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The new family: challenges to American family law

*Cynthia Grant Bowman**

The vast demographic and social changes of the twentieth century have produced a variety of new family forms – cohabiting couples, same-sex couples, an increased number of single-parent families, and extended families resulting from divorce, for example. The legal system in the United States has yet adequately to address the legal problems that these new family forms create. This article discusses a number of major issues that arise from this failure, including: (1) the sometimes negative impact of gender-neutral rules in divorce upon women and children; (2) the ambiguity and inadequacy of property and support obligations between cohabitants; (3) the legal incidents of non-residential conjugal relationships; (4) the incomplete revolution in the status of gay and lesbian couples; (5) relationships in the post-divorce family, such as those between stepparents and their stepchildren; and (6) the many conflict of laws questions that arise from inconsistent treatment of these issues by different states.

INTRODUCTION

There have been vast changes in the structure of families in Europe and North America since our classic family law rules were developed. Other commentators at this workshop¹ have described some of the challenges to that law posed by new reproductive techniques and by the amazing cultural diversity that has replaced what was previously assumed to be homogeneity. Focusing on the United States, my discussion will concentrate instead on the new family forms that have arisen as a result of the great demographic and social changes that took place in the twentieth century. During this period, women entered the paid labour market in large numbers for the first time. The percentage of women in the labour force in the US was only 32.7% in 1948, but 59.2% by 2009.² The married family, as a result, now consists primarily of dual-income couples, with all of the attendant problems for care work and the division of household labour. Moreover, people are marrying later in life. The age of first marriage rose in the US from 23 for men and 20 for women in 1966 to 27 for men and 25 for women by 2006.³ The divorce rate also rose dramatically in the course of the twentieth century, until it reached what seems to be a more or less steady state hovering around 50%.⁴

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¹ C. Jones, 'New Reproductive Technologies', and N. Bala, 'Responding to Cultural Diversity', papers delivered at the Workshop.

² Bureau of Labor Statistics, *Current Population Survey, Employment status of the civilian noninstitutional population 16 years and over by sex, 1973 to date*, available at: <http://www.bls.gov/cps/cpsaat2.pdf>.

³ US Census Bureau, *Estimated Median Age at First Marriage, By Sex: 1890 to the Present*, Table MS-2 (2006).

⁴ US Census Bureau, *Number, Timing, and Duration of Marriages and Divorces: 2001* 4 (2003).

These changes have been accompanied by dramatic changes in family forms. There has been a phenomenal increase in unmarried cohabitation, either instead of or prior to marriage. In the US, the numbers of opposite-sex cohabiting couples rose from 500,000 in 1960 to 6.8 million (13.6 million individuals) by 2008, a very large social change in a relatively brief period of time.⁵ Single parenthood, whether as a result of divorce or from simply never marrying, has increased apace, posing substantial economic problems to the family unit.⁶ Over the second half of the twentieth century, moreover, gay and lesbian relationships came out of the closet, and same-sex couples began to demand recognition and equal treatment in all spheres, including the family. At the same time, the modern women's movement demanded and brought about major transformations of the law governing the treatment of women both in the public sphere, including the workplace, and in the family.

What we sometimes call the revolution in family law in the latter part of the twentieth century was an attempt to deal with some of the issues presented by these changes. The almost universal adoption of no-fault divorce was one major change, to which other family law principles are still adapting. Other changes resulted from the women's movement and were intended to promote gender equality by the elimination of gender-specific laws. A variety of new institutions — domestic partnerships, civil unions, and same-sex marriage — have been established to respond to the demands of gay and lesbian couples.

The legal system in the US has had a hard time dealing with the new family forms resulting from all of these changes. Major issues arising from the new family relationships include: (1) the impact of gender-neutral rules in divorce law upon women and children; (2) property and support obligations between cohabitants; (3) the legal incidents of non-residential but conjugal relationships, sometimes called LATs ('living apart together'); (4) the legal status of gay and lesbian couples; (5) relationships in a new type of extended family, the post-divorce family, including the rights and obligations attached to step-relationships of various kinds; and (6) the many conflict of law issues that arise, both among states in the US and among nations in Europe, from the establishment of domestic partnerships, civil unions, and same-sex marriages in some areas and not in others. In this essay, I will discuss each of these areas of challenge to traditional American family law but will spend the most space on the legal treatment of cohabitation, the area upon which I have done the most research and writing.

POST-SEX-EQUALITY FAMILY LAW AND THE ILLUSION OF EQUALITY

The interaction between the movement for gender-neutral legal rules and the almost-universal revolution from a fault-based to a no-fault system of divorce has created its own set of problems. Liberal feminism, with its demand that women be treated just like men, has led to the importation of gender-neutral rules into family law, replacing previously gender-specific laws concerning post-marital support and child custody, for example.⁷ One result has been, at least in the US, the near-disappearance of any long-term spousal support after marriage and a rise in demands for custody by

⁵ P.J. Smock and W.D. Manning, 'Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy' (2004) 26 *Law and Policy* 87, at p 88; US Census Bureau, *Current Population Survey, 2008 Annual Social and Economic Supplement*, Table UC1.

⁶ For example, 41% of all births in the US in 2008 were to unmarried mothers. See Pew Research Center, *The New Demography of American Motherhood* (2010), at p 13, available at <http://pewsocialtrends.org/assets/pdf/754-new-demography-of-motherhood.pdf>.

⁷ See, eg *Orr v Orr*, 440 US 268 (1977) (declaring alimony only for wives unconstitutional).

fathers, even though the vast majority of children are still raised by their mothers after divorce. The new gender-neutral laws are premised upon a presumption of equality that does not in fact exist for many women.⁸ Women still make less than men on average, work in sex-segregated jobs, and shoulder most of the caretaking work in our society. But many courts ignore these continuing inequalities between women and men in the workplace and the domestic division of labour and simply presume that women are now men's equals. Thus judges may find that women no longer have any special needs for protection after divorce, citing the existence of gender-neutral laws and anti-discrimination statutes. For example, Justice Flaherty of the Pennsylvania Supreme Court upheld a premarital contract awarding no property and virtually no support to a wife after a 9 year marriage because, he proclaimed:

'There is no longer validity in the implicit presumption that supplied the basis for earlier decisions. Such decisions rested upon a belief that spouses are of unequal status. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in marriage, or in society generally.

Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded.'⁹

For similar reasons, divorcing wives in the US are typically awarded only rehabilitative alimony of a few years duration, during which they are expected to acquire job skills and become self-sufficient, even after long-term marriages during which they did not work for pay but instead contributed substantial labour to making a home and raising the couple's children.

Some scholars have suggested drastic remedies for these problems. Martha Fineman, for example, has suggested that marriage simply be abolished as a legal category and that benefits be distributed instead to what she calls the 'mother/child dyad', by which she means caretakers of either gender and dependent persons of any age.¹⁰ Less drastically, the American Law Institute has proposed new rules for the distribution of property and support of ex-spouses upon divorce, under which separate property would be re-characterised as marital property over time and after marriages of a state-defined duration, spouses would receive compensatory payments for loss of the marital living standard, graduated according to the number of years of marriage.¹¹ None of these suggestions has been adopted by any state.

POST-SEPARATION LEGAL REMEDIES FOR COHABITANTS

Next I turn to the legal rights and obligations of cohabitants who either cannot or do not want to register as domestic partners, if that status is available to them where they live. Many of these cohabiting couples are heterosexual, and sociologists have given us a good deal of information about them. In the US, for example, the median duration of cohabiting unions is about 1.5 years, with two thirds lasting less than 2 years (in the

⁸ See M. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press, 1991).

⁹ *Simeone v Simeone*, 581 A2d 162, 165 (Pa. 1990).

¹⁰ M.A. Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 228–235 (Routledge, 1995).

¹¹ American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* §§ 4.12, 5.04 (2002).

UK, by contrast, the average duration is 6.5 years).¹² Four out of 10 cohabiting couples in the US have children in the household; about half of them are the biological children of both partners, and about half relate to one partner as they would to a step-parent.¹³ The majority of cohabitants pool their incomes in some way, and they are no different in this respect from married couples if they have a child.¹⁴ Cohabitation is particularly common in the US among groups who are disadvantaged economically and educationally and among racial and ethnic minorities, especially African Americans and Puerto Ricans.¹⁵ Finally, cohabitants experience higher rates of domestic violence and femicide than those who are married.¹⁶

Some authors argue that unmarried cohabitation should be discouraged because of its negative characteristics and that the law should accomplish this by denying legal remedies of any sort to cohabitants.¹⁷ Even if it were possible to affect the rate of cohabitation in this way, I reach an opposite conclusion. I conclude that cohabitants are extremely vulnerable in many ways, especially when their relationships dissolve, a vulnerability that seems to fall more on women than on men, and that for this reason, the law should provide remedies to them.

Yet in virtually every state of the US, cohabitants have very few rights when their relationships end unless they enter into an express contract that can be proved in court, which very few do.¹⁸ If they have any property, which most do not, they can sue to divide it based upon equitable principles of unjust enrichment or constructive trust, but this typically requires the party seeking a share to be able to trace her contribution to the acquisition of the property, usually a monetary contribution.¹⁹ So a woman who paid for food and household necessities out of her income, or stayed home to raise the couple's children, while her partner paid the mortgage, can end up without any legal claim to the family home.²⁰ Moreover, cohabitants in the US have very few rights against third parties or the state if their partners are injured or killed – workers'

¹² L.L. Bumpass, 'What's Happening to the Family? Interactions Between Demographic and Institutional Change' (1990) 27 *Demography* 483, at p 487; A. Barlow, 'Cohabitation Law Reform – Messages from Research' (2006) 14 *Feminist Legal Studies* 167, at pp 172–173.

¹³ L.L. Bumpass et al, 'The Role of Cohabitation in Declining Rates of Marriage' (1991) 53 *Journal of Marriage and Family* 913, at p 919; R.M. Kreider and J. Fields, *Living Arrangements of Children: 2001* (US Census Bureau, 2001), at p 5 (Table 2).

¹⁴ K.R. Heimdal and S.K. Houseknecht, 'Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States' (2003) 65 *Journal of Marriage and Family* 525, at p 533; C. Vogler, 'Cohabiting Couples: Rethinking Money in the Household at the Beginning of the Twenty First Century' (2005) 53 *Sociological Review* 1, at pp 12–13.

¹⁵ C.G. Bowman, *Unmarried Couples, Law, and Public Policy* (Oxford University Press, 2010), at pp 111–117.

¹⁶ *Ibid*, at pp 151–158.

¹⁷ W.C. Duncan, 'The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation' (2003) 82 *Oregon Law Review* 1001, at p 1031; M. Gallagher, 'Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?' (2004) 18 *Notre Dame Journal of Law, Ethics & Public Policy* 225, at pp 238–240.

¹⁸ C.G. Bowman, 'Legal Treatment of Cohabitation in the United States' (2004) 26 *Law and Policy* 120.

¹⁹ *Ibid*, at pp 123–124.

²⁰ The position of cohabitants in England is substantially similar, although they receive advantageous treatment under many laws – concerning tenancies, pensions, workers compensation, and the Fatal Accidents Act, for example – and certain rights upon inheritance. R. Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy' (2004) 26 *Law and Policy* 13, at pp 15, 17, 22–23; A. Barlow, 'Regulation of Cohabitation, Changing Family Policies and Social Attitudes: A Discussion of Britain Within Europe' (2004) 26 *Law and Policy* 57, at p 71.

compensation benefits and unemployment insurance in California,²¹ negligent infliction of emotional distress claims in New Jersey,²² and loss of consortium actions in New Mexico.²³

American casebooks are full of examples of the injustices that result from the absence of any legal remedies for cohabitants, especially women. Mr and Mrs Hewitt of Illinois, for example, lived together as though they were married for 15 years, beginning when they were students and continuing through his higher education, the building of his professional business, and the accumulation of property and other assets that would have been subject to equitable distribution if they had been formally married. Mrs Hewitt cared for the couple's house, shopped and cooked, helped Mr Hewitt in his business, both by entertaining clients and by working in his office, and raised their children. When it came to 'divorce', however, she was left without any property or support at all, including any equitable share in their home.²⁴ A similar result obtained in the well-known *Marvin v Marvin* case in California, despite the fact that the California Supreme Court held in it that both express and implied contracts between cohabitants were enforceable.²⁵ Moreover, if their relationships had not dissolved but instead had lasted until the death of their partners, neither Mrs Hewitt nor Mrs Marvin would have inherited any of their partners' property under the intestacy laws; and neither would have been able to recover damages from a third party for his wrongful death or workers' compensation or social security survivors' benefits from the state.

Among the common law nations, Canada has gone the farthest toward dealing with the inequities that result from treating long-term cohabitants differently than married couples. Cohabitants are entitled to all the rights of married couples under federal law, including social security, if they have lived in a conjugal relationship for one year or more.²⁶ They are entitled to post-relationship support in most provinces if they have lived in a marriage-like relationship for a defined number of years.²⁷ They are entitled to property distribution in some provinces; and in other provinces, they can take advantage of a somewhat more favourable law of constructive trust than the traditional interpretation, one that rewards non-monetary contributions.²⁸ Moreover, cohabitants in Canada receive many benefits as individuals, such as universal health insurance, that are not generally available in the US from the government and are usually tied there to marital and/or employment status.

To deal with these problems, I make a proposal for drastic legal reform in the US in my book *Unmarried Couples, Law, and Public Policy*.²⁹ After a period of time to be defined by the state or a change in position based on the birth of a child, I propose that the state should impose the rights and obligations of marriage upon cohabitants, while respecting the autonomy of couples who do not want this result by allowing them to opt

²¹ See, eg *State v Workers' Comp. Appeals Bd.*, 156 Cal Rptr 183 (Cal Ct App 1979); *MacGregor v Unemployment Ins. Appeals Bd.*, 689 P.2d 453 (Cal 1984)(*en banc*).

²² *Dunphy v Gregor*, 642 A.2d 521 (N.J. 1980).

²³ *Lozoya v Sanchez*, 66 P.2d 948 (N.M. 2003).

²⁴ *Hewitt v Hewitt*, 77 Ill.2d 49 (1979). *Hewitt* is still good law in Illinois.

²⁵ *Marvin v Marvin*, 18 Cal 3d 660 (1976). But see *Marvin v Marvin*, 5 Family Law Reporter (BNA) 3079 (1979) (awarding nothing on remand).

²⁶ Modernization of Benefits and Obligations Act, 2000 S.C., Chap. 12 (Can.).

²⁷ See B. Hovius, 'Property Rights for Unmarried Cohabitants in Canada' [2006] *International Family Law* 29.

²⁸ *Ibid.*, at pp 29–34.

²⁹ C.G. Bowman, *Unmarried Couples, Law, and Public Policy* (Oxford University Press, 2010), at pp 223–230.

out by mutual agreement. The main argument against this proposal is that it constitutes an unacceptable incursion upon the autonomy of individuals who have not chosen to enter into marriage and thus should not be subjected to any obligations they have not imposed upon themselves by contract.³⁰ How do I respond to this objection? First, as between the two parties, the same justifications for the imposition of obligations apply as do for post-relationship support and property distribution on divorce—justifications based on principles such as contribution, reliance, and reimbursement. Secondly, from the viewpoint of the state, one of the fundamental purposes of family law is to protect vulnerable parties when their relationships end. From what we know about the characteristics of cohabiting couples – their economic interdependence, the presence of children in their households, and other sources of vulnerability – there is reason to believe that these couples may in fact need the protections of family law even more than married couples do.

The conflict between autonomy and protection arises most keenly where one party does not desire to undertake these mutual commitments and the other does. Whom should the law favour in this conflict? My recommendation is to set the default position in favour of imposing obligation but to allow opting out if both parties agree; this then shifts the balance of power in intra-couple bargaining to the party desiring commitment. This party is likely to be the woman.³¹

THE LEGAL TREATMENT OF COUPLES WHO DO NOT LIVE TOGETHER

Another new family form is that of couples who do not live together. Studies show that so-called living apart together is widespread.³² Living apart together is virtually unstudied in the US, but the phenomenon is quite common. Some preliminary studies of who these people are and why they do not live together show that their reasons for not doing so vary – they work or study in different cities, for example; they have children or parents to look after; or they do not want to risk ruining their relationship by too much togetherness.³³ These reasons can be subdivided into those resulting from constraints (eg jobs in different cities, the necessity of caring for dependent family members), in the absence of which the couple would cohabit, and other reasons that would exist even in the absence of constraint (eg preferring to maintain their own separate homes, friends, and independence even while living in the same city).

Do LATs fall into the category of a new family form to which traditional family law should adapt? Scholars of the phenomenon differ in their responses to this question, some seeing LAT as a dramatic new lifestyle, more individualised and freer than traditional co-residential relationships, and perhaps prioritising friendship over sexual coupling.³⁴ Other scholars emphasise the heterogeneity of LATs and the congruence of their attitudes about family with those of the general population.³⁵ Until we know

³⁰ See, eg R.L. Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 *International and Comparative Law Quarterly* 480, at p 483.

³¹ See, eg R.R. Rindfuss and A. VandenHeuvel, 'Cohabitation: A Precursor to Marriage or an Alternative to Being Single?' (1990) 16 *Population and Development Review* 703, at p 711.

³² S. Duncan and M. Phillips, 'People Who Live Apart Together (LATs) – How Different Are They?' (2010) 58 *Sociological Review* 112, at p 114.

³³ Ibid. See also, J. Haskey and J. Lewis, 'Living-apart-together in Britain: Context and Meaning' (2006) 2 *International Journal of Law in Context* 37; S. Rosenell, 'On Not Living with a Partner: Unpicking Coupledness and Cohabitation' 11 *Sociological Research Online* available at: <http://www.socresonline.org.uk/11/3/rosenell.html>.

³⁴ Ibid.

³⁵ S. Duncan and M. Phillips, 'People Who Live Apart Together (LATs) – How Different Are They?' (2010) 58 *Sociological Review* 112, at p 114.

more about this particular style of life, as we now do about cohabitation, however, it is difficult to reach any definite conclusion about the appropriate legal treatment of it. What is essential at this point is to carry out studies of the economic relationships among these couples. Do they pool income? Do they share any expenses? Do they share ownership of any property? To what extent are they economically interdependent? By definition, of course, LATs have separate homes, which seems to portend substantial economic independence, and they are unlikely to have children in common. Both of these facts would tend to support treating them as separate individuals rather than as a family unit under the law.

THE LEGAL STATUS OF GAY AND LESBIAN COUPLES

The new family form that has attracted the most attention in recent years is the establishment of families by gay and lesbian couples and their recognition by the state in some areas. A growing list of countries (Canada, Spain, Portugal, Sweden, Norway, Belgium, the Netherlands, Iceland, South Africa, and Argentina) now recognise same-sex marriage, while other nations, like the UK, provide comparable benefits through the establishment of some type of domestic partnership. The situation in the US, where this issue has proved very controversial, is marked by immense diversity. By 2010, a small number of jurisdictions recognised same-sex marriage – Massachusetts, Connecticut, New Hampshire, Vermont, Iowa, and the District of Columbia; but the benefits and obligations of marriage in those states extend only to those available under state law, excluding the many federal law benefits of marriage, such as social security.³⁶ Other states allow same-sex couples to enter into civil unions or partnerships that include all the benefits and obligations of marriage under state law, and still others offer partnerships with some less comprehensive set of benefits.³⁷ The situation is not only complex but also in flux.

Unlike countries where the law on this matter has been transformed by the passage of legislation, the extension of rights to same-sex couples in the US has largely been the product of litigation. Court cases have challenged the exclusion of same-sex couples from marriage based on a variety of grounds under both the federal and state constitutions, including deprivation of a fundamental right to marry under the Due Process Clause and discrimination based on both sex and sexual orientation under the Equal Protection Clause.³⁸ Some of these challenges have succeeded, although in some states (New Jersey, for instance) civil unions or domestic partnerships have been established instead of same-sex marriage. One interesting development over the last decade has been that forces opposed to same-sex marriage have become increasingly willing to accept domestic partnerships with all of the benefits of marriage as a substitute for it.

In short, this is an unfinished revolution in the US. Because family law is a matter for the states under the US Constitution, legal challenges to exclusion of same-sex couples from marriage have proceeded on a state-by-state basis until now. In 2010, however, a major federal court suit was tried in California, raising the question as one

³⁶ As a result of ongoing litigation, California has shifted between same-sex marriage and domestic partnership with all the benefits of marriage.

³⁷ The following states offer domestic partnerships with rights comparable to those given married couples: California, Nevada, the District of Columbia, Oregon, and Wisconsin. The following offer domestic partnerships with more limited benefits: Colorado, Hawaii, Maryland, and Maine.

³⁸ See, eg *Goodridge v Dept of Public Health*, 440 Mass. 309 (2003); *Varnum v Brien*, 763 NW2d 862 (Iowa, 2009).

of federal constitutional law.³⁹ Under this law, the answer turns on a judgment whether the state's interest in traditional marriage is substantial enough to merit continuing to exclude same-sex couples from the institution in a state where they are already entitled to all the state-law benefits of marriage as domestic partners. On 4 August 2010, the federal district court in Northern California held that the restriction of marriage to opposite-sex couples violated both the Due Process clause of the US Constitution – specifically, the fundamental right to marry – and also constituted discrimination based upon sexual orientation for which there was no legitimate state purpose, thus violating the Equal Protection clause as well.⁴⁰

RELATIONSHIPS IN THE NEW EXTENDED FAMILY

The law has only begun to adjust to the many new family forms encompassed within what may be called the new extended family. Whereas the extended family of old was comprised of blood relatives – grandparents, aunts, uncles, cousins, and the like – the new extended family is created by the prevalence of divorce, cohabitation, and assisted reproductive technology. An anecdote from my own life should suffice to illustrate. When my stepson got married, the wedding pictures looked very different from ones in the past. Attending him were four brothers – two half-brothers and two step-brothers, all of whom had shared significant portions of his childhood. Arrayed around him and his new wife in the photos were his mother and father, his father's third wife, his previous step-mother and her new husband, his paternal grandfather, his mother's ex-husband and that man's mother, and his then-stepmother's mother. Most of these people had played important roles in raising him and had significant continuous relationships with him. His paternal grandfather, at 80, was somewhat stressed by the array, but my own grandfather probably would not have attended at all.

How, if at all, does or should the law address these relationships in the new extended family? The law of divorce already handles issues between the child and his two parents and between those two parents upon cessation of their marriage. That is only a small number of the people in that wedding photo, though. Some states have begun to recognise continuing relationships between children and their step-parents upon divorce, including, in some instances, visitation and the payment of support.⁴¹ In most states, in the absence of an agreement with their former spouse, step-parents would be required to petition for any further contact with their stepchild under a statute governing third party visitation, often styled on an original statute about visitation for grandparents after the divorce or death of their own child. In any event, the court will give substantial deference to the wishes of the child's biological parent whether to grant or deny visitation.⁴²

The same situation can arise if a cohabiting couple separates. If one partner is not biologically related to a child who lived in that cohabiting household, his or her rights are tenuous. Thus, it is entirely possible that a person who has parented a child for a significant period of time, perhaps even acting as the primary parent, may lose all contact with the child; at best, they are likely to be reduced to very limited contact,

³⁹ *Perry v Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal. 2010).

⁴⁰ The decision of the United States District Court for the Northern District of California in *Perry v Schwarzenegger* is available at: <https://ecf.cand.uscourts.gov/cand/09cv2292/>.

⁴¹ See D.R. Fine and M.A. Fine, 'Learning from the Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies' (1992) 97 *Dickinson Law Review* 49; J. Carbone, 'The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity' (2005) 65 *Louisiana Law Review* 1295, at pp 1311–1314.

⁴² *Troxell v Granville*, 530 US 57 (2000).

especially if the biological parent has remarried.⁴³ In some, though not all of these cases, the outcome will impose a substantial loss upon the child, the loss of a primary parenting figure in his or her life.

The law has only just begun to address this issue in the US. Many of the first cases involved lesbian mothers who separated from their partners after having jointly decided to have and to raise a child together; only one of them, of course, can be the biological mother. Pleading *de facto* parenthood, or parenthood by estoppel, or other equitable theories, the non-biological mother sought visitation and/or custody; and in the earlier cases, she usually lost, either based on lack of standing or under a best interest standard.⁴⁴ Recent cases, however, have begun to reverse this trend, awarding visitation and sometimes even custody to the non-biological mother.⁴⁵ Not surprisingly, the developing rules governing the relationship of lesbian mothers to their children interact with those governing parentage in situations of gestational surrogacy and other forms of assisted reproductive technology.⁴⁶

In turn, cohabiting step-parents seeking visitation with their non-biological children upon termination of a cohabiting relationship now borrow from the analysis used by the courts in lesbian parent cases. The legal rule announced by the Wisconsin Supreme Court has been particularly influential in this respect, holding that a cohabitant may seek visitation if:

- (1) the biological parent consented to formation of a parent-like relationship between the cohabitant and his or her child;
- (2) the cohabitant and child had lived in the same household;
- (3) the cohabitant had taken significant responsibility, including financial support, for the child's care and education; and
- (4) the cohabitant was in the parent-like role long enough to have a bonded relationship with the child of a parental nature.⁴⁷

Under this or similar standards, some opposite-sex cohabitants have succeeded in establishing standing to seek visitation with their previous partner's biological child, and in one exceptional case even custody; but these cases are very rare.⁴⁸ With the dramatic increase in cohabitation, especially if it lasts for longer periods of time, these issues will confront courts in increasing numbers in the future. The Wisconsin standard, or some other like it, seems attractive, if one is concerned with protecting the relationships of the large number of children raised in cohabiting households to adults who play significant emotional and financial roles in their lives. The law needs to explore, in this context and in that of assisted reproduction, why it is so wedded to the idea that a child can only have two parents, and why the rights of multiple parents to relationship with the child are based on a concept of all or nothing.⁴⁹

⁴³ See, eg *Temple v Meyer*, 544 A2d 629 (Conn.1988).

⁴⁴ See, eg *Alison D v Virginia M*, 569 N.Y.S.2d 586 (1991).

⁴⁵ See, eg *Jones v Boring-Jones*, 884 A2d 915 (Pa. 2005); *Elisa B v Superior Court*, 117 P2d 660 (Cal. 2005).

⁴⁶ *Ibid*, citing *Johnson v Calvert*, 851 P2d 776 (Cal. 1993) (recognising parenthood by intent).

⁴⁷ In *Re Custody of HSH-K (Holtzman v Knott)*, 533 NW2d 419, 421 (Wis. 1995).

⁴⁸ See, eg *Barker v Briggs*, 544 A2d 629 (Conn. 1988) (visitation); *Ellison v Ramos*, 502 SE2d 891 (N.C. App. 1998) (custody).

⁴⁹ See M.B. Jacobs, 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents' (2007) 9 *Journal of Law and Family Studies* 309.

PROBLEMS RAISED BY CONFLICTS OF LAWS

Finally, many thorny conflict of law issues arise between states and nations with respect to the treatment of same-sex unions, domestic partnerships, and cohabitation. As people enter these new relationships and then move to another jurisdiction, courts are increasingly confronted with these conflicts. If a same-sex couple is married in Iowa, for example, would they need a divorce to remarry in Illinois? How and where would they obtain it if they are now resident in Illinois? If a same-sex couple registers as civil partners in the UK, how will they be treated if they move to the US? These questions are being resolved, incrementally, as individual cases arise or in some instances by statute. Some American state courts – those of New York, for example – have decided to recognise same-sex marriages entered in other jurisdictions even if same-sex marriage is not legal within its own borders.⁵⁰ Thus, a lesbian couple married in Massachusetts could get a divorce in New York, with all of its attendant remedies for property distribution, support, and custody of children, even though they could not marry there. Most states, however, have proclaimed by statute, typically called a Defense of Marriage Act that they will refuse to recognise same-sex marriages (and sometimes refuse to recognise civil unions or domestic partnerships as well). These conflicts create significant problems given the mobility of the American population.⁵¹

CONCLUSION

There are now so many family relationships our grandparents never dreamed of – the couples we all recognise as couples but know are not married, the extended post-divorce family portrayed in my stepson's wedding pictures, same-sex marriages and domestic partnerships, and the relationships of children born of artificially assisted reproductive techniques to their sperm or egg donors and surrogate mothers. The family law of our grandparents' era is understandably ill-equipped to address the legal issues that arise out of these new family forms. American law has begun to confront many of these questions and to adapt, but slowly, to what is still an unfolding story. Our legal concepts struggle at varying paces to keep up with the reality of family life today, but if they fail to address the problems experienced by the families that exist today, and cling to the ideals upon which traditional family law is premised, this failure will leave many persons whom the law should protect in an exceedingly vulnerable position.

⁵⁰ *Martínez v County of Monroe*, 850 N.Y.S.2d 760 (2008) (recognising same-sex marriage entered into in Canada).

⁵¹ Within Europe, of course, the proliferation of different ways of treating same-sex couples and of opposite-sex unmarried couples creates not only conflicts of law but also additional problems for the project of harmonisation of European law. See, eg I. Sumner, 'Transformers – Marriages in Disguise?' [2003] *International Family Law* 15, at pp 19–21; K. Boele-Woelki, 'The Working Method of the Commission on European Family Law', in K. Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Intersentia, 2005), at pp 18–21.