

**Mark Leinauer***Doctoral Candidate**University of California, Berkeley*

Mark's research focuses on the judicial evaluation of non-heterosexual parents in custody matters. In particular Mark is interested in the impact of parental gender on these evaluations (what headwinds and biases do gay male fathers face that lesbian mothers do not, and vice versa?) and the impact of the child's gender. His dissertation uses mixed methods to probe these questions. He has interviewed applicable attorneys and parents throughout the country. He has also compiled every (published) custody case involving a gay male father or lesbian mother and coded them for outcome and arguments against parental fitness. And he is currently in the process of running a survey experiment to test the influence of alleged moderators on the judicial evaluation of gay male and lesbian parents. When concluded, Mark hopes to not only provided the first empirical demonstration of disparate custody outcomes across orientation and gender, but also a thorough explanation of those disparities and an evaluation of their legal relevance.

Mark is interested in the application of quantitative methods to legal questions generally and hopes to apply these methods to other questions of theoretical and practical concern in the future.

Mark holds a law degree from Washington University in St. Louis and a master's degree in Public Policy Analysis from the University of California, Berkeley. He expects to finish his doctoral work at Berkeley in May (Jurisprudence and Social Policy). Mark has also served as a judicial clerk and worked as litigator for several years (during which time he handled several custody matters with non-heterosexual parents). In his free time Mark camps, rides his bike up big hills, travels when possible and surfs badly.

*Mapping the Headwinds: An Empirical Analysis of Anti-Homosexual Bias in Custody Disputes*

While it has been suggested that non-heterosexual parents fare worse, on average, than heterosexual parents in custody determinations, to date there has been no empirical assessment of that claim. Nor has there been an intersectional assessment of how outcomes differ across the gender of the non-heterosexual parent or the gender of the child(ren) at issue. This article analyzes case law for evidence of anti-homosexual bias in custody determinations across orientation, the gender of the non-heterosexual parent and the gender of the child(ren) involved. Two datasets are compiled and contrasted: the complete set of published custody cases featuring one heterosexual and one non-heterosexual parent (n=212) and a comparable sample of “traditional” heterosexual vs. heterosexual custody cases (n=106).

Study One finds significant anti-homosexual bias against lesbian mothers in terms of custody allocation when compared to similarly situated heterosexual mothers ( $P > |z| = 0.003^{**}$ ), but no similar bias against gay male fathers. While gay male fathers fared slightly worse than comparably situated heterosexual fathers the difference was not significant to any meaningful degree of certainty ( $P > |z| = 0.619$ ). Data on custody allocation also suggest that the courts have been far more reluctant to place daughters into gay male or lesbian custody than sons. Lesbian mothers were found to be significantly less likely to prevail than comparably situated heterosexual mothers when a daughter was at issue ( $P > |z| = 0.006^{**}$ ), but no significant difference was found when the contest concerned a son ( $P > |z| = 0.157$ ). This bias was also evident for gay male fathers though the difference was just shy of statistical significance; when daughters were at issue gay male fathers were found to be less likely to prevail than their heterosexual peers at a 94% level of certainty ( $P > |z| = 0.056$ ), but contests concerning a son displayed no meaningful difference in outcome ( $P > |z| = 0.775$ ).

The imposition of visitation restrictions also evidenced significant anti-homosexual bias; Restrictions prohibiting the presence of significant others during visitation (“partner restrictions”) burdened 16% on the non-heterosexual set but only 2% of the heterosexual sample, a statistically significant differential ( $P > |z| = 0.000^{***}$ ). Prohibitions of overnight visitation also burdened gay male and lesbian parents significantly more often than heterosexual parents ( $P > |z| = 0.007^{**}$ ).

Visitation restrictions also demonstrated substantial differences across orientation and parental gender: While both gay male and lesbian parents faced these burdens at significantly higher rates than heterosexual fathers and heterosexual mothers respectively, visitation restrictions fell most heavily upon gay male fathers. These data suggest that gay male fathers have experienced both partner restrictions and overnight restrictions at a higher rate than lesbian mothers (25% vs 13% and 10% vs 5% respectively). There is also evidence that anti-homosexual bias in both custody allocation and visitation restriction has decreased over time, though caveats are required for both claims. In terms of custody allocation, these data suggest that anti-homosexual bias against lesbian mothers has decreased dramatically, though this conclusion is tentative because the relevant sample size for lesbian mothers is small when divided into decades and there is insufficient sample size to analyze custody allocation to gay male fathers over time. In terms of visitation restrictions, there is evidence that anti-homosexual bias has decreased for both gay male fathers and lesbian mothers, though significant anti-homosexual bias remains. Implications of these data and directions for future research are discussed.