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Try this short quiz:

1. Which American state has the highest proportion of same-sex couples raising children?
   A. California
   B. Mississippi
   C. New York
   D. Utah

2. Rank these English cities from highest to lowest by percentage of lesbian and gay male couples:
   Birmingham, West Midlands
   Blackpool, Lancaster
   Bournemouth, Dorset
   Brighton/Hove, East Sussex
   Lewes, East Sussex,
   Liverpool, Merseyside
   London,
   Manchester, Greater Manchester
   Norwich, Norfolk

3. Match these Canadian provinces or territories with the correct percentage of same-sex couples living there:
   A. Nova Scotia (largest city Halifax)  1. 0.21%
   B. Ontario (largest city Toronto)    2. 0.39%
   C. Saskatchewan (largest city Saskatoon) 3. 0.46%
   D. Yukon Territories (largest city Yellow Knife) 4. 0.57%

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Answer: A-2, B-3, C-1, D-4. Canada: 2001 Census information on same-sex couples
Same-sex couples by province or territory (from Statistics Canada),
The answers to the quiz may surprise you. Many people think of lesbians and gay men as white, wealthy, childless, urban singles; and media and popular culture trade in those beliefs. But that’s far from the whole story. Demographic patterns show us that the truth about same-sex couples is not what we might expect. Some lesbians and gay


5 As the short quiz demonstrates, understanding and interpreting demographic information and drawing inferences from that information requires familiarity with the social and legal cultures the data describe. Accordingly because this author is American, this paper will concentrate on United States same-sex couples and their characteristics. Future research could fruitfully compare and contrast the demographic information that exists on same-sex couples in the UK, Canada, the Netherlands, and to a lesser extent for other countries. Cf., e.g., http://www.gaydemographics.org, (last accessed June 14, 2008) and information linked there; Civil Partnerships – selected data reports (provisional), Office for National statistics (UK), http://www.statistics.gov.uk/statbase/Product.asp?vlnk=14675 (last accessed June 14, 2008); Statistics Canada, 2006 Census: Families, marital status, households and dwelling characteristics, THE DAILY, (September 12, 2007), http://www.statcan.ca/Daily/English/070912/d070912a.htm (last accessed June 14, 2008) (counting same-sex married couples for the first time).

Canadian census data are similar to many of the United States findings. The number of same-sex couples surged 32.6% between 2001 and 2006, five times the pace of opposite-sex couples (+5.9%). In total, the census enumerated 45,345 same-sex couples, of which 7,465, or 16.5%, were married couples. In 2006, half of all same-sex couples in Canada lived in the three largest census metropolitan areas, Montréal, Toronto and Vancouver. Toronto accounted for 21.2% of all same-sex couples, Montréal, 18.4% and Vancouver, 10.3%. In 2006, same-sex couples represented 0.6% of all Canadian couples. That figure is comparable to data from New Zealand (0.7%) and Australia (0.6%). Over half (53.7%) of Canadian same-sex married spouses were men compared with 46.3% who were women. Proportions were similar among same-sex common-law partners in both 2006 and 2001. In 2006, about 9% of same-sex households included children under 25. This was more common for females (16.3%) than for males (2.9%) same-sex couples. Id. The rise in the number of British same-sex couples and the shift in their geographic distribution also mirror US figures. See, e.g., Julie Bindel, Location, location, orientation, THE GUARDIAN (UK), March 27, 2008, Weekend Comment and Features, at 28 (comments of Dr. Darren Smith, University of Sussex)(describing parallel situation in the UK).
men live in urban agglomerations, but they also reside in suburban and rural areas. For example per capita, the largest number of lesbian couples in the United Kingdom live in Hebdon Bridge, a small West Yorkshire village with a population of approximately 4500. Moreover, same-sex couples raising children often choose to live where other couples with children are and not in neighborhoods with other lesbians and gay men. Non-white same-sex couples tend to reside where others of their race or ethnicity live, rather than in gay or lesbian enclaves. Thus, by examining demographic information from the census and other data sets, we can get a more accurate picture of who same-sex couples are and we may predict how family law will likely shift to accommodate those households. Because demographic information shows that lesbian and gay couples tend to resemble their heterosexual counterparts more than we might think, the modification to domestic relations jurisprudence will probably be more incremental than revolutionary.

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6 Amelia Hill, *Lesbians the toast of the Two Ferrets, Hebdon Bridge in Yorkshire has been outed as the Sapphic capital of Britain. And no one’s complaining*, The Observer (UK), July 29, 2001, News, at 9; Melissa Block and Michele Norris, *English Mill Town Welcomes Lesbian Families*, All Things Considered, National Public Radio (U.S.), airdate: May 6, 2008, 8:00 p.m. EST.


• **Geography and location**
  
  As of 2005, an estimated 8.8 million lesbian, gay men and bisexuals, and 776,943 same-sex couples lived in the United States. Of those 53% were male couples, and 47% female. Those figures represented a 30.7% increase in those couples since the 2000 census, while the total US population only grew an average of 6% during that same period. A 2007 demographic report confirmed those trends and found that the largest increases in same-sex couples primarily occurred in the American South, Midwest and Mountain states; it also found that that increase was proportionately larger than the US average for those regions. In contrast, areas with historically larger lesbian and gay male populations, like New England, the Mid-Atlantic and Pacific regions, grew at levels below the US average. Further, data on same-sex urban couples showed some movement from cities to suburbs. Atlanta, Detroit, and Philadelphia actually lost same-sex couples from their urban core, but gained lesbian and gay couples in the surrounding counties; these numbers again were disproportionate to normal urban/suburban regional population shifts.

Some of this population change is consistent with general US trends towards southern and southwestern states, but not all. One noteworthy difference is that the largest increases in same-sex couples occurred in traditionally socially conservative areas.

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13 *Id.* Census 2000 counted 594,391 same-sex couples in the US. The 2005 figures come from the American Community Survey and are estimates drawn from a 1.4 million household sample of the United States population. *Id.*


15 *Id.* at 6.

16 *Id.* at 7, table 2, figure 4.

17 *Id.* at 8-9, 11-14.
that have not been receptive to lesbian, gay and bisexual rights or legal protections. Of the ten states with the highest percentage increase in same-sex couples from 2000-2005, nine are in the Midwest or Mountain regions. As of 2005, none of those states had granted any legal recognition to same-sex couples, and all of them have passed a statute and/or state constitutional amendment limiting marriage to one man and one woman. Despite the lack of legal protections in those areas, some of this growth may be a result of lessening societal hostility to lesbian, gay and bisexual people, and a corresponding rise in same-sex couples ability to openly cohabitate or couple in that new social climate.

Increased social tolerance alone cannot explain those data, however. Rather as noted by Dr. Gary Gates, a prominent demographer of lesbians, gay men and bisexuals, much of that increase may be due to more gay people becoming visible and deciding to report their relationships to government officials. Existing same-sex couples may have believed that it was finally acceptable for them to report their relationship. Coming out appears to have played a significant role in the population increases in the Southeastern and Midwestern part of the US, and to a lesser extent in New England and the Mid-Atlantic states.

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18 Id. at 9-11; accord, Gates, New Estimates, supra note 10, at 3-4.
19 New Hampshire (106%), Wisconsin (81%), Minnesota (76%), Nebraska (71%), Kansas (68%), Ohio (62%), Colorado (58%), Iowa (58%), Missouri (56%), and Indiana (54%). Gates, New Estimates, supra note 10, at 3, Table 1.
In a parallel development, as suburban and conservative states’ lesbian and gay populations have swelled, traditional gay neighborhoods appear to be waning in importance within the lesbian, gay and bisexual community.\(^{25}\) Gay bars are closing or becoming mixed gay and straight.\(^{26}\) Even within cities, neighborhoods where gay men and lesbians settle have shifted. In New York City, for example, the erstwhile epicenter of gay male life, the West Village, moved first to Chelsea, and now, Hell’s Kitchen;\(^{27}\) Park Slope in Brooklyn, NY, once the home of many lesbians, has seen its population leave for other parts of that borough.\(^{28}\) Gays and lesbians, along with the businesses that cater to them, may be increasingly priced out of these locales as wealthier, heterosexual families move into the now-gentrified areas.\(^{29}\) Alternatively as gay life becomes more


\(^{27}\) David Shaftel, *Under the Rainbow,* THE NEW YORK TIMES (US), March 25, 2007, Sec. 14; Col. 3; The City Weekly Desk, at 1.


\(^{29}\) See, e.g., Brian Miller, *Over the Hill; The soul of Seattle's gayest neighborhood is being chipped away by high-priced condos. Does that signal the beginning of diaspora away from an older, richer, more hetero Capitol Hill?*, SEATTLE WEEKLY (US), January 16, 2008; Patricia Leigh Brown, *Gay Enclaves, Once Unique, Lose Urgency,* THE NEW YORK TIMES (US), October 30, 2007, Section A; Column 0; National Desk, at 1; *There goes the 'gayborhood'; Civil rights gains, acceptance diminish exclusive gay enclaves,* GRAND RAPIDS PRESS (MICHIGAN, US), March 18, 2007, National, at A17.
mainstream, it may have less need for these predominantly gay or lesbian spaces.\textsuperscript{30} Lesbians and gay men can move into once less welcoming communities: other cities, the suburbs, and more rural areas.\textsuperscript{31}

We should expect family law and legal doctrine to reflect this move. Gay people, their relationships, and their families are increasingly incorporated into legal institutions and doctrine. The broadening of the definition of marriage to include gay and lesbian couples is only the most visible indication of this trend. That mainstreaming also occurs elsewhere.

One such area is in the use of the courts. Empirical studies show that, compared to heterosexual respondents, lesbians and gay men generally hold less favorable opinions of the ability of the judicial system to treat sexual minorities fairly.\textsuperscript{32} Moreover, those same studies demonstrate that heterosexuals sometimes undervalue the risks that sexual minorities run by making their sexual orientation visible in court.\textsuperscript{33} Lesbians and gay men feel unwelcome in courts and legal institutions,\textsuperscript{34} and even openly gay people may prefer

\begin{itemize}
\item[\textsuperscript{31}] See, e.g., Patricia Leigh Brown, \textit{Gay enclaves in U.S. face prospect of being passé}, THE NEW YORK TIMES, October 30, 2007, at http://www.iht.com/articles/2007/10/30/americas/30gay.php (last accessed June 8, 2008);
\item[\textsuperscript{33}] Id. at 175-78, 188-89.
\item[\textsuperscript{34}] Accord, id. at 171-75 (discussing empirical studies of the treatment and experiences of lesbian and gay court users).
\end{itemize}
to be closeted there. If people believe society and institutions are hostile and that they must hide their sexuality, they will avoid engagement in activities and institutions where disclosure of that characteristic is mandatory. Informal alternative dispute resolution mechanisms might be perceived as better equipped to handle issues without bias or with a better understanding of lesbian or gay community values. Thus, lesbians and gay men may prefer that friends or peers address dissolution of relationships, or may go to counselors or mediation rather than the courts. Additionally, if gay people do not bring relationship, dissolution, visitation and other family law issues to courts, legal doctrine has no need to evolve mechanisms to accommodate those different households. And if the law is not seen as reflective or understanding of the realities gay or lesbian life,

35 Id. at 175-176.
36 Id. at 146-150.
37 Nadine A. Gartner, Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Dispute, 16 LAW & SEX 45 (2007); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L.J. 459, 463 (1990)(“if the relationship between two women ends and they cannot agree on matters of custody and visitation, [the] family will find itself in a court system ill-prepared to recognize its existence and to formulate rules to resolve its disputes.”); Clark Freshman, Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 UCLA L. REV. 1687, 1706-08, 1738 (1997) (“disputes between same-sex couples may fall into a category of cases involving parties that heavily disfavor litigation. Part of this fear, as discussed above, may stem from a concern of bias and animus because gays and lesbians remain classic out-groups. Indeed, one of the most frequently cited appeals of alternative dispute resolution for lesbians and gays is that it is more private than litigation”)(footnotes omitted). See generally, Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1979); William B. Rubenstein, Divided We Propagate: An Introduction To Protecting Families: Standards for Child Custody in Same-Sex Relationships, 10 UCLA WOMEN'S L.J. 143, 144-45 (1999); Julie Shapiro, A Lesbian-Centered Critique of Second-Parent Adoptions, 14 BERKELEY WOMEN'S L.J. 17, 18 n.5 (1999). See also, e.g., LA County Bar association, ADR services, (“Rainbow Mediation. Rainbow Mediation provides mediation and facilitation services to the lesbian, gay, bisexual, and transgender communities of Southern California. The program office is offered through our West Hollywood Community Services office. This is a service that participants can trust and provides the opportunity to settle conflicts outside of court.”) http://www.lacba.org/showpage.cfm?pageid=7044#Rainbow (last accessed June 12, 2008).
people lose confidence in those institutions and their access to them. Accordingly, a circle of withdrawal and mistrust is created.\(^{39}\)

Conversely, coming out and visibility is an important indicator how accepted people feel, and how comfortable they are participating in mainstream culture. Demographically, the lesbian and gay population is shifting away from traditional, urban, gay-identified locations to suburban and other venues.\(^{40}\) Sociologically, lesbian and gay visibility is also increasing in civil society.\(^{41}\) As people come to believe they are integrated into society, they will also turn to societal institutions to resolve disputes and

\(^{38}\) E.g, Brower, *Multistable Figures*, supra, note 36, at 179-180 (discussing empirical studies of lesbian or gay court users in California, New Jersey, and court employees in England and Wales). The public’s view of the courts is very heavily dependent on its perception that the justice system is concerned about procedural fairness: that is, (1) treatment with dignity and respect, (2) honest and impartial decision makers who decide based on facts, (3) the opportunity to express one’s views in court, (4) decision makers who were concerned with fair treatment and hearing your side of the story. *See e.g.*, David B. Rottman, National Center for State Courts, *Trust and Confidence in the California Courts: A Survey of the Public and Attorneys, Part I: Findings and Recommendations*, 26 Administrative Office of the Courts on behalf of the California Judicial Council (2005); Roger K Warren, *Public Trust and Procedural Justice*, Fall 2000 Court Rev., 12, 13 (2000).


\(^{40}\) *See e.g.*, *supra*, notes 14 - 19, and accompanying text.

\(^{41}\) *See e.g.*, *supra*, notes 23 - 24, and accompanying text.
enforce rights. Increasingly, they may believe that courts and traditional dispute resolution institutions are appropriate venues for their issues and that they “deserve” to be represented within those legal and institutional structures. Therefore as acceptance grows, the disputes they have will become progressively more visible in court. Thus family law and courts will increasingly have to deal with same-sex couples and their families – something they are not always well equipped to do now. Thus, both geographically and jurisprudentially we might expect same-sex couples to be visible in courts and legal institutions where they have not previously been as apparent.

Anecdotal data on younger lesbians and gay men who have grown up with more openness about their sexuality reinforce this conclusion that visibility and openness may lead to increased desire to join conventional legal and social institutions. In an era of growing acceptance of civil partnerships or marriage for same-sex couples and increasing numbers of same-sex families rearing children, younger lesbians and gay men see the possibility of fitting themselves into familiar and familial patterns and structures. One

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42 Cf., Dale Carpenter, blog post, Religious Liberty and SSM [same-sex marriage], THE VOLOKH CONSPIRACY, posted June 17, 2008, 8:24 p.m., available at http://volokh.com/archives/archive_2008_06_15-2008_06_21.shtml#1213748649 (last accessed June 17, 2008) (“It's also true that we are likely to see a rise in conflicts between antidiscrimination law and religious objectors in the future. That's not really something gay marriage is ‘causing,’ though married gay couples will probably be most prominent among those complaining about discrimination. They don’t see themselves as second-class citizens and are more likely to object when they think they're being treated as if they are.”).


44 Benoit Denziet-Lewis, Young Gay Rites, NEW YORK TIMES, April 27, 2008, Section MM; Column 0; Magazine Desk, at 28 (“[G]ay teenagers are coming out earlier and are increasingly able to experience their gay adolescence. That, in turn, has made them more likely to feel normal. Many young gay men don't see themselves as all that different from their heterosexual peers, and many profess to want what they’ve long seen espoused by mainstream American culture: a long-term relationship and the chance to start a family.”); Younger Gays Want Long-Term Relationships, Kids, 365GAY.COM, posted April 24, 2008, http://365gay.com/Newscon08/04/042408youth.htm (Last accessed April 25, 2008)
trend among younger sexual minorities is to contemplate and participate in marriage and monogamous relationships in which they raise children.

Indeed, a recent NEW YORK TIMES article profiled young same-sex couples in Boston and interviewed them about their wedding plans and expectations for married life. Some of those couples shared the same naïveté about marriage, divorce, and parenthood as their heterosexual counterparts. The interviewer asked one couple whether they ought to test their marital compatibility by living together rather than marry immediately. ‘The couple deflected the question with a you-must-not-really-understand-the-power-of-our-love look common to so many lovesick young couples. ‘We just know we'll be fine,’ Vassili told me, rubbing Marc's back. ‘We love each other, and that's all that matters.'”

Like many couples, these pairs believe that divorce statistics only apply to others. Realistic or not, some younger lesbians’ and gay men’s expectations indicate that the question for family law may be less how lesbians and gay men will radically transform family law and legal structures, but how existing domestic relations jurisprudence accommodates gay individuals and couples within current paradigms.

Finally, the ability of lesbian and gay male couples to marry legally in Canada, the Netherlands, Belgium, Norway, Spain, South Africa, and in Massachusetts and California in the United States, means those couples’ relationships take on a different societal and legal character. Couples often state that it feels different to be married or that

45 Denziet-Lewis, supra, note 44. See also, Letters to the Editor, THE NEW YORK TIMES (US), May 11, 2008, Sec. MM; Col. 0; Magazine Desk, at 6, (discussing the Denziet-Lewis, April 27, 2008 article)

46 See, e.g., Four Weddings and a Lawsuit, THE STRANGER (SEATTLE, US), March 11, 2004, Weddings/Celebrations, at http://www.thestranger.com/seattle/Content?oid=17393 (last accessed June 22, 2008) (discussing wedding plans by two 19-year old gay men and their belief that they will not be part of the national statistics on divorce); see also, Sarah Hampson, Generation Ex, When gay couples fail to reach happily ever after, GLOBE AND MAIL (TORONTO, CANADA), June 12, 2008, Globe Life Family & Relationships, at http://www.theglobeandmail.com/servlet/story/RTGAM.20080612.BNStory/lifeFamily/home (last accessed June 13, 2008) (discussing Canada’s experience with same-sex couples’ divorce); Ian Williams, I'd rather be a gay divorcée: Since many marriages are doomed to miserable failure, why are gays and lesbians rushing up the aisle to say 'I do'?, THE GUARDIAN (UK), June 21, 2008, at http://www.guardian.co.uk/commentisfree/2008/jun/20/gayrights.usa (last accessed June 22, 2008) (discussing the divorce rate and how gay and lesbian couples will enter that institution as well as marriage).
others perceive them differently.\(^47\) Moreover, as divorce and dissolution become more legalistic, couples can no longer informally end their relationships.\(^48\)

Similarly, legal status also brings doctrinal complications when inter-jurisdictional hurdles arise for newly married same-sex couples.\(^49\) For example, since these relationships are not uniformly recognized across the United States, couples may

\(^{47}\) See, e.g., Michele Norris, Melissa Block, *Lesbian Couple Hopes Third 'I Do' Proves Charm*, All Things Considered, NATIONAL PUBLIC RADIO (US), June 13, 2008; Stephen Magagnini, *Davis couple celebrate landmark state ruling*, SACRAMENTO BEE (CALIFORNIA US), May 16, 2008, State and regional news; Janet Kornblum, *Gay couples in California get ready for the rush*; Many planning to wed as marriage becomes legal on Monday, USA TODAY (US), June 12, 2008, LIFE, at 6D; Madeline Brand, Alex Cohen, *Same-Sex Couples Prepare to Marry Again*, NATIONAL PUBLIC RADIO (US), Day to Day, June 13, 2008. *See also*, William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 71 (1996) (“Getting married signals a significantly higher level of commitment, in part because the law imposes much greater obligations on the couple and makes it much more of a bother and expense to break up... Moreover, the duties and obligations of marriage directly contribute to interpersonal commitment.”).

\(^{48}\) Pam Belluck, *Gay Couples Find Marriage Is a Mixed Bag*, THE NEW YORK TIMES (US), June 15, 2008, Sec. A; Col. 0; National Desk, at 1; Wyatt Buchanan, *The Battle Over Same-Sex Marriage; Divorcing Gay Couples Create New Legal Issues; Alimony, Property Questions Have Even Lawyers Confused*, THE SAN FRANCISCO CHRONICLE (CALIFORNIA), September 25, 2006, at B1; *accord*, Cheratra Yaswen, *The X Effect: you've heard she's marrying someone else. Legally; Pride AND Joy*, 15 CURVE 40, Column, June 1, 2005, (discussing the emotional and social differences between lesbian relationships in Canada before marriage and after marriage); Joan Burnie, *Just Joan: Will gays have to get a divorce too; SCOTTISH DAILY RECORD (GLASGOW, SCOTLAND)*, January 3, 2006, at 36 (answering question about UK civil partnerships and consequences of dissolution).

find that it is easier to enter a legal status than it is to exit it.\textsuperscript{50} While states may have no residency requirements for marriage, they may for divorce;\textsuperscript{51} and traditional comity principles do not always view relationship recognition as an all or nothing proposition.\textsuperscript{52}

In \textit{Salucco v. Alldredge},\textsuperscript{53} a Massachusetts court using its general equity powers granted an uncontested petition for dissolution of a Vermont civil union. The court noted that the parties could not obtain a dissolution in Vermont, because the parties, a Massachusetts and an Arkansas resident, did not meet Vermont’s residency requirement. Further, they would not have been able to obtain a dissolution in either Arkansas or Massachusetts because they were not considered married for purposes of those states’ divorce statutes.\textsuperscript{54} Other couples have been unable to terminate their civil union, as courts


have stated they were without power to recognize the relationship even to end it.\textsuperscript{55} That decision leaves those couples in legal limbo.\textsuperscript{56}

Potentially harmful litigation strategies in dissolutions are another by-product of non-uniformity of relationship recognition. Because not all states legally recognize that status,\textsuperscript{57} separating or dysfunctional family members may seek to use these conflicts for tactical advantage. One striking example is \textit{Miller-Jenkins v. Miller-Jenkins},\textsuperscript{58} a series of litigations that has already consumed five years, and has involved two states’ judiciaries plus the United States Supreme Court.\textsuperscript{59} Janet and Lisa Miller-Jenkins entered into a civil union in Vermont. During their union, Lisa became pregnant by artificial insemination with the approval of both partners. She gave birth to a girl, Isabelle, who was jointly raised by Lisa and Janet the following year. After they ended their relationship, Lisa petitioned a Vermont court to terminate the civil union and determine custody of Isabelle; the Vermont court gave Lisa custody and awarded visitation to Janet.
Lisa then moved to Virginia and filed a new action in a Virginia trial court.\textsuperscript{60} Relying on the state's legislation denying recognition to any relationship except a marriage between a man and a woman,\textsuperscript{61} the Virginia court held it was not required to recognize the Vermont court’s jurisdiction, since the Vermont civil union was not recognized under Virginia law. In a subsequent case, the Virginia court also refused to recognize Janet's parental or visitation rights, and held that the birth mother, Lisa, was the child's sole legal parent.\textsuperscript{62} A Virginia intermediate appellate court ultimately reversed that decision.\textsuperscript{63} Lisa again sought review of the custody and visitation decision in the Virginia courts, but that appeal was also rejected.\textsuperscript{64} The Virginia Supreme Court eventually affirmed the first appellate court’s ruling, without reaching the merits of Lisa’s second appeal.\textsuperscript{65}

Meanwhile, in response to the Virginia trial court, Vermont reaffirmed its jurisdiction and its original visitation award. It refused to defer to a sister state and preclude the parties from a remedy.\textsuperscript{66} The Vermont court subsequently found Lisa in contempt for willful refusal to comply with the temporary visitation order; the Vermont Supreme Court affirmed that decision,\textsuperscript{67} and the United States Supreme Court denied certiorari.\textsuperscript{68} After those decisions, Lisa returned to a Vermont court to challenge the validity of the parties' Vermont civil union because both parties were Virginia residents when they entered their civil union and that union would have been void in Virginia.

\textsuperscript{60} \textit{Miller-Jenkins}, 912 A.2d at 956-57 (Vt. S.Ct opinion).
\textsuperscript{61} Virginia's Marriage Affirmation Act, VA. CODE ANN. § 20-45.3 (2008) (“A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.”)
\textsuperscript{62} \textit{Miller-Jenkins}, 2008 Va. LEXIS 65, at *3 (Va. S.Ct. opinion).
\textsuperscript{63} \textit{Miller-Jenkins}, 637 S.E.2d 330 (Va. App. 2006).
\textsuperscript{66} \textit{Miller-Jenkins}, 912 A.2d at 956-57 (Vt. S.Ct opinion).
\textsuperscript{67} \textit{Miller-Jenkins}, 912 A.2d at 974 (Vt. S.Ct. opinion).
\textsuperscript{68} \textit{Miller-Jenkins}, 127 S. Ct. 2130 (2007).
Accordingly, she argued the Vermont courts never had jurisdiction over the civil union, nor over the dissolution and visitation matters. Vermont rejected those claims.69

As Miller-Jenkins illustrates, even uniform state laws like the Uniform Child Custody Jurisdiction Act70 and the federal Parental Kidnapping Prevention Act,71 which were designed to resolve traditional opposite-sex couples’ interstate jurisdictional disputes about child custody matters, become more complex when we factor in inconsistent recognition of same-sex relationships.72 Thus, even in areas where family law has long appreciated the importance of uniformity, and even where same-sex couples arguably stand on the same legal footing as opposite-sex couples, doctrine and courts struggle to incorporate those families. As the following sections will demonstrate, same-sex families are already partnered in significant numbers. Some, like the Miller-Jenkinses, are already raising children. Accordingly, these inter-sovereign disputes can only increase.

- **Same-sex couples and children**
  Accommodation or incorporation rather than transformation is also a likely paradigm for family law to address households with children. The common perception is that lesbians and gay men are childless or possibly adoptive parents, while heterosexuals are raising biologically related offspring. Nevertheless, same-sex and opposite-sex couples often share more demographic characteristics than they lack, although differences certainly exist. In the United States, 27% of same-sex couple households are raising children under the age of 18; that figure is less than for opposite-sex couples,

70 The Uniform Child Custody Jurisdiction Act was enacted in 1968 by the National Conference of Commissioners on Uniform State Laws. The UCCJA was revised in 1997 and is now the Uniform Child Custody Jurisdiction and Enforcement Act, available at http://www.law.upenn.edu/bll/ulc/uccja/final1997act.htm. It has been accepted by all states, the District of Columbia and the Virgin Islands, available at http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/uccja68.htm.
Thirty-five percent of lesbians aged 18-44 have given birth, while 65% of heterosexual women in that same age cohort have done so. Sixteen percent of gay men have a biological or adopted child living with them, compared to 48% of heterosexual or bisexual men. Conversely, lesbian or bisexual women were twice as likely to report that they lived with a child to whom they had not given birth. This difference is probably attributable to lesbian or bisexual women’s greater likelihood to be living with women who had borne a child in past relationships or in their current one.

On other measures, lesbians and gay men closely resemble their non-gay counterparts. Both heterosexual and homosexual individuals who have not yet had children articulate similar wishes to parent, and both groups share a greater desire to have a child than people who have already have offspring. A similar percentage of heterosexual women and lesbians in both cohorts desire children (or an additional child), 53.5% and 41.4% respectively. A comparable pattern holds true for heterosexual and gay men, 66.6% and 51.8%.

Beyond merely desiring parenthood, same-sex couples are already parents. In California, a striking eighty-three percent of female and male same-sex couples with children were raising children to whom they were biologically related.

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73 Gates and Ost, supra, note 1, at 45.
75 Gates and Badgett, Adoption and Fostering, supra, note 74, at 5.
76 Id. For an attempt to figure out what percentage of same-sex families contain children who are biologically related to one of the partners or who are the product of prior relationships, see Gates and Romero, supra, note 7, at 11-13.
77 National Survey of Family Growth, discussed in Gates and Badgett, Adoption and Fostering, supra, note 74, at 5-6. Bisexuals had rates almost identical to heterosexuals on this measure. Id.
78 R. Bradley Sears, M.V. Lee Badgett, Same-Sex Couples and Same-Sex Couples Raising Children in California: Data from Census 2000, 11, Williams Project, Institute for Gay and Lesbian Strategic Studies, Los Angeles, (2004); see also Gates and Romero, supra, note 7 at 11-12.
than were white couples. Logically, some of these couples must have used artificial insemination or other alternate reproductive technologies. But the high percentage of biological connection in these families indicates that not all children could have been so conceived. Thus, a significant number of men and women in these relationships must have been in prior heterosexual relationships or had heterosexual sexual partners. Not surprisingly, women and men in same-sex couples who were previously married are nearly twice as likely to have a child under 18 in the home as their never married counterparts.

The high percentage of biological offspring is significant for family law. One impact on courts will be the need to address those prior heterosexual relationships and their interactions with the same-sex couples’ current family. Family courts will more often see custody and visitation disputes from the past relationships, than adoption or fostering conflicts. Of course, those disputes are already in the judicial system as opposite-sex divorce or dissolution cases. However as noted earlier, lesbians and gay men may now be more willing to identify their relationships to government and its institutions. Accordingly, courts will increasingly interpret custody and visitation standards for sexual minorities under the modern, “best-interests of the child” standard. Here history may serve as a warning for future jurisprudence. Sometimes the mere presence of a gay or lesbian parent has been presumed to be not in the child’s best interest. Although this may be progressively less common and legislatures and courts

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79 Gates, Lau, Sears, Race and Ethnicity, supra, note 8, at 7; see also Gates and Romero, supra, note 7, at 9.
80 Gates and Romero, supra, note 78, at 12.
81 Id.
may decide that homosexuality alone is not a reason to deny custody, courts must be vigilant that the issue does not resurface through the back door.

A judge may feel compelled to shelter a child from the effects of private biases against lesbian or gay parents and move custody from a homosexual parent to a more traditional household. In *Palmore v. Sidoti*, the U.S. Supreme Court addressed an analogous issue and held that a child’s exposure to possible societal prejudice against interracial couples was a constitutionally impermissible reason to change custody. There, a white mother with custody of her white child remarried an African-American man. The lower courts took custody away from the mother because “the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society.” Despite the cultural disapproval of that relationship, the Supreme Court stated that the potential for societal ostracism and any resulting injury to the child was not a reason to change custody from the mother to the father. Recognizing these private prejudices in the courts would cause the state to put its imprimatur on that bias in violation of the U.S. Constitution.

However, if the event that holds the potential for social ostracism is the mother’s lesbianism, some courts either fail to recognize the parallels to *Palmore* or wrongly reject *Palmore* as inapposite precedent. Many courts find nothing inconsistent in using the mother’s same-sex relationship like the trial court in *Palmore* employed the

84 See, e.g., *Id.* at 918-20 (2001).
85 See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995)(Court changes custody from lesbian mother and female partner to child’s maternal grandmother. “Living daily under conditions stemming from active lesbianism practiced in the home may impose a burden on the child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s relationship with its ‘peers and with the community at large.’”); *S.E.G.*, 735 S.W.2d at 165; but see, e.g., *SNE v. RLB*, 699 P.2d 875, 878 (Alaska 1985)(rejecting social intolerance of lesbianism as the reason to change custody from an otherwise fit mother.).
87 *Id.* at 431, citing the Record at 84. The court uses the term, “lifestyle,” to denote unacceptable behavior and to trivialize gay and lesbian relationships. See generally, *Romer v. Evans*, 517 U.S. 620, 645 (Scalia, J. dissenting).
88 *Palmore*, 466 U.S. at 433.
mother’s interracial relationship.\textsuperscript{89} In \textit{S.E.G. v. R.A.G.},\textsuperscript{90} the Missouri court removed a lesbian mother’s custody of her four minor children because Union, Missouri was a small community where gays were not common [he believed] or openly accepted. Therefore, the court felt it needed to protect the children from peer pressure, teasing and ostracism.\textsuperscript{91} That reasoning replicated the faults of the lower court in \textit{Palmore}, and was equally erroneous.

Another analytical flaw in custody and visitation decisions is that behavior that would be expected or desirable in opposite-sex couples may sometimes be seen as detrimental in same-sex couples.\textsuperscript{92} For example, the judge in \textit{S.E.G.} noted,

\begin{quote}
Wife and [female] lover show affection for each other in front of the children. They sleep together in the same bed in the family home in Union. When the wife and the four children travel to St. Louis to see [lover], they also sleep together there. All of these factors present an unhealthy environment for minor children.\textsuperscript{93}
\end{quote}

The court found a mother’s affection for her same-sex partner was a flagrant defiance of social convention and morality meriting restrictions on visitation.

Nevertheless, many of these same-sex couples are raising their own biological children.\textsuperscript{94} Therefore, judicial hostility to lesbians or gay parents in custody matters will not make these issues disappear; neither will restrictions on same-sex relationship recognition,\textsuperscript{95} nor generally ignoring what demographic data demonstrates about these couples. These families and their legal problems will continue to reach domestic relations calendars. Remember that the top ten states with the largest concentration of same-sex couples raising children all tend to skew socially conservative: Mississippi, South Dakota, Alaska, South Carolina, Louisiana, Alabama, Texas, Kansas, Utah,

\begin{itemize}
\item \textsuperscript{89} See, Mark Strasser, \textit{Fit To Be Tied: On Custody, Discretion, And Sexual Orientation}, 46 Am. U.L. Rev. 841, 860-61 (1997).
\item \textsuperscript{90} \textit{S.E.G.}, 735 S.W.2d at 166.
\item \textsuperscript{91} \textit{Id.} at 165.
\item \textsuperscript{92} See, Strasser, \textit{supra}, note 89, at 866-72.
\item \textsuperscript{93} \textit{S.E.G.}, 735 S.W.2d. at 166, compare \textit{Palmore}, 466 U.S. at 431, citing the Record at 84 (“the wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society.”).
\item \textsuperscript{94} See \textit{supra}, notes 78-81, and accompanying text.
\item \textsuperscript{95} See \textit{supra}, notes 20-21, and accompanying text.
\end{itemize}
Arizona. Particularly in those communities, judges may be correct that same-sex families may be seen as unconventional and face discrimination and ostracism. But these areas are also the ones experiencing some of the largest increases in the rate of growth of same-sex couples. Therefore, as more lesbian and gay couples become visible in society and social institutions in those areas have to accommodate them, those reactions may lessen. Even if the social climate in those states moves more slowly than the escalating presence of same-sex couples would indicate, the lessons of Palmore remain valid; family law ought not give societal prejudice the stamp of government sanction in custody and visitation.

In addition to dealing with past heterosexual relationships, data on the number of biologically related children in same-sex households have another important effect on family law. Unlike most heterosexual couples, biologically related children in same-sex families may often be legally connected to only one partner. If the same-sex relationship fails, those courts must address de facto parenting claims by the non-biological parent. These issues are already familiar to domestic relations courts. De

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96 Gates and Ost, supra, note 1, at 46, Table 6.1 (Data from 2000 Census).
97 E.g., Bottoms, 457 S.E.2d at108.
98 See supra, notes 18-19, and accompanying text.
99 Gregory M. Herek and John Capitano, “Some of My Best Friends:” Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Towards Gay Men and Lesbians, 22 PERSONALITY AND SOC. PSYCHOL. BULL 412 (1996) (finding that increased contact with lesbians and gay men improves heterosexuals’ attitudes about sexual minorities).
100 Cf., Palmore, 466 U.S. at 433 (prejudice against interracial families).
101 See Gates and Romero, supra, note 7, at 11-13; see also, supra notes 75-76, and accompanying text.
102 See, e.g., V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (lesbian mother’s former partner had cultivated a parent-child bond between herself and the mother’s children, and should be granted visitation as a “psychological parent”); Rubano v. DiCenzo, 759 A.2d 959, 973 (R.I. 2000) (former domestic partner of a child's biological mother allowed to assert a “de facto parental relationship” between herself and the child in Family Court; figures outside a child's traditional family are potentially important to the child’s emotional health); cf., e.g., Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (lesbian co-parent was a “biological stranger” to the child and she had no standing to seek visitation).
facto parent rights are not unique to same-sex relationships; children are often raised by opposite-sex, unmarried couples, grandparents, and others.

Indeed, one of the unintended consequences for heterosexual families and domestic relations law may be that the refusal of states and the federal government to grant relationship recognition to same-sex couples may mean that non-marriage solutions to these families’ legal issues will continue to be asserted in the courts. A growing body of family law that provides rights to non-marital couples, both same-sex and opposite-sex alike, lessens the primacy of traditional marriage to establish domestic responsibilities and privileges. Thus, “defense of marriage” initiatives denying relationship recognition to same-sex couples may in fact lead to undermining the unique and privileged place of marriage within those jurisdictions.

Alternative, non-marital claims and their negative consequences are exacerbated when different jurisdictions draw contrary conclusions on the validity of same-sex

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104 See, e.g., Troxel v Granville, 530 U.S. 57 (2000)


106 See, e.g., supra, notes 102 - 105, and accompanying text.

107 Cf., The Federalist Society Online Debate Series, Same Sex Marriage, August 6, 2008, third posting by Professor Dale Carpenter, (available at http://www.fed-soc.org/debates/dbtid.24/default.asp) (last accessed August 24, 2008) (“The alternative to gay marriage is not standing still. And it is not returning to some imaginary past where closeted gays kept to themselves and produced great art and show tunes for heterosexuals’ amusement. The alternative is millions of Americans living in real, functioning relationships, many of them parents, struggling to make the law responsive to their needs. And the law will respond, often in ways that potentially challenge the primacy of marriage itself: marriage-lite statuses made available to both heterosexual and homosexual couples, second-parent adoptions, de facto parent doctrines, and so on. To ignore gay families is not to preserve healthy family norms, it is potentially to undermine them.”); The Volokh Conspiracy, blog comment at 8.20.2008 6:21am by Public Defender on the Federalist Society Online Debate, Same Sex Marriage, (available at http://Volokh.com/posts/1219178071.shtml) (last accessed August 24, 2008).
couples’ relationships and families. In contrast to grandparents, who have had political success in changing laws to grant them child visitation privileges, the non-biological partner in same-sex couples often has no such rights. That lack has adverse impacts even where courts have traditional domestic relations dispute resolution powers over those families.

One interesting twist on de facto parental rights is a related topic, the incorporation of same-sex couples into statutes on presumed parenthood for children born during a marriage or held out as children of that relationship. Elisa B. v. Superior Court illustrates that problem. The California Supreme Court decided that California's Uniform Parentage Act (UPA) imposed parental obligations on a woman whose former

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112 CAL. FAM. CODE §§7600-7730 (West 2008).
lesbian partner conceived twins by artificial insemination. Relying on the UPA and California precedent making a man who consented to the artificial insemination of his wife during marriage the father of any resulting child, the court found that Elisa and the birth mother had both caused the child to be conceived. Further, Elisa had raised the girl as her own daughter. Therefore, Elisa was to be treated as a parent under the statute – regardless of her gender or sexual orientation. The California court moved beyond the words of the statute and the particular problem motivating its enactment to find that same-sex couples and their children needed the same protections afforded opposite-sex families. The court obligated Elisa to pay child support for children conceived during the relationship, even though the couple had not been in a state-sanctioned domestic partnership. This last point is significant because the court did not address an earlier California intermediate appellate court holding that an unmarried father had no parental rights under the UPA although his female partner bore a child through artificial insemination during the relationship.

Moreover, although the court could have reached the same result through equitable principles or de facto parentage, it applied statutory parentage

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114 Elisa B., 117 P.3d at 670.
115 Id. at 669-70.
116 Id. at 662.
117 Id. at 663. Elisa B was decided before California statutorily extended the Family Code provisions to same-sex couples in registered domestic partnerships. Section 297 of the Family Code, which allowed same-sex couples in California to register as domestic partners, was not passed until 2000, two years after the children were born. The case also preceded the California Supreme Court’s decision permitting same-sex couples to marry. In re Marriage Cases, 43 Cal. 4th 757 (Cal. 2008)
118 Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 55 (Ct. App. Cal. 2000). The Dunkin court, however, granted parenting rights derived from a contract he and the mother had signed. Id. at 57-58.
119 Cf. E.N.O. v. L.M.M., 711 N.E.2d 886, 889-90 (Mass. 1999) (the court could use its equity jurisdiction to grant visitation rights, although a non-biological partner had no statutory rights under the state’s parentage presumptions).
120 Cf., In re Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (the court applied de facto parentage doctrine to provide a non-biological parent rights and responsibilities, despite no coverage under statutory presumptions).
presumptions applicable to opposite-sex married couples. This article is agnostic on whether the California court acted appropriately.\footnote{See generally, Jennifer L. Rosato, \textit{Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption}, 44 FAM. CT. REV. 76 (2006) (arguing that children of same-sex couples should enjoy the protections of parentage presumptions).} What the decision shows, however, is that family law will have to acknowledge and incorporate these couples into statutory provisions designed for very different circumstances and relationships\footnote{Casenote, 119 HARV. L. REV., supra, note 110, at 1620 ) (“California's codification of the UPA has become outdated and is inapplicable to many of the family formations that have become possible since the statute was adopted. The UPA was written in 1973, in an era when ‘the only way to create a child was by sexual intercourse between a man and a woman ... and when society had a much narrower view of who should be allowed to have a parental relationship with a child.””) (quoting, Anthony Miller, \textit{Baseline, Bright-line, Best Interests: A Pragmatic Approach for California To Provide Certainty in Determining Parentage}, 34 MCGEORGE L. REV. 637, 638 (2003)).} or specifically reject them from statutory provisions.

Unlike heterosexual relationships, however, many same-sex couples have no recognition of their relationship while it is still functional. Thus, when it becomes dysfunctional, the courts face more significant complications. If a jurisdiction does not recognize these relationships, then sometimes courts are left with domestic relations problems that cannot be heard in family courts.\footnote{E.g., Chambers v. Ormiston, 935 A.2d 956, 2007 R.I. LEXIS 123, *16-17 (R.I. 2007) (family court, a court of limited statutory jurisdiction, was without jurisdiction over the parties' divorce because a same-sex couple’s Massachusetts marriage was not recognized by Rhode Island); Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (refusing to recognize a Vermont civil union for purposes of dissolving it); Burns v. Burns, 253 Ga. App. 600 (Ga. Ct. App. Jan. 23, 2002) (refusing to recognize civil union for purposes of measuring compliance with visitation order).} Those cases may instead end up inserted into the general jurisdiction civil courts as business partnerships, joint ventures, implied and express contracts, or other civil litigation.\footnote{See, e.g., Vallera v. Vallera, 134 P.2d 761, 763 (Cal. 1943) (contract); Hill v. Estate of Westbrook, 247 P.2d 19, 20 (Cal. 1952) (meretricious relationships); Nichols v. Funderburk, 881 So. 2d 266, 269-73 (Miss. App. 2003), aff’d. 2004 Miss. LEXIS 1198 (Miss., Sept. 23, 2004) (discussing business partnership, constructive trust, equitable property division among unmarried cohabitants); Kozlowski v. Kozlowski, 395 A.2d 913, 917-19; (N.J. Super. Chanc. Div. 1978), aff’d, 403 A.2d 902 (N.J. 1979) (discussing joint venture, business partnership, quasi-contract). \textit{See generally}, Marvin v. Marvin, 557 P.2d 106, 116n.10 (Cal. 1976) (“The [cohabitating] parties might keep their earnings and property separate, but agree to compensate one party for services which benefit the other.}\footnote{See, e.g., Vallera v. Vallera, 134 P.2d 761, 763 (Cal. 1943) (contract); Hill v. Estate of Westbrook, 247 P.2d 19, 20 (Cal. 1952) (meretricious relationships); Nichols v. Funderburk, 881 So. 2d 266, 269-73 (Miss. App. 2003), aff’d. 2004 Miss. LEXIS 1198 (Miss., Sept. 23, 2004) (discussing business partnership, constructive trust, equitable property division among unmarried cohabitants); Kozlowski v. Kozlowski, 395 A.2d 913, 917-19; (N.J. Super. Chanc. Div. 1978), aff’d, 403 A.2d 902 (N.J. 1979) (discussing joint venture, business partnership, quasi-contract). See generally, Marvin v. Marvin, 557 P.2d 106, 116n.10 (Cal. 1976) (“The [cohabitating] parties might keep their earnings and property separate, but agree to compensate one party for services which benefit the other.}
not have had judicial education in dealing with family court litigants or their particular concerns and underlying social dynamics.\textsuperscript{125}

Domestic relations lawsuits are often more emotional than general civil litigation. Rather than a dispute about contacts or torts, family cases concern personal relationships that have deteriorated. Stakes are higher since parties’ families and emotions are involved. People in family courts are seeking more than a legal resolution; they are seeking a settlement and sometimes even a vindication of a deeply personal and intimate claim.\textsuperscript{126} Thus, general jurisdiction civil courts may be ill equipped to deal with the bitterness, intransigence or psychological issues that can appear in domestic relations calendars.

Public surveys of court users show that litigants give the lowest ratings to the family courts on procedural fairness – the perception that the courts treat court users fairly and respectfully and that courts provide them an appropriate opportunity to be heard.\textsuperscript{127} Some of that perception must be colored by the circumstances that family law litigants find themselves: seeking to resolve matters stemming from a failed intimate relationship. Most likely, same-sex couples and their relationships will share those same beliefs and those same consequences. Finally, the general jurisdiction civil court is not likely to have the same juridical authority or the personnel resources to order the parties to mediation or counseling as some domestic relations courts have been given\textsuperscript{128} – often

\textsuperscript{125} See, e.g., the conferences sponsored by the National Council for Juvenile and Family Court Judges, available at \url{http://www.ncjfcj.org/content/view/285/378/} (last accessed on June 18, 2008); and courses offered by the National Judicial College for state court judges, commissioners, administrative law judges and other bench and hearing officers on family law topics, available at \url{http://www.judges.org/news/news042208.html} (last accessed June 18, 2008).


\textsuperscript{127} Rottman, \textit{supra}, note 38, at 19.

\textsuperscript{128} See, e.g., Maine specialized judicial rules for the Family Division of the courts, available at \url{http://www.courts.state.me.us/maine_courts/specialized/family/rules.html} (last accessed, June 18, 2008); The District of Columbia Family Court Rules, available at
as a result of the psycho-social dynamics of family law cases. Accordingly, courts may be left to address these matters without the necessary or appropriate tools, causing adverse impacts on both litigants and the judicial system.

One particularly appropriate family court approach to resolving custody and visitation issues is court ordered mediation. As one commentator noted, “[s]erious rethinking of the judicial role in custody disputes began when evidence began to accumulate showing that for a child, divorce may be the legal dissolution of a marriage, but it is certainly not the dissolution of the importance of parent-child or parent-parent relationships.” Alternate dispute resolution is considered especially suitable for potential litigants who have had a long-standing relationship. Thus, ADR is particularly effective in the family law context, especially in custody cases where children need to have a continued relationship with both parents and parents require an ongoing relationship with each other through their children. Mediation instead of litigation may allow parents to resolve differences with less confrontation and permit these relationships to continue.

Mediation facilitates voluntary accommodation of rights among competing claimants to allow the parties to reach their own solution, if possible. If one party seeking visitation lacks a clear legal basis for that claim, it undermines the other party’s
incentives to mediate. Because same-sex couples may not have their relationships legally recognized, their parental bonds may also not be acknowledged. Thus, even if a court has the power to order mediation for those couples, parties would not be able to mediate until it is determined that the non-biological parent has recognized rights.\textsuperscript{134} Lack of legal status for same-sex families weakens available and established family law dispute resolution tools. Those families are already in the court system and demographic data shows that those numbers are rising. Therefore, this uncertainty will lead to an increase in litigation on same-sex couples’ custody rights – leaving children caught in the middle.\textsuperscript{135}

Finally, an additional way in which inconsistent family status inhibits domestic relations doctrine is the tactical exploitation of non-recognition to advance parties’ legal positions. We have already explored the \textit{Miller-Jenkins} litigations as one example of that effect.\textsuperscript{136} Unlike in most heterosexual family cases, lawyers in same-sex couples’ custody and visitation disputes may employ the divisions among states’ legal regimes to tactical advantage, thus potentially creating detrimental effects on both those relationships and on legal doctrine.\textsuperscript{137} For example, one lesbian couple lived as a family with their daughter for a number of years, although the relationship had no legal recognition under either state or federal law. Once their relationship soured, the biological mother refused her former partner visitation rights. When the case was heard sixteen months later, the court “found that the mother had successfully ‘weaned’ [the] daughter” from the ex-partner. Therefore, the former partner could not prove the child would be harmed if cut off from her – the state’s legal requirement for non-biological parents.\textsuperscript{138} Thus, the delays caused by the tactical use of litigation and the failure of

\textsuperscript{134} See, Goldhaber, \textit{supra}, note 72, at 265; Sherman, \textit{supra}, note 126, at n.136-138
\textsuperscript{136} See \textit{e.g.}, the \textit{Miller-Jenkins} litigations, \textit{supra}, notes 58-71, and accompanying text.
family law to integrate same-sex couples may affect those families themselves. Moreover, as this case demonstrates, jurisprudence may encourage strategic gaming of relationship recognition, hurting both doctrine and familial bonds.

With the wide variety of state regulations on same-sex relationships and the increasing numbers of those couples in states which do not grant any legal recognition of those families, we cannot rely on family courts or legal doctrine to curb these tactics and prevent the resulting harm to children. As gay rights organizations have suggested, lawyers for gay and lesbian clients in family law cases should voluntarily avoid capitalizing on inter-jurisdictional conflicts to gain legal advantage. Those groups state that those tactics hurt the parties as well as other lesbian and gay families by reinforcing unfavorable legal doctrine.\textsuperscript{139} That sound advice may fall victim to parties’ desires in these matters; and parties may sometimes hold children and jurisprudence hostage to their individual personal animosities.\textsuperscript{140} Demographic data show that same-sex couples’ relationships currently fail at rates below that of opposite sex couples,\textsuperscript{141} but those numbers may be distorted by the relative newness of their legal status.\textsuperscript{142} We should expect that rates of dissolutions, and thus the social dynamics and courtroom behavior in family law cases would eventually mirror those of opposite-sex couples.

Although the numbers are relatively small compared to those on biological children, lesbian and gay adoption demographics are also significant. Of the estimated

\textsuperscript{140} See generally, Gartner, (M)Otherhood, supra, note 37, at 54-60.
\textsuperscript{141} See, e.g., Ray Henry, A New Struggle for Gay Couples; Divorce Proving Difficult to Obtain Due to State Laws, THE WASHINGTON POST (US), April 20, 2008, A-Section at A06, (speculating that same-sex couples’ dissolution rate may be lower since many of those couples had been together for a long time prior to marriage or civil union); Wyatt Buchanan, The Battle Over Same-Sex Marriage; Couple Split Up, Drop Names From State Court Case, THE SAN FRANCISCO CHRONICLE (CALIFORNIA US), November 13, 2006, at B1 (stating that Vermont civil union statistics on dissolution were about 1.4 percent); Tracey Kaplan, Gay Couple's Split Months After Vows Adds Fuel To Debate; Breakup Tangled In Legal Ambiguity, SAN JOSE MERCURY NEWS (CALIFORNIA US), July 10, 2004, at 1A (dissolution counts for Vermont, Massachusetts, and for heterosexual marriage).
\textsuperscript{142} Clyde Haberman, Equal Chance Of Divorce For All, THE NEW YORK TIMES (US), March 9, 2004, Sect. B, Col. 1, Metropolitan Desk, at 1 (discussing possible divorce rate for same-sex couples; initially lower but eventually approximating heterosexual rates).
3.1 million lesbian and gay male households in the US, 1.6 percent include an adopted child under 18.\textsuperscript{143} Stated differently, nearly 80% of adopted children grow up with opposite-sex married couples, 3% with opposite-sex unmarried couples, and 15% in single heterosexual households.\textsuperscript{144} Lesbian and gay parents raise a little over 4% of adopted children in the US.\textsuperscript{145} Within that percentage, single lesbians and gay men parent 3%, and same-sex couples rear 1% of adopted children. Strikingly, of that 1%, roughly 80% have female same-sex parents.\textsuperscript{146} Accordingly, a huge gender gap exists between female and male same-sex couples raising adopted children. That disparity and the differences among single and coupled, and gay and straight households means that policymakers and courts must be careful not to assume that an adoption matter involving a lesbian or gay parent or parents is identical to the heterosexual family arrangements that they more typically encounter; lesbian and gay adoptive parents tend overwhelmingly to be single – and if coupled, to be female. Therefore, adoption law needs to carefully weigh these differences and assess them against the legal policies underlying that doctrine to resolve these disputes appropriately.

The incorporation of lesbian or gay parents into adoption law and policy sometimes requires legal, organizational and attitudinal change among child welfare professionals, children's advocates and policymakers. Where not already accomplished, legal and de facto restrictions on adoption by gays and lesbians should be ended.\textsuperscript{147} This includes working to expand co-parent and second parent adoption,\textsuperscript{148} as well as revising agency policies and practices that may impede consideration of lesbians and gay men as

\textsuperscript{143} Gates and Badgett, Adoption and Fostering, supra, note 74, at 7-8.
\textsuperscript{144} Id. at 11.
\textsuperscript{145} Id. at 7-8.
\textsuperscript{146} Id. at 11.
adoptive parents. 149 Demographic data make this issue more pressing. A 2004 study found that more than two-thirds of children living in same-sex households lived in states where second-parent adoption was not regularly available. 150

Moreover, agencies and institutions must develop clear statements in support of such adoptions. Much discretion lies in the hands of individual caseworkers, whose decisions may or may not reflect official agency or state policy. 151 Clear statements may also overcome some barriers created by well-meaning but harmful advice. For example, some suggest that lesbians and gay men should hide or minimize their sexual orientation when seeking to become adoptive parents. 152 However, a “don't ask, don't tell” approach disadvantages parents and, ultimately, their children by preventing recognition of the unique challenges and strengths of adoption when the parents are gay or lesbian.

One of the challenges in same-sex adoptive parents is the potential for societal prejudice against their families. This bias is related to the issue discussed earlier in custody cases. 153 However, in addition to sexual orientation discrimination, demographic data show a potential for additional bias. Compared to opposite-sex couples, same-sex couples tend to adopt more children who are foreign-born, who are racial or ethnic

149 Jeanne Howard, Expanding Resources For Children: Is Adoption By Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?, at 12, (Evan B. Donaldson Adoption Institute, New York March 2006).
151 Id. at 12.
153 See supra, notes 86-93, and accompanying text.
minorities, or who may have special needs.\textsuperscript{154} Thus, one effect on family law is the need to address any attendant nativist, racial, ethnic, disability prejudice or difficulty that a non-traditional family may provoke.\textsuperscript{155} As one commentator noted in discussing transracial adoption:

\begin{quote}
[B]y adopting a Black child, white parents may voluntarily subject themselves to racism. Even though white people generally are not subject to racism, Black children often are. By adopting a Black child, white parents subject themselves to possible racism either against them, because they are now part of an interracial family, or against their child, because of their child's skin color. For example, parents who have adopted transracially often tell stories about strange looks that they receive from complete strangers in stores, restaurants, etc.\textsuperscript{156}
\end{quote}

Because same-sex couples disproportionately raise children of disparate races or cultures from themselves, or children with disabilities, they and their children may be subject to these prejudices in addition to those stemming from being lesbian or gay.\textsuperscript{157} As in custody cases, courts must be vigilant to prevent that bias from distorting adoption decisions or legal doctrine as the number of same-sex adoption matters increase.

Finally, we should be cognizant that courts, their decisions and resulting legal doctrine inform and shape social norms.\textsuperscript{158} By determining how domestic relations law

\begin{itemize}
\item \textsuperscript{154} Gates and Badgett, Adoption and Fostering, supra, note 74, at 12-13. The United States Supreme Court spoke to a similar issue in Palmore v. Sidoti, 466 U.S. 429 (1984). See supra, notes 85-93, and accompanying text.
\item For issues involving transracial adoption, see e.g., Margaret Howard, Transracial Adoption: Analysis Of The Best Interest Standard, 59 NOTRE DAME L. REV. 503 (1984); Hawley Fogg-Davis Symposium On Transracial Adoption: A Race-Conscious Argument For Transracial Adoption, 6 B.U. PUB. INT. L.J. 385 (1997); Michelle M. Mini, Note: Breaking Down The Barriers To Transracial Adoptions: Can The Multiethnic Placement Act Meet This Challenge?, 22 HOFSTRA L. REV. 897 (1994).
\item Howard, supra, note 149, at 3.
\item Mini, supra, note 154, at 913 n.76.
\item See, e.g., Timothy E. Lin Note: Social Norms And Judicial Decisionmaking: Examining The Role Of Narratives In Same-Sex Adoption Cases, 99 COLUM. L. REV. 739 (1999).
\item Cf., Maxwell S. Peltz, Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights, 3 MICH. J. GENDER & L. 175, 192 (1995) (the creation of legal norms generates social norms). Court rhetoric is often reflective and generative of those norms. Kendall Thomas, The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick,
should treat lesbian and gay families, courts not only resolve the cases of the people before them, they decide the legitimacy of these family structures, and implicitly convey approval or disapproval of those arrangements. Therefore, family law may not only change jurisprudentially, but its signaling function is likely to convey different social messages.

- **Same-sex couples, interdependency and household resources**

Beyond family recognition, residence and related data, same-sex couples also resemble opposite-sex couples in income and interdependency measures. In California, household demographic indicia show that same-sex couples rely nearly as much on each other and on the relationship as do opposite-sex married couples, and more than opposite-sex unmarried couples do. For example, the percentages of households in which only one partner was employed were: opposite-sex married couples 34%, same-sex couples 29% and opposite-sex unmarried couples 24%. Similarly, income disparities between the higher and lower earning partners were: opposite-sex married couples $42,497, same-sex couples $37, 034, and opposite-sex unmarried couples $24,502. Consistent with these income disparity figures are California data that same-sex couples are only slightly more likely to have both partners working outside the home than opposite-sex couples. Thus

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79 VA. L. REV. 1805, 1811 (1993); see also, amsiegel, A Thought Experiment on Same-Sex Marriage, PRAWFSBLAWG, blog post and comments, June 18, 2008 at 01:21 PM, at http://prawfsblawg.blogs.com/prawfsblawg/2008/06/a-thought-exper.html#more (last accessed, June 19, 2008).

159 Lin, supra, note 158, at 766-68, 767n.141 quoting L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (“no matter how ... society views the private morality of the situation, we cannot ignore the influence her [homosexual] conduct may well have upon the future of this child and cannot give our judicial cachet to such conduct by etching in the law-books for all to read and follow.”) (internal quotations omitted).

160 Sears and Badgett, Same-Sex Couples, supra, note 78, at 9.

161 Id.

162 Same-sex couples 71% employed, opposite-sex couples 62% employed. Id. at 8. Employment patterns are similar between the two groups. Roughly the same percentage of individuals in both groups work for the government, in the private for-profit sector, in non-profit sectors, and are self-employed. Id. at 8, table 3. Individuals in married couples and same-sex couples are also similar in mean and median ages. Average age: same-sex couples 43, married couples 47; mean age: same-sex couples 40, married couples 44. Id. at 8.
in contrast to common perceptions, same-sex couples are often dependent on each other for support similar to the traditional model for opposite-sex families.

Also contrary to the popular stereotypes, the annual earnings of men in same-sex couples are substantially lower than those of married men – average income $43,117 for same-sex coupled men, $49,777 for married men; median income $32,500 compared to $38,000. Women in same-sex couples earn on average $34,979 annually, compared with $26,245 for married women; their median income is $28,600 compared to $21,000. Further, in California same-sex couples with children have lower household incomes, less education, and lower rates of home ownership than do opposite-sex married couples with children. That picture is echoed in national data as well. Household incomes of same-sex parents with children tend to be substantially less than married households with children. Median income of same-sex households is $46,200 compared to $59,600 for married persons; the mean is $59,270 compared to $74,777.

These economic data on same-sex couples suggest family law should evaluate doctrine and incorporate these couples into that jurisprudence, rather than dramatically transform those legal constructs. Since same-sex couples and opposite-sex couples are roughly similar in terms of income, resources and interdependence, the legal solutions already developed for opposite-sex couples would appear to be equally relevant for lesbians’ and gay men’s families. For example, death protections for surviving spouses like forced share, dower, curtesy, inheritance, and community property regimes all seem pertinent to surviving same-sex spouses or partners.

164 Id. at 15.  
167 E.g., Smith v. Smith, 148 Cal. App. 4th 1115; 56 Cal. Rptr. 3d 341 (Ct. App. Cal. 2007)(discussing ways in which courts have tried to protect military spouses under
Indeed, civil partnerships and civil unions often encompass versions of these marital rights. Further, in jurisdictions that permit same-sex couples to marry, those same protections are naturally incorporated. However, same-sex couples will still have problems that heterosexual married couples do not. For example, the Internal Revenue Code makes alimony payments deductible to the person paying. But because same-sex marriages or civil unions are not recognized at the federal level, a gay man or lesbian who is ordered to pay will not be able to take that deduction. Similarly, child support payments may be viewed as taxable gifts to an ex-partner.


See, e.g., Wyatt Buchanan, The Battle Over Same-Sex Marriage; Divorcing Gay Couples Create New Legal Issues; Alimony, Property Questions Have Even Lawyers Confused, THE SAN FRANCISCO CHRONICLE (CALIFORNIA), September 25, 2006, at B1;
and their families into existing structures. Spousal and child support, temporary custody, or other family benefits on dissolution are solutions that family law has provided to deal with dependency and inequality within marital and, to some degree, quasi-marital relationships. Finally, juvenile justice issues, child dependency, guardianship, paternity presumptions, spousal privileges, and other rights and responsibilities of couples ought to be applicable to same-sex couples. If same-sex couples share the characteristic of interdependence like opposite-sex couples, they, too, need the security and protection that law provides to married spouses and their families.

174 E.g., Elisa B., 117 P.3d at 670-71, (Cal. 2005) (former lesbian partner, who agreed to raise children with the birth mother, received the children into her home and held them out as her own had an obligation to support the children); Chambers v. Chambers, 2005 Del. Fam. Ct. LEXIS 1, *20-22 (Del. Fam. Ct. Jan. 12, 2005) (same).


176 E.g., Childers v. Childers, 575 P.2d 201, 207 (Wash. 1978) (courts have the power to protect the victims of divorce); Konzelman v. Konzelman, 729 A.2d 7, 20 (N.J. 1999) (O’Hern, J. dissenting) (economic needs and dependency underpin alimony).

177 See, e.g., Marvin, 557 P.2d 106 (Cal. 1976)(opposite-sex couples; in the absence of an express contract, the court should look to the parties’ conduct to determine if it demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties); but see, e.g., Jones vs. Daly, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (Ct. App. Cal. 1981) (Marvin-type action unavailable to gay male couple, since male cohabitants engaged in sexual activities and agreed to cohabit and to hold themselves out to the public as cohabiting mates, and entered into an agreement part of which was to render services as a lover. A court will not enforce a contract for the pooling of property and earnings if it is explicitly and inseparably based on sexual services.).

178 See, e.g., Judicial Council of California, Domestic Partnership Rights and Responsibilities, supra, note 166.

The failure of the United States federal government and most states to recognize these relationships exacerbates the position in which these families find themselves. They are shut out from virtually all federal support programs designed to protect and support families and many of their state analogs. Indeed, of the top five states with the highest percentage of same-sex couples raising children – Mississippi, South Dakota, Alaska, South Carolina and Louisiana – none have any form of same-sex relationship recognition and all have adopted both statutes and constitutional provisions banning same-sex marriage. Therefore, many of the same-sex couples who require the protections granted by traditional family law and relationship recognition have those avenues foreclosed to them.

In addition to their resemblance to married couples on economic interdependence measures, some same-sex couples may have a more acute need for legal support for their

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273-74 (Bridges, J., concurring in part, dissenting in part) (long-term cohabitating opposite-sex couple should be entitled to marital protections because their relationship is functionally the same); Grace Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L Rev 1125 (1981) (long-term co-habiting couples).


183 National Gay and Lesbian Task Force, *Relationship Recognition for Same-Sex Couples in the United States* (graphic), at


relationships. As mentioned earlier, when same-sex and married couples are compared in racially and ethnically homogeneous cohorts, same-sex couples’ incomes tend to be lower than those of opposite-sex married couples.\(^{185}\) However, disparities in income, employment, and home ownership within both same-sex couples and opposite-sex married couples are also strongly associated with race and ethnicity.\(^{186}\) Like opposite-sex couples, same-sex couples composed of persons of color generally have fewer economic resources measured on those metrics than do white same-sex couples.\(^{187}\)

Significantly, forty percent of same-sex couples raising children are non-white compared to only 24% of all same-sex couples with or without children;\(^{188}\) likewise, 24% of married heterosexual parents are non-white.\(^{189}\) Census data reveal that minority same-sex couples tend to be demographically similar to heterosexual couples of the same race or ethnicity.\(^{190}\) Accordingly, many same-sex families suffer racial or ethnicity-based economic and social barriers to advancement comparable to their heterosexual counterparts. Those same barriers may discourage those couples from getting married or entering a civil partnership, even should the opportunities arise. Thus, we might expect that the take-up rate of same-sex marriage or other forms of relationship recognition to be less for minorities than for white same-sex couples. Indeed, one study of California’s domestic partnership status supports this conclusion. Registered same-sex couples were more likely to be white, have higher incomes, and higher levels of education than unregistered same-sex couples.\(^{191}\) Therefore, although the need may be more acute for

\(^{185}\) Gates and Romero, supra, note 7, at 14.
\(^{186}\) Gates, Lau, Sears, Race and Ethnicity, supra, note 8, at 5.
\(^{187}\) Id. at 7.
\(^{188}\) Gates and Romero, supra, note 7, at 9.
\(^{189}\) Id. at 14.
\(^{190}\) Id. at 25, Figure 9-2, 26, Figure 9-3.
some same-sex families, simply securing the right to state and federal relationship recognition would not cure all their problems.

- **Prognosis and conclusion**

  Obviously, relationship recognition and its attendant legal protections can likely never fully address demographic differences among same-sex couples and between same- and opposite-sex families. Additionally, feminist and other commentators have critiqued the gender and other assumptions underlying traditional family law doctrine, as well as its efficacy in resolving these problems.\(^{192}\) Nevertheless, the law has two basic choices. (1) keep same-sex couples outside of these legal doctrines and the solutions they provide (however flawed) or (2) incorporate same-sex couples into these solutions and rethink them. The former alternative ignores demographic and economic realities of modern life; whereas the latter may lead to the biggest effect that lesbians and gay men and same-sex couples can have on family law: the opportunity to review and reevaluate existing solutions and doctrine.\(^{193}\)

  One brief illustration demonstrates this potential. The Commonwealth of Massachusetts passed the Massachusetts Maternity Leave Act (“MMLA”),\(^{194}\) which provides eight weeks unpaid employment leave to give birth or adopt a minor child. The law expressly applies only to mothers and not fathers; that gender distinction is written into both the statute and the agency guidelines interpreting it. In June 2008, a Commissioner at the Massachusetts Commission Against Discrimination (“MCAD”) announced that effective immediately the MMLA will apply to new parents of either sex. This means that both mothers and fathers or both parents in marriages of same-sex couples in Massachusetts will be entitled to the statutory benefits.

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\(^{194}\) Massachusetts Maternity Leave Act (“MMLA”), MASS. GEN. LAWS. chap. 149, §105D.
The reason for the Commission’s interpretation is to avoid the following problem:

If two women are married [as is legal in Massachusetts] and adopt a child, then they are both entitled to leave under the [MMLA], and yet if two men are married and adopt a child, they would be entitled to no leave under a strict reading of the statute. That result was troubling to us, and we didn’t think it was in keeping with our mandate by statute, which is to eliminate, eradicate and prevent discrimination in Massachusetts.195

On one level this announcement is unsurprising. The statute created a gender distinction that was arguably invalid sex discrimination under the state constitution.196 Thus, MCAD converted a gender-based statute to gender-neutrality. Note that same-sex couples’ marriages triggered MCAD’s reformation. Of course, the statute had always included gender-discrimination against men in opposite-sex couples. Mothers, but not fathers were the only ones entitled to leave. Nevertheless, MCAD said nothing about that statutory distinction. That same-sex couples sparked the sex discrimination reevaluation shows that courts have to question assumptions they may have previously overlooked when they incorporate lesbians and gay men and same-sex couples into family law. Like Elisa B., the California statutory parentage case discussed earlier,197 addressing the factual differences between same-sex and opposite-sex couples leaves space for family law to reflect on the underlying purposes and preconceptions behind existing doctrine.

We can explain this shift in perspective because same-sex couples may force a reexamination of gender and sex roles within family law. The mechanics of this reassessment signal other, future changes that same-sex couples might prompt in

197 See, supra, notes 111-118, and accompanying text.
domestic relations. Massachusetts courts and administrative agencies recognized that they needed to rethink the equation of sex, gender, motherhood and care-giving in the MMLA when two married women or men were raising a child. In contrast, because heterosexual marriage appears unremarkable, decision makers often do not notice its gendered underpinnings. In the heterosexual context, the conflation of sex, gender, motherhood and childcare responsibilities may have passed unnoticed or seemed more appropriately addressed by the legislature. Same-sex couples appeared sufficiently different from traditional families that their incorporation into marriage caused a cascading effect on other doctrinal areas like the MMLA. The MCAD realized that if two women could take leave under the MMLA, necessarily only one would have carried that child to term, yet both could share caring responsibilities. By its terms, the law encompassed both childbearing and child-minding roles for women. Indeed, an amendment to the law to include adoption reinforces that fact because by definition neither adoptive parent has given birth. Accordingly, once MCAD found that the regulation allowed leave for shared child-care responsibilities by a parent who did not bear the child, the sex-discrimination claim is obvious; men, too, can be carers.

Incorporating lesbians and gay men and same-sex couples into the law may affect society more extensively. A maternity only leave policy “encourages” new mothers to learn to parent and to care for children while fathers work, so it reinforces traditional gendered relationship patterns that often find their way explicitly or implicitly into family law. For new parents of a first child, neither the mother nor the father may have any particular experience or skills in childcare. In essence, an eight-week maternity leave becomes a “boot-camp” for new mothers, but not fathers. But a sex-neutral, maternity or paternity leave gives time for both spouses to learn these skills – and may encourage more equality – since it recognizes both men and women as potential equal partners in


childcare. A same-sex couple necessarily understands that lesson since traditional, sex-differentiated roles are biologically absent. When the law has to incorporate those couples, doctrine may appreciate that difference and acknowledge how existing legal norms may reinforce or undermine gender roles.

Of course, this hope may be overly optimistic. With comparable economic discrepancies present in both opposite-sex and same-sex couples, one parent may end up as the primary care giver. In opposite-sex couples, that is likely to be the woman due to economic, traditional, cultural and other reasons. In same-sex couples, one partner may also assume primary childcare responsibilities. Social science evidence shows that this may be somewhat less common in same-sex couples. However, whether same-sex couples replicate “gender” in those jobs depends on whether the roles are valued differently – whether the parties to the relationship and/or society view the roles hierarchically. The increased visibility of same-sex families in society and in legal institutions may help make these assumptions manifest.

Demographic data are far from a perfect tool to reveal the nuances of lesbian and gay families. Indeed, because they only obliquely uncover sexual orientation through counting same-sex couples, that data offers little chance to explore the relationships and the families of single lesbians or gay men, or those couples who are not living with a partner. Nevertheless, many of our common perceptions of same-sex couples are misleading or inaccurate. Accordingly, traditional family law has not always appropriately incorporated those couples into doctrine, nor appreciated where they are sufficiently different to call for more tailored solutions. Once we recognize that same-sex families racially, economically and geographically diverge from our stereotypes – and often in ways similar to their heterosexual counterparts – that information may assist us


201 See, e.g., Gates and Badgett, Adoption and Fostering, supra, note 74, at 25 discussing methodology and data limitations.
to more accurately develop law and social policy. Thus, that data can not only inform family law, it can help transform it.