

IT'S NOT JUST SHOPPING, URBAN  
LOFTS, AND THE LESBIAN GAY-BY  
BOOM:  
  
HOW SEXUAL ORIENTATION  
DEMOGRAPHICS CAN INFORM FAMILY  
COURTS

TODD BROWER\*

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I. INTRODUCTION

Try this short quiz:

1. Which American state has the highest proportion of same-sex couples raising children?<sup>1</sup>
  - A. California
  - B. Mississippi
  - C. New York
  - D. Utah
2. Rank these English cities from highest to lowest by percentage of

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\* A.B. 1976, Princeton University; J.D. 1980, Stanford University Law School; LL.M. 1990, Yale University School of Law. Professor of Law, Western State University College of Law, Fullerton, California; Judicial Education Consultant, The Williams Institute, UCLA School of Law, Los Angeles, CA. The author expresses his gratitude to the Williams Institute and to Steve MacIsaac. © 2009 Todd Brower.

1. GARY J. GATES & JASON OST, THE GAY & LESBIAN ATLAS 75, 113, 129, 153 (2004) (Answer: B. Mississippi, 41%; D. Utah, 33%; C. New York, 27%; A. California, 26%).

same-sex couples:<sup>2</sup>

Birmingham, West Midlands  
 Blackpool, Lancaster  
 Bournemouth, Dorset  
 Brighton and 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:<sup>3</sup>

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%

## II. SEXUAL ORIENTATION DEMOGRAPHICS AS TOOLS FOR FAMILY COURTS

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.<sup>4</sup> But that's far from the whole story.<sup>5</sup> Demographic patterns show us that the truth about same-sex

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2. See Gaydemographics.org, United Kingdom: 2001 Census Information on Same-Sex Couples, <http://www.gaydemographics.org/UK/index.htm> (last visited Feb. 2, 2009) (Answer: Brighton and Hove, London, Manchester, Blackpool, Bournemouth, Lewes, Norwich, Birmingham, Liverpool).

3. See Gaydemographics.org, Canada: 2001 Census Information on Same-Sex Couples by Province or Territory, <http://www.gaydemographics.org/canada/gen.htm> (last visited Feb. 2, 2009) (Answer: A-2, B-3, C-1, D-4).

4. See Tvtropes.org, Queer As Tropes, <http://tvtropes.org> (last visited Feb. 11, 2009) (discussing and referencing gay and lesbian stereotypes in the media). Various pages on the Tvtropes.org website discuss six gay stereotypes in depth: Mr. Humphreys from *Are You Being Served?*; Daffyd Thomas from *Little Britain*; Justin from *Ugly Betty*; Marc from *Ugly Betty*; Jack and Will from *Will and Grace*. See generally VITO RUSSO, THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES (rev. ed. 1987); see also Matthew Wood, *The Portrayal of Gays and Lesbians on TV, and How Viewers React* (1996), available at <http://www.aber.ac.uk/media/Students/mtw9402.html>.

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 same-sex couples and their characteristics in the United States. Future research could fruitfully compare and contrast the demographic information that exists on same-sex couples in the U.K., Canada, the Netherlands, and to a lesser extent other countries. Cf. 2006 Census: *Families, Marital Status, Households and Dwelling Characteristics*, THE DAILY (Can.), Sept. 12, 2007, <http://www.statcan.ca/Daily/English/070912/d070912a.htm> [hereinafter 2006 Census] (counting same-sex married couples for the first time); Off. for Nat'l Stat., Civil

couples is not what we might expect. Some lesbians and gay 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 Hebden Bridge, a small West Yorkshire village with a population of approximately 4,500.<sup>6</sup> Moreover, same-sex couples raising children often choose to live where other couples with children are, not in neighborhoods with other lesbians and gay men.<sup>7</sup> Non-white same-sex couples tend to reside where others of their race or ethnicity live, rather than in gay or lesbian enclaves.<sup>8</sup> 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.<sup>9</sup>

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Partnerships – Selected Data Tables (provisional), <http://www.statistics.gov.uk/statbase/Product.asp?vlnk=14675> (last visited Feb. 2, 2009).

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 (more than 5.9%). *See 2006 Census, supra*. In total, the census enumerated 45,345 same-sex couples, of which 7,465, or 16.5%, were married couples. *See id.* In 2006, half of all same-sex couples in Canada lived in the three largest census metropolitan areas, Montréal, Toronto, and Vancouver. *Id.* Toronto accounted for 21.2% of all same-sex couples, Montréal, 18.4%, and Vancouver, 10.3%. *Id.* In 2006, same-sex couples represented 0.6% of all Canadian couples. *Id.* That figure is comparable to data from New Zealand (0.7%) and Australia (0.6%). *Id.* Over half (53.7%) of Canadian same-sex married spouses were men compared with 46.3% who were women. *Id.* Proportions were similar among same-sex common-law partners in both 2006 and 2001. *Id.* In 2006, about 9% of same-sex households included children under twenty-five. *Id.* This was more common for female (16.3%) than for male (2.9%) same-sex couples. *Id.* *See, e.g.,* Julie Bindel, *Location, Location, Orientation*, THE GUARDIAN (U.K.), Mar. 27, 2008, at 28 (referring to comments of Dr. Darren Smith of the University of Sussex describing a parallel situation in the U.K.). The rise in the number of British same-sex couples and the shift in their geographic distribution also mirror U.S. figures. *Id.*

6. *See* Amelia Hill, *Lesbians the Toast of the Two Ferrets, Hebden Bridge in Yorkshire Has Been Outed as the Sapphic Capital of Britain. And No One's Complaining*, THE OBSERVER (U.K.), July 29, 2001 at 9; *All Things Considered: English Mill Town Welcomes Lesbian Families* (National Public Radio broadcast May 6, 2008).

7. *See* GATES & OST, *supra* note 1, at 46-47. For a description of the methodology and attendant challenges in using census and other data, see Gary J. Gates & Adam P. Romero, *Parenting by Gay Men and Lesbians: Beyond the Current Research*, in MARRIAGE AND FAMILY: COMPLEXITIES AND PERSPECTIVES (H. Elizabeth Peters & Claire M. Kemp Dush eds., Columbia Univ. Press forthcoming 2009) (manuscript at 6-9, on file with author).

8. GARY J. GATES ET AL., THE WILLIAMS INSTITUTE, RACE AND ETHNICITY OF SAME-SEX COUPLES IN CALIFORNIA 3-4 (2006) [hereinafter GATES ET AL., RACE AND ETHNICITY].

9. Much of the discussion about the anniversaries of same-sex marriage recognition in Massachusetts has focused on the lack of societal catastrophes. *See* Deb Price, *The Sky Didn't Fall in Mass.*, USA TODAY, May 17, 2005, at 13A; Jonathan

### A. Geography and Location

As of 2005, an estimated 8.8 million lesbian, gay men, and bisexuals,<sup>10</sup> and 776,943 same-sex couples lived in the United States.<sup>11</sup> Of those, 53% were male couples, and 47% female.<sup>12</sup> Those figures represented a 30.7% increase in same-sex couples since the 2000 census, while the total U.S. population only grew an average of 6% during the same period.<sup>13</sup> 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 U.S. average for those regions.<sup>14</sup> 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 U.S. average.<sup>15</sup> Further, data on same-sex urban couples showed some movement from cities to suburbs.<sup>16</sup> Atlanta, Detroit, and Philadelphia actually lost same-sex couples from their urban cores, but gained lesbian and gay couples in the surrounding counties; these numbers again were disproportionate to normal urban/suburban regional population

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Rauch, *At a Same-Sex Wedding, The New Is Made Old Again*, 37 THE NAT'L J., Oct. 15, 2005, at 3161; Kenji Yoshino, *The Irresistible Banality of Same-Sex Marriage: How Opponents of Marriage for Gays Will Be Bored into Submission*, THE VILLAGE VOICE, June 14, 2005, available at <http://www.villagevoice.com/2005-06-14/people/the-irresistible-banality-of-same-sex-marriage>. But see generally Stephanie Coontz, Editorial, *The Great Marriage Paradigm Shift; With Wedding Season in Full Swing, Stephanie Coontz Charts the Wholesale Revolution in the Institution*, PITTSBURGH POST-GAZETTE, May 22, 2005, at J-1; see also Rick Fulton, *I'm Proud We'll Have the First Primetime Gay Soap Wedding; Exclusive Emmerdale Actor Mathew is Delighted his Character Ties the Knot in Latest Storyline*, SCOTTISH DAILY RECORD & SUNDAY MAIL LTD., Feb. 28, 2008, at 37 (discussing how soap operas in Britain reflect the commonly accepted reality of modern life, including same-sex civil partnerships).

10. GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 1 (2006) [hereinafter GATES, SAME-SEX] (describing how estimates of lesbian, gay, and bisexual individuals can be made from the American Community Survey and the U.S. Census numbers).

11. *Id.* at 2; accord Dennis Campbell, *3.6m People in Briton are Gay—Official: First Whitehall Figure Settles Long-Running Debate*, THE OBSERVER (U.K.), Dec. 11, 2005, at 13 (stating that the HM Treasury and the Department for Trade and Industry concluded that there were 3.6 million gay or lesbian Britons in the U.K. in 2005).

12. GATES, SAME-SEX, *supra* note 10, at 2.

13. See *id.* (noting that the 2000 Census counted 594,391 same-sex couples in the United States, and explaining that the 2005 figures come from the American Community Survey and are estimates drawn from a 1.4 million household sample of the U.S. population).

14. See *id.*

15. GARY J. GATES, THE WILLIAMS INSTITUTE, GEOGRAPHIC TRENDS AMONG SAME-SEX COUPLES IN THE UNITED STATES IN THE U.S. CENSUS AND THE AMERICAN COMMUNITY SURVEY 4 (2007) [hereinafter GATES, GEOGRAPHIC TRENDS].

16. See *id.* at 6 (noting that only six of the largest cities in America experienced a statistically significant change in the number of same-sex couples from 2000 to 2006).

shifts.<sup>17</sup>

Some of this population change is consistent with general U.S. trends found in southern and southwestern states, but not all.<sup>18</sup> One noteworthy difference is that the largest increases in same-sex couples occurred in traditionally socially conservative areas that have not been receptive to lesbian, gay, and bisexual rights or legal protections.<sup>19</sup> Of the ten states with the highest percentage increase in same-sex couples from 2000 to 2005, nine are in the Midwest or Mountain regions.<sup>20</sup> As of 2005, none of those states had granted any legal recognition to same-sex couples,<sup>21</sup> and all of the nine have passed a statute and/or state constitutional amendment limiting marriage to one man and one woman.<sup>22</sup> Despite the lack of legal protection in those areas, some of this growth may be a result of decreasing societal hostility to lesbian, gay, and bisexual people, and a corresponding rise in same-sex couples' ability to openly cohabit or couple in the new social climate.<sup>23</sup>

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.<sup>24</sup> Existing same-sex couples may have believed that it was finally acceptable for them to report their relationship. Coming out

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17. See *id.* at 7 (displaying maps in table 2, figure 4 that depict the percentage increase of same-sex couples in suburban areas of Philadelphia, Atlanta, and Detroit).

18. See *id.* at 11.

19. See *id.* at 9-11; see also GATES, SAME-SEX, *supra* note 10, at 3-4 (noting that six of the eight states with measures to ban same-sex marriage on the 2006 ballot had increased reporting of same-sex marriage over 30%).

20. See GATES, SAME-SEX, *supra* note 10, at 3 (listing the ten states with the highest percentage increase in same-sex couples in the years 2000-2005: New Hampshire (106%), Wisconsin (81%), Minnesota (76%), Nebraska (71%), Kansas (68%), Ohio (62%), Colorado (58%), Iowa (58%), Missouri (56%), and Indiana (54%)).

21. See National Gay and Lesbian Task Force, *Relationship Recognition for Same-Sex Couples in the U.S.* (2008), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/relationship\\_recognition\\_11\\_08\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_11_08_color.pdf) [hereinafter NGLTF, *Relationship Recognition*]. Indeed, the only states that have passed civil union or full marriage equality statutes are Vermont (civil unions in 2000), Massachusetts (full marriage equality in 2004), California (civil unions in 2005), New Jersey (civil unions in 2006), New Hampshire (civil unions in 2007), and Connecticut (full marriage equality in 2008). *Id.*

22. See National Gay and Lesbian Task Force, *Anti-Gay Marriage Measures in the U.S.* (2007), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/GayMarriage\\_09\\_25\\_07.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf) [hereinafter NGLTF, *Anti-Gay Marriage Measures*] (noting that Iowa's 1998 anti-marriage legislation was overturned in 2007 by a state trial court).

23. See GATES, GEOGRAPHIC TRENDS, *supra* note 15, at 8; GATES, SAME-SEX, *supra* note 10, at 4.

24. See GATES, GEOGRAPHIC TRENDS, *supra* note 15, at 8; GATES, SAME-SEX, *supra* note 10, at 4; see also Bindel, *supra* note 5, at 28 (describing a parallel situation in the U.K. through the comments of Dr. Darren Smith of the University of Sussex).

appears to have played a significant role in the population increases in the Southeastern and Midwestern parts of the United States, and to a lesser extent in New England and the Mid-Atlantic states.<sup>25</sup>

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.<sup>26</sup> Gay bars are closing or becoming mixed gay and straight.<sup>27</sup> 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, to Hell's Kitchen.<sup>28</sup> Park Slope in Brooklyn, NY, once the home of many lesbians, has seen its population leave for other parts of that borough.<sup>29</sup> 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.<sup>30</sup> Alternatively, as gay life becomes more mainstream, it may have less need for these predominantly gay or lesbian spaces.<sup>31</sup> Lesbians and gay men can move into once less welcoming

25. See GATES, *GEOGRAPHIC TRENDS*, *supra* note 15, at 13.

26. See *Mainstream? Now that Gay Is Good and Glamorous if Society Accepts Homosexuality, Does the Need for Separateness Dissolve? Will Queer Culture Become Bland, Sanitized and Shallow?*, THE GLOBE AND MAIL (Can.), July 12, 1997, at D-2 (raising questions about the future of gay identity once it has become part of mainstream culture); Robin Abcarian, *Which Way, WeHo?; The Soul of Boys Town Is at Stake as Success Spawns a New Diversity*, L.A. TIMES, May 28, 2006, at E1 (explaining the culture change in North Hollywood); Tim Dick, *At the End of the Rainbow*, SYDNEY MORNING HERALD (Austl.), Mar. 11, 2006, at 27 (noting the change in Sydney's culture to reflect a less predominately gay city); Lisa Leff, *In San Francisco's Castro District, a Cry of "There Goes The Gayborhood"*, WASH. POST, Mar. 18, 2007, at D01 (reporting that the changing San Francisco culture is no longer predominately gay); Andrew Sullivan, *The End of Gay Culture*, THE NEW REPUBLIC, Oct. 24, 2005, at 16 (explaining that gay culture is no longer one singular identity).

27. See David Flick, *Closing Time for Crossroads, Center for Gay Activism: Crossroads Plans to Shut its Doors, Turning a Page on a Group Traditionally Isolated*, THE DALLAS MORNING NEWS, Dec. 1, 2007, at 1A; Shawn Hubler, *Will the Last Gay Bar in Laguna Beach Please Turn Out the Lights?*, L.A. TIMES, Mar. 25, 2007, West Magazine at 20; Robert David Sullivan, *Last Call—Why the Gay Bars of Boston Are Disappearing, and What it Says About the Future of City Life*, BOSTON GLOBE, Dec. 2, 2007, at E-1 (noting that over half the number of gay bars that opened in the early 1990s are closed).

28. David Shaftel, *Under the Rainbow*, N.Y. TIMES, Mar. 25, 2007, § 14, at 1.

29. Ariella Cohen, *Lesbians Moving Out of "Dyke Slope"*, THE BROOKLYN PAPER, Sept. 30, 2006, available at [http://www.brooklynpaper.com/stories/29/38/29\\_38\\_lesbians.html](http://www.brooklynpaper.com/stories/29/38/29_38_lesbians.html).

30. See *There Goes the "Gayborhood"; Civil Rights Gains, Acceptance Diminish Exclusive Gay Enclaves*, GRAND RAPIDS PRESS (Mich.), Mar. 18, 2007, at A17; Patricia Leigh Brown, *Gay Enclaves, Once Unique, Lose Urgency*, N.Y. TIMES, Oct. 30, 2007, at A1; 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, Jan. 16, 2008, available at <http://www.seattleweekly.com/2008-01-16/news/over-the-hill/>.

31. See Gregory Rodriguez, Op-Ed., *Gay—The New Straight*, L.A. TIMES, Nov. 5, 2007, at 17.

communities: other cities, the suburbs, and more rural areas.<sup>32</sup>

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 judicial system's ability to treat sexual minorities fairly.<sup>33</sup> Moreover, those same studies demonstrate that heterosexuals sometimes undervalue the risks that sexual minorities run by making their sexual orientation visible in court.<sup>34</sup> Lesbians and gay men feel unwelcome in courts and legal institutions,<sup>35</sup> and even openly gay people may prefer to be closeted there.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Additionally, if gay people do not bring relationship,

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32. See Brown, *supra* note 30; Cohen, *supra* note 29. Cf. *Marketplace: Gay Bars Adjusting to a New Reality* (National Public Radio broadcast Apr. 25, 2008) (discussing the trend away from exclusively gay or lesbian spaces to mixed heterosexual and homosexual socialization). Accord Bindel, *supra* note 5 (describing British lesbians and gay men moving from gay ghettos in large cities, and also changes in smaller communities like Bournemouth in Dorset).

33. See Todd Brower, *Multistable Figures: Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 173-74, 186-87 (2007) [hereinafter Brower, *Multistable Figures*].

34. *Id.* at 175-78, 188-89.

35. See *id.* at 171-75 (discussing empirical studies of the treatment and experiences of lesbian and gay court users).

36. *Id.* at 175-76.

37. *Id.* at 145-50 (noting the pressures members of the LGBT community face when choosing to mask or reveal their sexual orientation in different social contexts).

38. See 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) (arguing that "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." *Id.* See also Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 LAW & SEXUALITY 45, 66-69 (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) [hereinafter Polikoff, *This*

dissolution, visitation, and other family law issues to courts, legal doctrine has no need to evolve mechanisms to accommodate those different households. If the legal system is not seen as reflective or understanding of the realities of gay or lesbian life, people lose confidence in its institutions and their access to them.<sup>39</sup> Accordingly, a circle of withdrawal and mistrust is created.<sup>40</sup>

Conversely, coming out and visibility are important indicators of 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.<sup>41</sup> Sociologically, lesbian and gay visibility is also increasing in civil society.<sup>42</sup> As people come to believe they are integrated into society, they will also turn to societal institutions to resolve disputes

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*Child*] (discussing how “[i]f 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”). See generally Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 952-54, 990-91 (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, 145 (1999); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN’S L.J. 17, 18 n.5 (1999). See also L.A. County Bar Ass’n, Dispute Resolution Services, [#Rainbow](http://www.lacba.org/showpage/cfm?pageid=7044) (last visited Feb. 2, 2009) (“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.”).

39. See Brower, *Multistable Figures*, *supra* note 33, at 179-80 (discussing empirical studies of the experiences of lesbian or gay court users in California and 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 make fact-based decisions, (3) the opportunity to express one’s views in court, and (4) decision makers who are concerned with fair treatment and hearing your side of the story. 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 (2005); see also Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12, 13 (2000).

40. For a parallel development in minority religious communities, see Marion Boyd, *Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism*, in THE ART OF THE STATE VOLUME III: BELONGING? DIVERSITY, RECOGNITION AND SHARED CITIZENSHIP IN CANADA 465, 465-70 (Keith Banting, Thomas J. Courchene & F. Leslie Seidle eds., 2007); CBC Online (Canada), *In Depth: Islam Shariah Law FAQs*, May 26, 2005, <http://www.cbc.ca/news/background/islam/shariah-law.html>. Traditional conflict of laws, arbitration, and contract principles also allow parties to decide disputes according to preferred legal doctrine and institutions. Nat’l Group for Comm’ns & Computers Ltd. v. Lucent Techs. Int’l, Inc., 331 F. Supp. 2d 290, 293-94 (D.N.J. 2004); *Abd Alla v. Mourssi*, 680 N.W.2d 569, 573-74 (Minn. Ct. App. 2004) (upholding a decision from an arbitration body governed by Shariah law); see also *Jabri v. Qaddura*, 108 S.W.3d 404, 413-14 (Tex. App. 2003) (resolving a family law dispute arising from an arbitration agreement according to Shariah law).

41. See, e.g., GATES, *GEOGRAPHIC TRENDS*, *supra* note 15, at 6, 9.

42. See, e.g., Bindel, *supra* note 5, at 28.

and enforce rights.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> Therefore, 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 the conclusion that visibility and openness may lead to increased desire to join conventional legal and social institutions.<sup>46</sup> 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.<sup>47</sup> One trend among younger sexual minorities is to contemplate

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43. Cf. Posting by Dale Carpenter to the Volokh Conspiracy, [http://volokh.com/archives/archive\\_2008\\_06\\_15-2008\\_06\\_21.shtml#1213748649](http://volokh.com/archives/archive_2008_06_15-2008_06_21.shtml#1213748649) (June 17, 2008, 08:24 PM) (“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. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (applying a strict scrutiny analysis to a statute limiting marriage to a union between “a man and a woman,” and holding that the statute is unconstitutional). The decision that marriage must be available to same-sex couples in California was overridden by a statewide constitutional initiative, Proposition 8, passed during the November 2008 election. CAL. CONST. art. I § 7.5 (stating “[o]nly marriage between a man and a woman is valid or recognized in California,” which is a codification of the ballot initiative known as “Prop. 8” or the “California Marriage Protection Act”). Immediate challenges were filed to that initiative seeking to declare it unconstitutional. See, e.g., Jessica Garrison & Maura Dolan, *Brown Asks Justices to Toss Prop. 8*, L.A. TIMES, Dec. 20, 2008, at A1. Accord Alison Leigh Cowan, *Gay Couples Say Civil Unions Aren’t Enough*, N.Y. TIMES, Mar. 17, 2008, at B1 (discussing arguments before the Connecticut Supreme Court).

45. See Polikoff, *This Child*, *supra* note 38, at 463.

46. See Benoit Denizet-Lewis, *Young Gay Rites*, N.Y. TIMES, Apr. 27, 2008, at MM28.

47. See *id.* This article states

[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.

*Id.*; see also *Younger Gays Want Long-Term Relationships and Kids*, 365GAY, Apr. 24, 2008, available at <http://pridetb.homestead.com/4YoungerGaysWantLong-Term>

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.<sup>48</sup> 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.’”<sup>49</sup> Like many couples, these pairs believe that divorce statistics only apply to others.<sup>50</sup> 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.<sup>51</sup>

Finally, the ability of lesbian and gay male couples to marry legally in Canada, the Netherlands, Belgium, Norway, Spain, South Africa, and in Massachusetts<sup>52</sup> and Connecticut<sup>53</sup> 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 others perceive them differently.<sup>54</sup> Moreover, as divorce and dissolution become

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RelationshipsKids4-24-08365GayCom.htm.

48. See Denziet-Lewis, *supra* note 46.

49. See *id.*; see also Guy Kettelhack, Letter to the Editor, N.Y. TIMES, May 11, 2008, at 6 (analyzing the Denziet-Lewis, Apr. 27, 2008 article).

50. See *Four Weddings and a Lawsuit*, THE STRANGER (Seattle), Mar. 11, 2004 (examining the wedding plans of two nineteen-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: Same-Sex Divorce; When Gay Couples Fail to Reach Happily Ever After*, THE GLOBE & MAIL (Can.), June 12, 2008, at L1 (comparing Canada’s experience with same-sex couples’ divorce); Ian Williams, *I’d Rather be a Gay Divorcee: Since Many Marriages Are Doomed to Miserable Failure, Why Are Gays and Lesbians Rushing up the Aisle to Say “I do”?*, THE GUARDIAN (U.K.), June 21, 2008 (discussing the divorce rate and that gay and lesbian couples will both marry and divorce).

51. See Rubenstein, *supra* note 38, at 144-45; Williams, *supra* note 50.

52. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the Commonwealth of Massachusetts may not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry”).

53. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411 (Conn. 2008) (holding that the state’s civil union scheme impermissibly discriminates against gay persons on account of their sexual orientation because civil unions do not embody the status or significance of the institution of marriage).

54. See *All Things Considered: Lesbian Couple Hopes Third “I Do” Proves*

more legalistic, couples can no longer informally end their relationships.<sup>55</sup>

Similarly, legal status also brings doctrinal complications when inter-jurisdictional hurdles arise for newly married same-sex couples.<sup>56</sup> For example, since these relationships are not uniformly recognized across the United States, couples may find that it is easier to enter a legal status than it is to exit it.<sup>57</sup> While states may have no residency requirements for marriage, they may for divorce;<sup>58</sup> and traditional comity principles do not

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*Charm* (National Public Radio broadcast June 13, 2008); *Day-to-Day: Same-Sex Couples Prepare to Marry Again* (National Public Radio broadcast June 13, 2008); Janet Kornblum, *Gay Couples in California Get Ready for the Rush; Many Planning to Wed as Marriage Becomes Legal on Monday*, USA TODAY, June 12, 2008, at 6D; Stephen Magagnini, *Davis Couple Celebrate Landmark State Ruling*, THE SACRAMENTO BEE, May 16, 2008, at A10; see also William N. Eskridge, Jr., THE CASE FOR SAME-SEX MARRIAGE 71 (1996) (hypothesizing that “[g]etting 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.”).

55. See Pam Belluck, *Gay Couples Find Marriage is a Mixed Bag*, N.Y. TIMES, June 15, 2008, at A1; Wyatt Buchanan, *The Battle Over Same-Sex Marriage; Divorcing Gay Couples Create New Legal Issues; Alimony, Property Questions Have Even Lawyers Confused*, S.F. CHRON., Sept. 25, 2006, at B1; see also Joan Burnie, *Just Joan: Will Gays Have to Get a Divorce Too*, SCOTTISH DAILY REC. & SUNDAY DAILY REC., Jan. 3, 2006, at 36 (answering question about U.K. civil partnerships and consequences of dissolution); Cheratra Yaswen, *The X Effect: You’ve Heard She’s Marrying Someone Else Legally; Pride AND Joy*, 15 CURVE 40 (2005) (discussing the emotional and social differences between lesbian relationships in Canada before marriage and after marriage).

56. See Pam Belluck, *For Better, Worse and in Between; Cautionary Tales from Massachusetts About Gay Marriages*, INT’L HERALD TRIB., June 16, 2008, at 4; Pam Belluck & Adam Liptak, *Split Gay Couples Face Custody Hurdles*, N.Y. TIMES, Mar. 24, 2004, § 1, at 18; Edward Fitzpatrick, *Judge Points to Way Court Might Consider Same-Sex Issue*, PROVIDENCE J. BULL. (R.I.), June 12, 2008, at 1; Ray Henry, *Some Gay Couples Are Having Trouble Obtaining Divorces*, Apr. 15, 2008, ABC NEWS, available at <http://abcnews.go.com/US/wireStory?id=4657843> [hereinafter Henry, *Obtaining Divorces*] (discussing American couples’ problems with conflicting jurisdictions’ laws); see also Hampson, *supra* note 50 (discussing Canada’s experience with same-sex couples’ divorce).

57. See *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002) (refusing to recognize a Vermont civil union for the purpose of dissolving it); *Chambers v. Ormiston*, 935 A.2d 956, 958 (R.I. 2007) (rejecting a family court’s recognition of same-sex couple’s marriage from another state for the purpose of entertaining a divorce petition); cf. *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (declining to recognize a civil union when measuring compliance with a visitation order).

58. Compare CAL. FAM. CODE § 300 (West 2008) (establishing no residency requirement for marriage in California), with CAL. FAM. CODE § 2320 (West 2008) (stating that a judgment for dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of California for six months and a resident of the county of filing for three months). Compare MASS. GEN. LAW ANN. ch. 207, §§ 11-12 (West 2008) (repealing the residency requirements for marriage in Massachusetts), with MASS. GEN. LAW ANN. ch. 208, §§ 4-5 (West 2008) (requiring that parties seeking a divorce must live together as husband and wife in the Commonwealth). Compare VT. STAT. ANN. tit. 18, §§ 5160-5164 (2000) (stating that a marriage license may be issued to non-residents of Vermont), with VT. STAT. ANN. tit. 15, § 592 (2008) (explaining that complaints for divorce or annulment of marriage are subject to a residency requirement). Connecticut civil union law requires that

always view relationship recognition as an all or nothing proposition.<sup>59</sup>

In *Salucco v. Alldredge*, a Massachusetts court, using its general equity powers, granted an uncontested petition for dissolution of a Vermont civil union.<sup>60</sup> The court noted that the parties could not obtain a dissolution in Vermont because the parties, a Massachusetts resident 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.<sup>61</sup> Other couples have been unable to terminate their civil unions, as courts have stated they were without power to recognize the relationship even to end it.<sup>62</sup> That decision leaves those couples in legal limbo.<sup>63</sup>

Potentially harmful litigation strategies in dissolutions are another by-product of non-uniformity of relationship recognition. Because not all states legally recognize that status, separating or dysfunctional family members may seek to use these conflicts for tactical advantage.<sup>64</sup> One striking example is *Miller-Jenkins v. Miller-Jenkins*, a series of litigation that has already consumed five years, and has involved two states' judiciaries and the United States Supreme Court.<sup>65</sup> Janet and Lisa Miller-

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dissolution of such a union follow existing law for dissolution of a marriage in the state. If both parties were non-residents at the time of the marriage, one party must reside in the state for one year in order to dissolve the marriage. CONN. GEN. STAT. ANN. § 46b-44(c) (2008). See Marriage Act, R.S.O., ch. M 3, (1990) (Can.) (omitting a citizenship or residency requirement in order to get married in Canada).

59. See, e.g., Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 434 (2005).

60. No. 02 E0087GC1, 2004 WL 864459, at \*1 (Mass. Super. App. Ct. Mar. 19, 2004) (dissolving a civil union prior to the recognition of marriage for same-sex couples in Massachusetts).

61. *Id.* at \*2. Accord Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 739 n.163 (2004).

62. See *Chambers*, 935 A.2d at 958 (rejecting, in a divorce proceeding, a family court recognition of same-sex couple's marriage from another state); *Rosengarten*, 802 A.2d at 184 (refusing to recognize a Vermont civil union in order to dissolve it); *Burns*, 560 S.E.2d at 49 (deciding not to recognize civil union for the purposes of measuring compliance with a visitation order).

63. See, e.g., Editorial, *Breaking Up is Hard to Do*, ROANOKE TIMES, June 15, 2008, at 2 (describing Teresa and Rebekah Austin's Vermont civil union, which cannot be dissolved in Virginia).

64. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303-04, 1309 (M.D. Fla. 2005) (refusing to recognize the Massachusetts marriage of a same-sex couple under Florida or federal law). But see *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 455 (App. Div. 2003) (recognizing a Vermont civil union partner as a "spouse" for the purposes of New York's wrongful death statute), *rev'd*, 802 N.Y.S.2d 476 (App. Div. 2005).

65. See *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins, Vt.)*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007), *appeal after remand*, No. 2007-271, 2008 WL 2811218, at \*1 (Vt. 2008); and *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins, Va.)*, 637 S.E.2d 330 (Va. Ct. App. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008).

Jenkins entered into a civil union in Vermont.<sup>66</sup> During their union, Lisa became pregnant by artificial insemination with the approval of both partners. She gave birth to a girl, Isabella, 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 Isabella; the Vermont court gave Lisa custody and awarded visitation to Janet.<sup>67</sup>

Lisa then moved to Virginia and filed a new action in a Virginia trial court.<sup>68</sup> Relying on the state's legislation denying recognition to any relationship except a marriage between a man and a woman, 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.<sup>69</sup> 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.<sup>70</sup> A Virginia intermediate appellate court ultimately reversed that decision.<sup>71</sup> Lisa again sought review of the custody and visitation decision in the Virginia courts, but that appeal was also rejected.<sup>72</sup> The Virginia Supreme Court eventually affirmed the first appellate court's ruling, without reaching the merits of Lisa's second appeal.<sup>73</sup>

Meanwhile, in response to the Virginia trial court, Vermont reaffirmed its jurisdiction and its original visitation award.<sup>74</sup> It refused to defer to a

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66. For a revealing look at the family dynamics behind *Miller-Jenkins*, see April Witt, *About Isabella: Janet Jenkins and Lisa Miller Got Hitched and Had a Baby Together. Vermont Says That's a Simple Truth. Virginia Said it Was all Null and Void. The Future of a Little Girl Hangs in the Balance*, WASH. POST, Feb. 4, 2007, at W14 (Magazine).

67. See *Miller-Jenkins*, Vt., 912 A.2d at 956.

68. See *Miller-Jenkins*, Va., 637 S.E.2d at 332.

69. See *Miller-Jenkins*, Va., 661 S.E.2d at 824-25 (describing the procedural history at the trial court level). The Marriage Affirmation Act, VA. CODE ANN. § 20-45.3 (West 2008), states that

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.

70. See *Miller-Jenkins*, Va., 661 S.E.2d at 824-25 (explaining that a Virginia circuit court concluded that it had jurisdiction over the custody dispute and entered an order awarding sole custody to Lisa as the child's "sole" parent, and that Janet did not have parental rights).

71. See *Miller-Jenkins*, Va., 637 S.E.2d at 338 (vacating the trial court's decision and remanding with instructions to allow Janet to register the Vermont order).

72. See *Miller-Jenkins v. Miller-Jenkins*, No. 0688-06-4, 2007 Va. App. LEXIS 158, at \*1 (Va. App. 2007).

73. See *Miller-Jenkins*, Va., 661 S.E.2d at 827.

74. See *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins, Vt.)*, 912 A.2d 959-60

sister state and preclude the parties from a remedy.<sup>75</sup> 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,<sup>76</sup> and the United States Supreme Court denied certiorari.<sup>77</sup> 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.<sup>78</sup> Accordingly, she argued that the Vermont courts never had jurisdiction over the civil union, nor over the dissolution and visitation matters; Vermont rejected these claims.<sup>79</sup>

As *Miller-Jenkins* illustrates, even uniform state laws like the Uniform Child Custody Jurisdiction Act (UCCJA)<sup>80</sup> and the federal Parental Kidnapping Prevention Act (PKPA),<sup>81</sup> 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.<sup>82</sup> 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 these families. As the following sections will demonstrate, significant numbers of same-sex families already exist. Some, such as the parties in *Miller-Jenkins*, are already raising children. Accordingly, these inter-sovereign

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(Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007), *appeal after remand*, No. 2007-271, 2008 WL 2811218, at \*1 (Vt. 2008).

75. *Miller-Jenkins, Vt.*, 912 A.2d at 956-57.

76. *Id.* at 974.

77. *See Miller-Jenkins v. Miller-Jenkins*, 127 S. Ct. 2130 (2007) (denying petition for writ of certiorari to the Supreme Court of Vermont).

78. *See Miller-Jenkins v. Miller-Jenkins*, 2008 WL 2811218, at \*1 (Vt. Mar. 2008) (ruling on new claims, made by Lisa, that the family law court did not consider: Vermont's choice-of-law principles in accepting Lisa and Janet's parentage; a violation of Lisa's constitutional rights by establishing parentage to a non-biological, non-adoptive person; an error by not giving full faith and credit to Virginia's parentage orders; and abusing its discretion by not allowing her to amend her complaint).

79. *See id.* at \*1-4 (finding no new evidence or facts to consider that would affect prior legal conclusions).

80. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT (UCCJA) §§ 1-28, 9 U.L.A. 111-70 (1968). 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/uccjea/final1997act.htm>. It has been accepted by all states, the District of Columbia, and the Virgin Islands.

81. *See* 28 U.S.C. § 1738A (2000).

82. *See generally* Oren Goldhaber, Note, "I Want My Mommies": *The Cry for Mini-DOMAs to Recognize the Best Interests of the Children of Same-Sex Couples*, 45 FAM. CT. REV. 287, 289 (2007) (explaining the differences between the UCCJA and the Parental Kidnapping Prevention Act (PKPA)); *Marriage Ban Misused in Custody Case*, THE VIRGINIAN-PILOT, June 11, 2008, at B8 (describing the inconsistent recognition of same-sex marriage amongst the states).

disputes can only increase.

### *B. 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 27.5% of same-sex couple households are raising children under the age of eighteen; that figure is less than for opposite-sex couples, 36%.<sup>83</sup> Thirty-five percent of lesbians aged eighteen to forty-four have given birth, while 65% of heterosexual women in that same age cohort have done so.<sup>84</sup> Sixteen percent of gay men have a biological or adopted child living with them, compared to 48% of heterosexual or bisexual men.<sup>85</sup> Conversely, lesbian or bisexual women were twice as likely to report that they lived with a child to whom they had not given birth.<sup>86</sup> This difference is probably attributable to lesbian or bisexual women's greater likelihood of living with women who had borne a child in a past or current relationship.<sup>87</sup>

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 had offspring.<sup>88</sup> A similar percentage of heterosexual women and lesbians in both cohorts desire children (or an additional child), 53.5% and 41.4% respectively.<sup>89</sup> A comparable pattern holds true for heterosexual and gay men, 66.6% and 51.8%.<sup>90</sup>

Beyond merely desiring parenthood, same-sex couples are already parents. In California, a striking 83% of female and male same-sex couples with children were raising children to whom they were biologically

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83. See GATES & OST, *supra* note 1, at 45.

84. See GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5 (The Williams Institute & The Urban Institute 2007) [hereinafter GATES ET AL., ADOPTION] (citing data from the National Survey of Family Growth, conducted by the National Center for Health Statistics in 2002).

85. See *id.*

86. See *id.*

87. See *id.*; see also Gates & Romero, *supra* note 7, at 11-13 (attempting to determine 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).

88. See GATES ET AL., ADOPTION, *supra* note 84, at 5.

89. See *id.*

90. See *id.* at 5-6 (reporting that bisexuals had rates almost identical to heterosexuals on this measure).

related.<sup>91</sup> Moreover, non-white same-sex couples with children were more likely to be raising their own children than were white couples.<sup>92</sup> 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.<sup>93</sup> Not surprisingly, women and men in same-sex couples who were previously married are nearly twice as likely to have a child under eighteen in the home as their never-married counterparts.<sup>94</sup>

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 the government and its institutions.<sup>95</sup> Accordingly, courts will increasingly interpret custody and visitation standards for sexual minorities under the modern "best interests of the child" standard.<sup>96</sup> 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.<sup>97</sup> Although

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91. See R. BRADLEY SEARS & M.V. LEE BADGETT, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN CALIFORNIA: DATA FROM CENSUS 2000, THE WILLIAMS PROJECT: INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES 1, 10-11 (2004); see also Gates & Romero, *supra* note 7, at 11-12.

92. See GATES ET AL., RACE AND ETHNICITY, *supra* note 8, at 7; see also Gates & Romero, *supra* note 7, at 9.

93. See Gates & Romero, *supra* note 7, at 12.

94. See *id.* (explaining that nearly 94% of households where one partner was previously married included a biologically related child).

95. See GATES, GEOGRAPHIC TRENDS, *supra* note 15, at 8.

96. See, e.g., E.N.O. v. L.M.M., 711 N.E.2d 886, 890-91 (Mass. 1999) (finding that in every case in which a court may have the opportunity to disrupt a relationship between a parent and a child, the court needs to consider whether it is in the child's best interest to maintain contact with the parent, in light of the specific circumstances of their relationship).

97. Cf. S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (determining that a homosexual mother's conduct with her lover can never be kept private enough to be a neutral factor in the development of a child's values and character). See Todd Brower, "A Stranger to Its Laws": Homosexuality, Schemas, and the Lessons and Limits of Reasoning by Analogy, 38 SANTA CLARA L. REV. 65, 82 (1997) [hereinafter Brower, *A Stranger*] (noting that courts view lesbian mothers as foisting their choices and preferences upon their children and the world at large); Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 J. AM. ACAD. MATRIMONIAL LAW, 95, 97-98 (2002) (advising attorneys to accept that in many courtrooms, that a parent is a lesbian or gay will start out as the proverbial "elephant in

this may be increasingly less common,<sup>98</sup> and legislatures and courts may decide that homosexuality alone is not a reason to deny custody,<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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 ha[d] chosen for herself and her child a lifestyle unacceptable to the father and to society."<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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.<sup>105</sup> Many courts find nothing inconsistent in using the mother's same-sex relationship like the trial court in *Palmore* employed the mother's interracial relationship.<sup>106</sup> In *S.E.G. v. R.A.G.*, the Missouri court removed a lesbian

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the room" in an inquiry into the best interests of the child).

98. See Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 924-26 (2001).

99. See, e.g., *id.* at 919.

100. See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (transferring custody from a lesbian mother and female partner to the child's maternal grandmother because the court believed that "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'"); see also *S.E.G.*, 735 S.W.2d at 165-66. *But see, e.g., S.N.E. v. R.L.B.*, 699 P.2d 875, 878-79 (Alaska 1985) (rejecting social intolerance of lesbianism as the reason to change custody from an otherwise fit mother).

101. 466 U.S. 429, 433-34 (1984).

102. See *id.* at 431 (referring to the term "lifestyle" to denote unacceptable behavior and to trivialize gay and lesbian relationships); see also *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (opining that Coloradans are entitled to be hostile toward homosexual conduct).

103. See *Palmore*, 466 U.S. at 434.

104. *Id.* at 433.

105. See, e.g., *S.E.G.*, 735 S.W.2d at 166.

106. See Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 860-61 (1997) (arguing against the position that

mother's custody of her four minor children because Union, Missouri was a small community where gays were not common or openly accepted.<sup>107</sup> Therefore, the court felt it needed to protect the children from peer pressure, teasing, and ostracism.<sup>108</sup> That reasoning replicated the faults of the lower court in *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.<sup>109</sup> For example, the judge in *S.E.G.* noted,

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 wife and 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.<sup>110</sup>

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.<sup>111</sup>

Nevertheless, many of these same-sex couples are raising their own biological children.<sup>112</sup> 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,<sup>113</sup> nor will generally ignoring what demographic data demonstrates about these couples. These families and their legal problems will continue to reach domestic relations dockets. 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, and Arizona.<sup>114</sup> Particularly in those communities, judges may be correct that same-sex families may be seen as unconventional and face discrimination and ostracism.<sup>115</sup> However, these

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same-sex relationships, like interracial relationships, should be prohibited on the basis of immorality).

107. 735 S.W.2d at 166.

108. *See id.*

109. *See Strasser, supra* note 106, at 866-72 (noting that courts distinguish between heterosexual behavior and homosexual behavior when considering appropriate displays of affection in front of children).

110. *Compare S.E.G.*, 735 S.W.2d at 166, *with Palmore v. Sidoti*, 466 U.S. 429, 431 (1984) (stating from the court record that "[t]he wife has chosen for herself and her child, a lifestyle unacceptable to the father and to society").

111. *See, e.g., S.E.G.*, 735 S.W.2d at 166.

112. *See, e.g., GATES ET AL., RACE AND ETHNICITY, supra* note 8, at 7.

113. *See, e.g., NGLTF, Anti-Gay Marriage Measures, supra* note 22.

114. *See GATES & OST, supra* note 1, at 46 (citing data from the 2000 Census).

115. *E.g., Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (noting that children in same-sex families may face "social condemnation" afflicting a child's peer relationships).

areas are also experiencing some of the largest increases in the rate of growth of same-sex couples.<sup>116</sup> 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.<sup>117</sup> 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 to give societal prejudice the stamp of government sanction in custody and visitation.<sup>118</sup>

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.<sup>119</sup> If the same-sex relationship fails, those courts must address de facto parenting claims by the non-biological parent.<sup>120</sup> These issues are already familiar to domestic relations courts. De facto parent rights are not unique to same-sex relationships; children are often raised by opposite-sex, unmarried couples,<sup>121</sup> grandparents,<sup>122</sup> and others.<sup>123</sup>

Indeed, one of the unintended consequences for heterosexual families

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116. See *supra* notes 19-20 and accompanying text.

117. See generally Gregory M. Herek & John Capitano, "Some of My Best Friends": Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Towards Gay Men and Lesbians, 22 PERS. & SOC. PSYCHOL. BULL. 412 (1996) (finding that increased contact with lesbians and gay men improves heterosexuals' attitudes about sexual minorities).

118. Cf. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (noting the prejudice against interracial families and determining that the law cannot be used to give effect to these private prejudices).

119. See *Gates & Romero*, *supra* note 7, at 11-13; see also *supra* notes 85-87 and accompanying text.

120. See *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (finding that a 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) (observing that the former domestic partner of a child's biological mother should be allowed to assert a "de facto parental relationship" between herself and the child in family court, and that 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) (categorizing a lesbian co-parent as a "biological stranger" to the child and giving her no standing to seek visitation).

121. See *Michael H. v. Gerald D.*, 236 Cal. Rptr. 810, 817-19 (Ct. App. 1987), *aff'd*, 491 U.S. 110 (1989) (putative father); see also *Koelle v. Zwiren*, 672 N.E.2d 868, 875 (Ill. App. Ct. 1996) (male caretaker); *Price v. Howard*, 484 S.E.2d 528, 529 (N.C. 1997) (male caretaker).

122. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 61 (2000) (considering paternal grandparents' petition for visitation with grandchildren born out of wedlock).

123. See *Riepe v. Riepe*, 91 P.3d 312, 314 (Ariz. Ct. App. 2004) (widowed step-mother); *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 706 (Ct. App. 2003) (half-sister); *Webster v. Ryan*, 729 N.Y.S.2d 315 (Fam. Ct. 2001), *overruled by Harriet II v. Alex LL*, 740 N.Y.S.2d 162 (App. Div. 2002) (foster mother).

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,<sup>124</sup> 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.<sup>125</sup>

Alternative non-marital claims and their negative consequences are exacerbated when different jurisdictions draw contrary conclusions on the validity of same-sex couples' relationships and families.<sup>126</sup> In contrast to grandparents, who have had political success in changing laws to grant them child visitation privileges,<sup>127</sup> the non-biological partner in same-sex couples often has no such rights. That lack of rights has an adverse impact

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124. See, e.g., *supra* notes 120-23 and accompanying text.

125. Cf. Dale Carpenter, *The Federalist Society Online Debate Series: Same Sex Marriage*, Aug. 6, 2008, <http://www.fed-soc.org/debates/dbtid.24/default.asp>.

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.

See also Posting by Public Defender to the Volokh Conspiracy, <http://Volokh.com/posts/1219178071.shtml> (Aug. 24, 2008, 6:21 AM) (emphasizing that the absence of same-sex marriage is weakening heterosexual marriage by giving heterosexual couples an alternative to marriage).

126. See *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins, Vt.)*, 912 A.2d 951 (Vt. 2006) (holding that the same-sex civil union was not void and that the court was not required to enforce a conflicting decision of a Virginia court), *cert. denied*, 127 S. Ct. 2130 (2007), *appeal after remand*, No. 2007-271, 2008 WL 2811218, at \*1 (Vt. 2008); *Miller-Jenkins v. Miller-Jenkins (Miller-Jenkins, Va.)*, 637 S.E.2d 330, 337 (Va. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008); Belluck & Liptak, *supra* note 56; Henry, *Obtaining Divorces*, *supra* note 56 (discussing American couples' problems with conflicting jurisdictions' laws). Accord Hampson, *supra* note 50 (discussing Canada's experience with same-sex couples' divorce).

127. See Beth Sherman, *Third Party Visitation Statutes: Society's Changing Views About What Constitutes a Family Must Be Formally Recognized by Statute*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 5 (2002) (claiming that the existence of grandparent and third party visitation statutes across the United States indicates the wide public support behind the argument that these nonparental parties have a right to seek visitation); Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U. L. REV. 731, 744-48 (2001) (arguing that legislation in favor of grandparents' rights resulted from the strength in size, wealth, and historical political activism of the seniors' lobby).

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.<sup>128</sup> *Elisa B. v. Superior Court* illustrates that problem.<sup>129</sup> The California Supreme Court decided that California's Uniform Parentage Act (UPA) imposed parental obligations on a woman whose former lesbian partner conceived twins by artificial insemination.<sup>130</sup> Relying on the UPA and California precedent, which made 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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> The court obligated Elisa to pay child support for children conceived during the relationship,<sup>134</sup> even

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128. See Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 1 (2004) (arguing that even in jurisdictions that have enacted a minimum Defense of Marriage Act, parental rights likely can survive the invalidation of a same-sex relationship); Recent Case, *Same-Sex Couples' Parental Rights and Obligations—California Supreme Court Holds Child Support Provisions of Its Uniform Parentage Act Applicable to Same-Sex Couples: Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), 119 HARV. L. REV. 1614, 1620-21 (2006) (demonstrating that the California Supreme Court stretched existing law and introduced uncertainty in its attempt to bring the case within the statute's coverage). Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 118-32 (1989) (upholding a law creating an irrebutable presumption that the husband of a woman who gave birth during the course of the marriage is the legal father).

129. See 117 P.3d 660, 664 (Cal. 2005) (addressing whether a former lesbian partner was obliged to pay child support for children intentionally conceived while the relationship was extant).

130. See *id.* at 662 (referencing CAL. FAM. CODE §§ 7600-7730 (West 2008)).

131. See *Elisa B.*, 117 P.3d at 670 (discussing CAL. FAM. CODE §7611(d) which controls those situations where the presumed parent acts with the birth mother to cause a child to be conceived); see also *People v. Sorensen*, 437 P.2d 495, 499 (Cal. 1968) (en banc) (ruling that husbands who consent and participate in the artificial insemination of their wives cannot create a merely temporary relation to the child to later be disclaimed at will); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 286-87 (Ct. App. 1998).

132. *Elisa B.*, 117 P.3d at 670 (concluding that although Elisa was not the children's biological mother, she voluntarily accepted the rights and obligations of parenthood after the twins were born).

133. See *id.* at 669-71 (determining that earlier cases that held non-biological partners from same-sex relationships who had not adopted their partner's children be deemed nonparents for purposes of support were unpersuasive in light of later cases recognizing that non-biological parents could be presumed parents).

134. *Id.* at 662.

though the couple had not been in a state-sanctioned domestic partnership.<sup>135</sup> 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 even though his female partner bore a child through artificial insemination during the relationship.<sup>136</sup>

Moreover, although the court could have reached the same result through equitable principles<sup>137</sup> or de facto parentage,<sup>138</sup> it applied statutory parentage presumptions applicable to opposite-sex married couples. This article is agnostic on whether the California court acted appropriately.<sup>139</sup> 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<sup>140</sup> 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

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135. See *id.* at 666 (noting that *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. See CAL. FAM. CODE § 298 (West 2008). The case also preceded the California Supreme Court's decision permitting same-sex couples to marry. *In re Marriage Cases*, 183 P.3d 384, 399-402 (Cal. 2008) (finding that language in the California Family Code limiting the definition of marriage as a union "between a man and a woman" was unconstitutional and a violation of equal protection), *superseded by* CAL. CONST. art. I, § 7.5. See also Editorial, *California's Legal Tangle*, N.Y. TIMES, Nov. 25, 2008, at A30.

136. *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 55-58 (Ct. App. 2000) (observing that the court granted parenting rights derived from a contract, which the plaintiff and the mother had signed).

137. Cf. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 889-90 (Mass. 1999) (holding that the court could use its equity jurisdiction to grant visitation rights even though a non-biological partner had no statutory rights under the state's parentage presumptions).

138. Cf. *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (en banc) (applying the de facto parentage doctrine to provide a non-biological parent rights and responsibilities, despite a lack of coverage under statutory presumptions).

139. See Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 75 (2006) (arguing that children of same-sex couples should enjoy the protections of parentage presumptions).

140. See Recent Case, *supra* note 128, at 1620 (quoting Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California To Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 638 (2003)):

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.

courts may sometimes be left with domestic relations problems that cannot be heard in family courts.<sup>141</sup> 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.<sup>142</sup> Judges in these courtrooms may not have had judicial education in dealing with family court litigants or their particular concerns and underlying social dynamics.<sup>143</sup>

Domestic relations lawsuits are often more emotional than general civil litigation. Rather than a dispute about contracts 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."<sup>144</sup> 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 show that litigants give the lowest ratings to the family courts on procedural fairness—the perception that the courts treat the parties fairly and respectfully, and that courts provide them an appropriate opportunity to be heard.<sup>145</sup> 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. Same-sex couples and their relationships will most likely share those same beliefs and those

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141. See *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002) (refusing to recognize a Vermont civil union for purposes of dissolving it); *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (declining to recognize a civil union for purposes of measuring compliance with a visitation order); *Chambers v. Ormiston*, 935 A.2d 956, 958 (R.I. 2007) (holding that family court, as 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).

142. See *Hill v. Westbrook's Estate (In re Westbrook's Estate)*, 247 P.2d 19, 20 (Cal. 1952) (meretricious relationships); *Vallera v. Vallera*, 134 P.2d 761, 763 (Cal. 1943) (contract); *Nichols v. Funderburk*, 881 So. 2d 266, 269-73 (Miss. Ct. App. 2003) (discussing business partnership, constructive trust, and equitable property division alternatives for unmarried cohabitants), *aff'd*, 883 So. 2d 554 (Miss. 2004); *Kozlowski v. Kozlowski*, 395 A.2d 913, 917-19 (N.J. Super. Ct. Ch. Div. 1978) (discussing joint venture, business partnership, and quasi-contract), *aff'd*, 403 A.2d 902 (N.J. 1979); see also *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (explaining that "[cohabitating] parties might keep their earnings and property separate, but agree to compensate one party for services which benefit the other. They may choose to pool only part of their earnings and property, to form a partnership or joint venture, or to hold property acquired as joint tenants or tenants in common, or agree to any other such arrangement.").

143. See, e.g., National Council for Juvenile and Family Court Judges, Conference Calendar, <http://www.ncjfcj.org/content/view/285/378/> (last visited Feb. 2, 2009); National Judicial College 2009 Course Schedule, <http://www.judges.org/news/news042208.html> (last visited Feb. 2, 2009).

144. Sherman, *supra* note 127, at n.132.

145. Rottman, *supra* note 39, at 19.

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<sup>146</sup>—often as a result of the psycho-social dynamics of family law cases.<sup>147</sup> 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.<sup>148</sup> 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.”<sup>149</sup> Alternative dispute resolution (ADR) 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.<sup>150</sup>

Mediation facilitates voluntary accommodation of rights among competing claimants, allowing the parties to reach their own solution, if possible.<sup>151</sup> If one party seeking visitation lacks a clear legal basis for that

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146. See, e.g., KAN. STAT. ANN. § 23-602 (2007) (describing that the court may order mediation of any contested issue of child custody, residency, parenting time, division of property, or any other issues at any time, upon motion of a party, or on the court’s own motion); RULES FOR THE FAM. DIV. OF THE ME. DIST. CT. (2005), [http://www.courts.state.me.us/maine\\_courts/specialized/family/rules.html](http://www.courts.state.me.us/maine_courts/specialized/family/rules.html) (last visited Feb. 2, 2009); see also Mediation in the Alaska Court System, <http://www.state.ak.us/courts/mediation.htm#15> (last visited Feb. 2, 2009) (detailing the mediation resources of the Alaska courts in domestic relations matters); Lynn Ryan MacKenzie, *Family Court Mediation Services*, 1 FAM. CT. BULL. (2000), available at [http://www.sconet.state.oh.us/Judicial\\_and\\_Court\\_Services/family\\_court/vol1num2.pdf](http://www.sconet.state.oh.us/Judicial_and_Court_Services/family_court/vol1num2.pdf) (describing the uses and processes of mediation in the Ohio family court system).

147. See *infra* notes 148-52 and accompanying text.

148. See Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 407-08 (2000) (asserting that mediation would be better for litigants who must have a continuing relationship after trial because mediation emphasizes common interests and not divisions).

149. *Id.* at 405.

150. *Id.* at 407-08.

151. See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOTIATION L. REV. 71, 83-84 (1998); Colleen N. Kotyk, Note, *Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick*, 6 WM. & MARY BILL OF RTS. J. 277, 280 (1997) (quoting Bette J. Roth et al., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 23:9, at 7 (1996)).

claim, it undermines the other party's incentives to mediate. Because same-sex relationships may not be 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.<sup>152</sup> 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.<sup>153</sup> Therefore, this uncertainty will lead to an increase in litigation of same-sex couples' custody rights—leaving children caught in the middle.<sup>154</sup>

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. The *Miller-Jenkins* litigations are one example of that effect.<sup>155</sup> Unlike in most heterosexual family cases, lawyers in same-sex couples' custody and visitation disputes may employ the divisions among states' legal regimes to their tactical advantage, thus potentially creating detrimental effects on both those relationships and on legal doctrine.<sup>156</sup> 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.<sup>157</sup> Once the couple's relationship soured, the biological mother refused to give 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.<sup>158</sup> Therefore, the former partner could not prove the child would be harmed if cut off from her—the state's legal requirement

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152. See Goldhaber, *supra* note 82, at 287; Sherman, *supra*, note 127, at nn.136-38.

153. See UNIFORM CHILD CUSTODY JURISDICTION ACT, Prefatory Note, 9 U.L.A. 261, 262 (1968) (citing as one of the reasons for the enactment of the uniform law, the growing public concern that thousands of children are uprooted while parents or third parties battle for custody in the courts of several states); GATES, GEOGRAPHIC TRENDS, *supra* note 15, at 1 (reporting that as of 2007, the number of same-sex couples calling themselves "unmarried partners" has quintupled since 1990).

154. See *supra* notes 65-81 and accompanying text.

155. See, e.g., the *Miller-Jenkins* litigations, *supra* notes 65-79 and accompanying text.

156. Gartner, *supra* note 38, at 48-49; see also Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235, 1261 (2005) (expressing concern about the potential for forum shopping to the detriment of a partner).

157. See *Stadter v. Siperko*, 661 S.E.2d 494, 496 (Va. Ct. App. 2008) (noting that the non-biological mother never adopted the child, and that she and the biological mother never wrote a pre-separation agreement concerning her parental rights).

158. See *id.* at 497 (discussing with approval the basis for the trial court's denial of visitation, including expert testimony from a social worker, who met the child twice and found no emotional damage, and animosity between the parties).

for non-biological parents.<sup>159</sup> Thus, the delays caused by the tactical use of litigation and the failure of 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 that 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.<sup>160</sup> That sound advice may fall victim to parties' desires in these matters; and parties may sometimes decline to assert their autonomous identity in order to conform with a court's heteronormative expectations, to the detriment of precedent.<sup>161</sup> Demographic data show that same-sex couples' relationships currently fail at rates below that of opposite sex couples,<sup>162</sup> but those numbers may be distorted by the relative newness of their legal status.<sup>163</sup> 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

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159. Editorial, *supra* note 63, at 2 (describing Christine Stadter's predicament and expressing skepticism that a judge could rule for someone in Stadter's position without being accused of activism).

160. See, e.g., Gay & Lesbian Advocates & Defenders et al., *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA WOMEN'S L.J. 151, 155 (1999).

161. See Gartner, *supra* note 38, at 54-60 (exploring the phenomenon of lesbians attempting to seem more feminine, maternal, and less politically vocal for courts have consistently rewarded the less "threatening" partner in a custody dispute).

162. See Wyatt Buchanan, *The Battle Over Same-Sex Marriage; Couple Split Up, Drop Names from State Court Case*, S.F. CHRON., Nov. 13, 2006, at B1 (stating that Vermont statistics place civil union dissolution rates at about 1.4%); Ray Henry, *A New Struggle for Gay Couples; Divorce Proving Difficult to Obtain Due to State Laws*, WASH. POST, Apr. 20, 2008, at A6 (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); Tracey Kaplan, *Gay Couple's Split Months After Vows Adds Fuel To Debate; Breakup Tangled in Legal Ambiguity*, SAN JOSE MERCURY NEWS, July 10, 2004, at 1A (citing low same-sex dissolution counts for Vermont and Massachusetts, while the divorce rate for heterosexual couples remains at about half after six or seven years of marriage).

163. Clyde Haberman, *NYC; Equal Chance Of Divorce For All*, N.Y. TIMES, Mar. 9, 2004, at B1 (discussing the divorce rate for same-sex couples as initially lower due to the novelty of the right, but anticipating that it will eventually approximate heterosexual rates).

significant. Of the estimated 3.1 million lesbian and gay male households in the United States, 1.6% include an adopted child under eighteen.<sup>164</sup> 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.<sup>165</sup> Lesbian and gay parents raise a little over 4% of adopted children in the United States.<sup>166</sup> Within that percentage, single lesbians and gay men parent 3%, and same-sex couples rear 1%, of adopted children.<sup>167</sup> Strikingly, of that 1%, roughly 80% have female same-sex parents.<sup>168</sup> 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.<sup>169</sup> This includes working to expand co-parent and second parent adoption,<sup>170</sup> as well as revising agency policies and practices that may impede consideration of lesbians and gay men as adoptive parents.<sup>171</sup> 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.<sup>172</sup>

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164. GATES ET AL., ADOPTION, *supra* note 84, at 7-8.

165. *Id.* at 11.

166. *Id.* at 7-8.

167. *Id.* at 11.

168. *Id.*

169. *See, e.g.*, National Gay & Lesbian Task Force, *Adoption Laws in the U.S.* (2008), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/adoption\\_laws\\_11\\_08.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/adoption_laws_11_08.pdf).

170. *See, e.g.*, National Gay & Lesbian Task Force, *Second-Parent Adoption in the U.S.* (2008), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/2nd\\_parent\\_adoption\\_11\\_08.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_11_08.pdf).

171. *See* EVAN B. DONALDSON ADOPTION INSTITUTE, EXPANDING RESOURCES FOR CHILDREN: IS ADOPTION BY GAYS AND LESBIANS PART OF THE ANSWER FOR BOYS AND GIRLS WHO NEED HOMES? 3, 11-12 (The Gill Foundation & the Human Rights Campaign 2006) (finding that of the 65% of agencies that had a policy on gay and lesbian adoption, a quarter of them rejected gay and lesbian applicants).

172. LISA BENNETT & GARY J. GATES, THE COST OF MARRIAGE INEQUALITY TO

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.<sup>173</sup> 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.<sup>174</sup> 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 same-sex adoptive parents face is the potential for societal prejudice against their families. This bias is related to the issue discussed earlier in custody cases.<sup>175</sup> 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 minorities, or who may have special needs.<sup>176</sup> Thus, one effect on family law is the need to address any attendant nativist, racial, ethnic, or disability prejudice or difficulty that a non-traditional family may provoke.<sup>177</sup> As one commentator noted in discussing transracial adoption:

[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,

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CHILDREN AND THEIR SAME-SEX PARENTS 7-8 (Human Rights Campaign Foundation 2004), available at <http://www.urban.org/url.cfm?ID=410939>.

173. See EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 171, at 12 (revealing that 14% of eighty adoption agency workers interviewed wrongly assumed that placing children with gay or lesbian parents was illegal or violated agency policy).

174. See Maggie Jackson, *Same-Sex Couples Face Unique Adoption Hurdles*, BOSTON GLOBE, Mar. 26, 2006, available at [http://www.boston.com/jobs/news/articles/2006/03/26/same\\_sex\\_couples\\_face\\_unique\\_adoption\\_hurdles/](http://www.boston.com/jobs/news/articles/2006/03/26/same_sex_couples_face_unique_adoption_hurdles/); Arlene Istar Lev, *Scrutinizing Would-Be Parents: Gays Looking to Adopt Will Have to Endure Rigorous Home Studies*, THE WASHINGTON BLADE, Mar. 31, 2006, available at <http://www.washingtonblade.com/2006/3-31/arts/home/annabes.cfm> (discussing hiding sexual orientation to get around agency rules or government policies).

175. See *supra* notes 101-111 and accompanying text.

176. GATES ET AL., ADOPTION, *supra* note 84, at 12-13; *Palmore v. Sidoti*, 466 U.S. 429, 433-35 (1984) (holding that racial prejudice was not a permissible ground to support removing a child from a natural mother who had remarried a black man); see also *supra* notes 100-111 and accompanying text. For issues involving transracial adoption, see generally Hawley Fogg-Davis, *Symposium On Transracial Adoption: A Race-Conscious Argument For Transracial Adoption*, 6 B.U. PUB. INT. L.J. 385 (1997); Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503 (1984); 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).

177. EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 171, at 3.

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.<sup>178</sup>

Because same-sex couples disproportionately raise children of different 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.<sup>179</sup> 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.<sup>180</sup> By determining how domestic relations law 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.<sup>181</sup> Therefore, family law may not only change jurisprudentially, but its signaling function is likely to convey different social messages.

### C. 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.<sup>182</sup> For example, the percentages of households in which only one partner was employed were: opposite-sex married couples 34%, same-

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178. Mini, *supra* note 176, at 913 n.76.

179. 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, 770-71 (1999).

180. Cf. Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & L. 175, 190-92 (1995) (stating that the creation of legal norms generates social norms though some courts deny this effect). See Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1811 (1993) (asserting that court rhetoric is often reflective and generative of societal norms); see also Posting of amsiegel to PrawfsBlawg, <http://prawfsblawg.blogs.com/prawfsblawg/2008/06/a-thought-exper.html#more> (June 18, 2008, 01:21 PM) (posing the question of the proper role of constitutional courts on the same-sex marriage issue).

181. Lin, *supra* note 179, at 766-68, 767 n.141 (quoting *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982)) (“[N]o 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).

182. See SEARS & BADGETT, *supra* note 91, at 8 (noting that this level of interdependence makes same-sex couples vulnerable when they are not given public and private support).

sex couples 29%, and opposite-sex unmarried couples 24%.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> Thus in contrast to common perceptions, same-sex couples are often dependent on each other for support similar to the traditional model for opposite-sex couples and 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.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup>

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

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183. *See id.* at 9 (suggesting that individuals involved in same-sex relationships may take on the other partner's tuition payment or child-care expenses much like heterosexual couples).

184. *See id.* (expressing concern that without the protection of marriage, the low-earning partner may encounter financial difficulty if the relationship dissolves or the high-wage earner dies).

185. *See id.* at 8. Seventy-one percent of same-sex couples are employed; among opposite-sex couples, 62% are employed. 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. Individuals in married couples and same-sex couples are also similar in average and median ages. The average age of same-sex couples is forty-three, and for heterosexual married couples the average age is forty-seven; the median age of same-sex couples is forty, and for heterosexual married couples the median age is forty-four. *Id.*

186. ADAM P. ROMERO ET AL., CENSUS SNAPSHOT: UNITED STATES 2 (The Williams Institute 2007).

187. *See SEARS & BADGETT, supra* note 91, at 15.

188. ROMERO ET AL., *supra* note 186, at 15.

gay men's families. For example, death protections for surviving spouses like forced share, dower, curtesy,<sup>189</sup> inheritance, and community property regimes<sup>190</sup> all seem pertinent to surviving same-sex spouses or partners.<sup>191</sup>

Indeed, civil partnerships and civil unions often encompass versions of these marital rights.<sup>192</sup> Further, in jurisdictions that permit same-sex couples to marry, those same protections are naturally incorporated.<sup>193</sup> 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.<sup>194</sup> But because same-

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189. See *Russell v. Russell*, 758 So. 2d 533, 538 (Ala. 1999) (discussing the relationship between common law dower and curtesy and statutory forced share provisions); *Gregory v. Estate of H.T. Gregory*, 866 S.W.2d 379, 382 (Ark. 1993) (classifying as well settled the right of a surviving spouse to take an elective share). See generally ACCESS AND FAIRNESS ADVISORY COMMITTEE, JUDICIAL COUNCIL OF CALIFORNIA, DOMESTIC PARTNERSHIP RIGHTS AND RESPONSIBILITIES: WHAT JUDGES NEED TO KNOW (2006) (discussing interaction between the California Domestic Partnership Act and various domestic relations statutory protections and presumptions).

190. See generally *Smith v. Smith*, 56 Cal. Rptr. 3d 341 (Ct. App. 2007) (discussing ways in which courts have tried to protect military spouses under community property doctrines); *Jones v. Steinberger*, 111 Cal. Rptr. 2d 521, 528 (Ct. App. 2001) (showing that a trial court judge may use whatever doctrine he sees fit to ensure substantial justice and fairness in community property division).

191. See Memorandum from the Deputy Assistant Att'y Gen. on Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union from Qualifying for Child's Insurance Benefits Under the Social Security Act (2007), <http://www.usdoj.gov/olc/2007/saadomaopinion10-16-07final.pdf> [hereinafter DOMA Memo]; (ALM Law Journal Newsletters), Sue Reisinger, *Justice Department OKs Benefits for Lesbian Couple's Child*, THE MATRIMONIAL STRATEGIST Sept. 2008, <http://www.law.com/jsp/article.jsp?id=1202422343319&pos=atagance> (discussing a U.S. Department of Justice opinion that entitled the son of a lesbian in a Vermont civil union to the federal Social Security child insurance benefits of the boy's mother's disabled partner despite the federal Defense of Marriage Act).

192. See California Domestic Partner Rights and Responsibilities Act, CAL. FAM. CODE §§ 297–299.6 (West 2004 & Supp. 2008); CONN. GEN. STAT. ANN. § 46b-38nn (2008); N.H. REV. STAT. ANN. § 457-A:1 (2008); N.J. STAT. ANN. § 37:1-29 (West 2007); VT. STAT. ANN. tit. 15, § 1201 (2008). Others states have some but not all protections of marriage: *i.e.*, Domestic Partnership Equality Amendment Act of 2006, D.C. CODE § 14-3 (2006); HAW. REV. STAT. § 527C-2 (2008); Act to Promote the Financial Security of Maine's Families and Children, ch. 672, § 321-sub 2004 Me. Sess. Law Sec. 1 (financial security of families and children); Act to Ensure Access to Health Insurance, ch. 347, § 2319-A, 2001 Me. Law Sec. 1 (access to health insurance); Oregon Family Fairness Act, 2007 Or. Laws, ch. 99 § 7 (2007); WASH. REV. CODE. § 26.60.010 (2008).

193. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (concluding that same-sex couples who wish to marry may not be denied the protections, benefits, and obligations inherent in civil marriage); *Halpern v. Toronto* [2003] 65 O.R.3d 201 (Can.) (holding that equal treatment regarding benefits and obligations had not been extended to same-sex cohabiting couples and that such unequal treatment is unjustified); *Minister of Home Affairs v. Fourie* [2005] (1) SA 1 (CC) at 114-19 (S. Afr.) (determining that because of their right to equal protection under the law, same-sex couples should enjoy the same status, entitlements, and responsibilities as married heterosexual couples).

194. 26 U.S.C. § 215(a) (2008) ("General rule. In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year."); see also Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 827-28 (2008).

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.<sup>195</sup> Similarly, child support payments may be viewed as taxable gifts to an ex-partner.<sup>196</sup>

Even without relationship recognition, state and federal domestic relations and other family support provisions should promote the incorporation of same-sex couples and their families into existing structures. Spousal and child support,<sup>197</sup> temporary custody,<sup>198</sup> or other family benefits on dissolution are solutions that family law has provided to deal with dependency and inequality within marital<sup>199</sup> and, to some degree, quasi-marital relationships.<sup>200</sup> 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.<sup>201</sup> If same-sex couples share the characteristic of interdependence like opposite-sex couples, they too need the security and protection that the law provides to married spouses and their families.<sup>202</sup>

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195. Cain, *supra* note 194, at 837-38.

196. *See, e.g.*, Buchanan, *supra* note 55.

197. *See* Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (ruling that a 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, No. CN-99-09493, 2005 Del. Fam. Ct. LEXIS 1, \*20 (Fam. Ct. 2005) (arriving at the same conclusion as the court in *Elisa B. v. Superior Court*).

198. *E.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999) (granting temporary visitation with partner's child pending trial because plaintiff was a de facto parent, and visitation was within the best interests of the child); A.C. v. C.B., 829 P.2d 660, 665 (N.M. Ct. App. 1992) (allowing standing based on deprivation of the right to maintain a continuing relationship with the child); J.A.L. v. E.P.H., 682 A.2d 1314, 1321-22 (Pa. Super. Ct. 1996) (holding that a mother's former lesbian partner could pursue visitation because she stood in loco parentis to the child); Holtzman v. Knott, 533 N.W.2d 419, 435 (Wis. 1995) (concluding that a lesbian partner can seek visitation when she has a parent-like relationship with the child).

199. *See* Konzelman v. Konzelman, 729 A.2d 7, 20 (N.J. 1999) (O'Hern, J., dissenting) (arguing that economic needs and dependency underpin alimony); Childers v. Childers, 575 P.2d 201, 207 (Wash. 1978) (holding that courts have the power to protect the victims of divorce).

200. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976) (holding that for 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, joint venture, or some other tacit understanding between the parties). *But see, e.g.*, Jones v. Daly, 176 Cal. Rptr. 130, 133, 135 (Ct. App. 1981) (finding that a Marvin-type action was unavailable to a gay male couple, since male cohabitants engaged in sexual activities, 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. *Id.*

201. *See, e.g.*, ACCESS AND FAIRNESS ADVISORY COMMITTEE, *supra* note 189.

202. *See, e.g.*, *supra* notes 197-198. Accord David Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 447 (1996); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y L. 291, 291 (2001). *Cf.* Nichols v.

The failure of the United States federal government and most states to recognize these relationships exacerbates the position in which these families find themselves.<sup>203</sup> They are shut out from virtually all federal support programs designed to protect and support families<sup>204</sup> and many of their state analogs.<sup>205</sup> 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,<sup>206</sup> and all have adopted both statutes and constitutional provisions banning same-sex marriage.<sup>207</sup> 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 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.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup>

Significantly, 40% of same-sex couples raising children are non-white

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Funderburk, 881 So. 2d 266, 273-74 (Miss. Ct. App. 2003) (Bridges, J., concurring in part, dissenting in part) (concluding that a 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, 1125 (1981) (discussing long-term co-habiting couples).

203. For a discussion of how courts should deal with inter-jurisdictional disputes over relationship recognition given these regulations, see Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 1 (2004); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 108 (1996); Tobias Barrington Wolff, *Interest Analysis In Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2217 (2005).

204. See, e.g., U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 04-353R, 3 (2004). But see Reisinger, *supra* note 191 (discussing a recent legal opinion by the Department of Justice Office of Legal Counsel on Social Security child insurance benefits). For a description of other ways in which the law privileges families see Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 230 n.16 (2004).

205. Gates & Romero, *supra*, note 7, at 15.

206. NGLTF, *Relationship Recognition*, *supra* note 21.

207. NGLTF, *Anti-Gay Marriage Measures*, *supra* note 22.

208. Gates & Romero, *supra* note 7, at 14.

209. GATES ET AL., RACE AND ETHNICITY, *supra* note 8, at 5.

210. *Id.* at 7.

compared to only 24% of all same-sex couples with or without children;<sup>211</sup> likewise, 24% of married heterosexual parents are non-white.<sup>212</sup> Census data reveal that minority same-sex couples tend to be demographically similar to heterosexual couples of the same race or ethnicity.<sup>213</sup> 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 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.<sup>214</sup> Therefore, although the need may be more acute for some same-sex families, simply securing the right to state and federal relationship recognition would not cure all their problems.

### III. PROGNOSIS AND CONCLUSION

Obviously, relationship recognition and its attendant legal protections may 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.<sup>215</sup> Nevertheless, the law has two basic choices:

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211. Gates & Romero, *supra* note 7, at 9 (comparing the percentages of same-sex couples with children by race).

212. *Id.* at 14.

213. *Id.* at 25-26, Figures 9-2 and 9-3.

214. See Christopher Carpenter & Gary Gates, *Gay and Lesbian Partnership: Evidence from Multiple Surveys* 2, 6 (CAL. CTR. FOR POPULATION RESEARCH, UCLA, Working Paper, 2006); Gates & Romero, *supra* note 7, at 15 (noting that demographic data collection is still in the initial stages for the recent opening of marriage to same-sex couples in California); see also Tony Perry et al., *With Gay Marriage Now Legal in California, It's the Start of a Couples' Crush*, L.A. TIMES, June 18, 2008, available at <http://articles.latimes.com/2008/jun/18/local/me-marriage18> (noting that same-sex unions became legal in California at 5:01pm on June 16, 2008); *Spike in Marriage Licenses Statewide*, L.A. TIMES, June 19, 2008, available at <http://www.latimes.com/news/local/la-marriagesmap%2C0%2C6124834.htmlstory> (comparing rates of licenses issued by counties on June 17, 2008—the first day for legal same-sex unions—to average rates).

215. See, e.g., NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (arguing that no couple should have to get married in order to receive the civil benefits of marriage); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1403-04 (2001); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1535 (1993) (commenting that gay marriage could diminish efforts to change the gendered nature of marriage in general).

(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.<sup>216</sup>

One brief illustration demonstrates this potential. The Commonwealth of Massachusetts passed the Massachusetts Maternity Leave Act (MMLA),<sup>217</sup> which provides eight weeks of 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.<sup>218</sup> In June 2008, a Commissioner at the Massachusetts Commission Against Discrimination (MCAD) announced that effective immediately, the MMLA would apply to new parents of either sex.<sup>219</sup> 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.

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.<sup>220</sup>

On one level this announcement is unsurprising. The statute created a gender distinction that was arguably invalid sex discrimination under the state constitution.<sup>221</sup> Thus, MCAD converted a gender-based statute to gender-neutrality. Note that same-sex couples' marriages triggered

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216. Cf. Dan Savage, *What Does Marriage Mean?*, SALON.COM, July 17, 2004, [http://dir.salon.com/story/mwt/feature/2004/07/17/gay\\_marriage/](http://dir.salon.com/story/mwt/feature/2004/07/17/gay_marriage/) (discussing monogamy and other assumptions in marriage).

217. Massachusetts Maternity Leave Act, MASS. GEN. LAWS. ANN. ch. 149, § 105D (West 1989).

218. *Id.*

219. David E. Frank, *Men Now Eligible for Maternity Benefits*, MASS. LAWS. WKLY., June 9, 2008, available at <http://www.masslawyersweekly.com/index.cfm/archive/view/id/443579>.

220. *Id.*

221. See MASS. CONST., pt. I, art. I; *Commonwealth v. MacKenzie*, 334 N.E.2d 613, 614-15 (Mass. 1975) (applying heightened scrutiny in a case of sex discrimination); *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1849) (recognizing that "all persons, without distinctions of age or sex, birth or color, origin or condition, are equal before the law").

MCAD's reformation.<sup>222</sup> 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,<sup>223</sup> 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 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.<sup>224</sup> 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.<sup>225</sup> 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

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222. Frank, *supra* note 219.

223. See *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (holding that a lesbian who acts together with her partner to conceive a child has a legal obligation to that child).

224. See Todd Brower, *Social Cognition "At Work": Schema Theory and Lesbian and Gay Identity in Title VII 21* (Soc. Sci. Network, Working Paper 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1213262](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1213262) (last visited Feb. 2, 2009).

225. Frank, *supra* note 219.

“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.<sup>226</sup> 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.<sup>227</sup> 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.<sup>228</sup> 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

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226. See, e.g., Posting of Jessica Sibley to ConcurringOpinions.com, *Maternity Leave Means Fathers Too*, [http://www.concurringopinions.com/archives/2008/06/maternity\\_leave.html#comments](http://www.concurringopinions.com/archives/2008/06/maternity_leave.html#comments) (June 11, 2008, 10:24 AM).

227. See Emily A. Impett & Letitia Anne Peplau, “*His*” and “*Her*” Relationships? *A Review of the Empirical Evidence*, in THE CAMBRIDGE HANDBOOK OF PERSONAL RELATIONSHIPS 273, 282 (Anita L. Vangelisti & Daniel Perlman eds., 2006); see also Tara Parker-Pope, *Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES, June 10, 2008, at F1 (discussing gender roles in same-sex and opposite-sex couples and styles of arguing).

228. See, e.g., GATES ET AL., ADOPTION, *supra* note 84, at 25 (discussing methodology and data limitations).

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 to more accurately develop law and social policy. Thus, that data can not only inform family law, it can help transform it.