the need to broaden domestic access to assisted reproductive technologies while remaining mindful of intersectional inequalities underlying domestic and global reproductive markets and the risk that expanded ART access will exacerbate the stigma of non-biological parenthood. Third, reforming the household registry and national ID system will better protect privacy and the autonomy of personal data, thereby reducing

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41. Interview with author, May 2, 2020.

the stigmatizing effects of outing and differential treatment on the basis of sexual orientation. Fourth, better enforcement of the laws banning discrimination based on sexual orientation in the workplace and in schools will reduce the stigmas associated with publicizing one's sexuality and will weaken the stigmatization argument against LGBT parenthood. Fifth, and finally, is the question of how best to reconceptualize legal parentage to recognize diverse family forms and eliminate the entangled stigmas of illegitimacy and adoption. **An answer to this last question requires critical reflection on the privileged status of marriage as a gateway to parental rights, the pros and cons of establishing an intentional and/or functional parenthood doctrine, and the possibility of recognizing more than two legal parents. LGBT parents seeking to legitimate their families face stigmas that may also affect other marginalized families. The goal is to find a path to equality for all LGBT families so that "when they enter, we all enter" (Crenshaw 1989, 167).**

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