

C O N T E M P O R A R Y F A M I L Y T R E N D S

After the Nuclear Age?

Some Contemporary Developments in Families and Family Law in Canada

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About the Author

Lois Harder is a professor of political science at the University of Alberta. She is currently engaged in two research projects, one considering the significance of sex in the law and policy regulating family forms and the second considering the relationships among kinship, citizenship, and national belonging. Her recent work has been published in *Citizenship Studies; Signs; and Social Politics*.

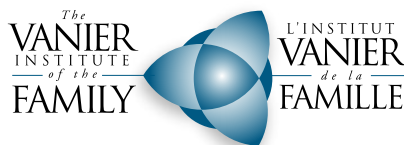
About the Institute

The Vanier Institute of the Family was established in 1965 under the patronage of Their Excellencies Governor General Georges P. Vanier and Madame Pauline Vanier. It is a national voluntary organization dedicated to promoting the well-being of Canada's families through research, publications, public education and advocacy. The Institute regularly works with businesses, legislators, policy-makers and program specialists, researchers, educators, family service professionals, the media and members of the general public.

Contemporary Family Trends (CFT) is a special collection of documents written by Canadian experts on a wide range of issues facing today's families. CFT papers are descriptive, interpretative, and provide a critical overview of relevant topics involving families.

The opinions expressed in this report are those of the author and do not necessarily reflect the views of the Vanier Institute of the Family.

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*After the Nuclear Age?
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FOREWORD

Families in Canada has never been more diverse – or fluid. What families “look like”, how and when they form, what they do, how they feel, and the challenges they face, are in many ways, far different from the experiences of earlier generations. But let’s not forget that family has never been static. What is perhaps different now is the speed of change and the scope and complexity of the choices – and constraints – confronting families and individuals.

The Vanier Institute has worked since 1965 to document and track the diversity of changing family life in Canada. We embrace an inclusive definition of families that emphasizes the work that families do in providing and caring for one another and enriching the communities within which we live. We have attempted to shine a light on families of all kinds, not the ideal of the family, but the reality of the family as people live it.

In “After the Nuclear Age,” Dr. Lois Harder shines a light on the efforts of family law to acknowledge and respond to the reality of family as people live it. Dr. Harder is a professor of political science at the University of Alberta. Over her career, she has explored the law and politics of regulating family relationships in Alberta, elsewhere in Canada, and the United States.

In this paper for the *Contemporary Family Trends* series, Dr. Harder examines the extent to which current family law accurately reflects and supports the relationships of care that Canadians are engaged in today. Through a review of key developments in Canadian family law, Dr. Harder asks us to think about how and why we understand certain people to be family and what the consequences of being named a family member are or should be. She notes that, in this, the shadow of traditional 1950s nuclear families looms large, creating obstacles to a more choice-driven approach to families that supports how Canadian actually organize their family lives.

This thought-provoking paper will be of tremendous interest to all who are interested in Canadian family law and policy.

Katherine Scott
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Abstract

“After the Nuclear Age?” surveys some of the recent developments concerning the meaning of family in Canadian law and policy. The paper invites readers to reflect on the rationales that support the recognition of diverse family structures and functions. It argues that the nuclear norm of monogamous, conjugal relationships and associated children offers only a partial, and perhaps inadequate, basis for defining, recognizing and respecting the close relationships that people actually understand as family. The stakes of this definitional process are high. If the people *we care about* and the people *we care for* are not readily incorporated in the laws the state sets out for us, there may be some important implications for our capacity to organize our family lives and to meet our family obligations in ways that reflect our choices.

As our population ages, as people establish lives away from their hometowns and forms of ‘traditional’ familial support, and as we try to devise living strategies that enable us to cope with economic strain, financial volatility and reduced social supports, an appreciation of family that extend beyond a narrowly procreative unit is emerging. It is thus incumbent upon us to think carefully about how to facilitate and recognize the connections and obligations we develop, in order to step out of the nuclear shadow.

After the Nuclear Age? *Some Contemporary Developments in Families and Family Law in Canada*

For the first time in Canada's history, the 2006 Census revealed that more Canadian households were made up of couples without children than those with children (Statistics Canada, 2007, 6). As well, the 2006 Census found that for the first time, there were more unmarried people aged 15 and over than legally married people in Canada (Statistics Canada, 2007, 6). In Quebec and the three territories, more than 30 percent of households include a common-law couple (Statistics Canada, 2007, 7). And among the family and household structures that the Census recognizes (married, common-law, single, lone parent), the traditional nuclear family which I am defining throughout this discussion as different-sex, legally married couples with children, was the only form experiencing a decline (Statistics Canada, 2007, 11).

Despite the fact that the traditional nuclear family is now a minority family form in Canada, it continues to define the norm of family life. Those relationships, in addition to marriage, that are worthy of state recognition are defined as 'marriage-like,' and the definition of a 'census family' is a married or common-law couple (different- or same-sex) with or without children, or a lone parent living with at least one child in the same dwelling (Statistics Canada, 2007, 10).¹ It is worth noting that 'census families' have only included different-sex common-law couples since 1981 and same-sex common-law couples since 2001. Moreover, these non-marital couples have only been recognized in law across Canada beginning in the 1990s (see below).²

1 The census definition is emphasized here because it is often used by policy makers to track changes in particular affective groupings over time and space, and to target resources, but it is by no means the only state-sanctioned definition of the family. Indeed, the legal definition of family varies depending on the context and purposes in which legislation is made and judicial decisions are rendered. That being said, it is also true that the idea, or norm, of the married, monogamous, heterosexual couple and their biological off-spring is the benchmark against which other familial definitions are measured.

2 In Canada, the federal government is responsible for defining who can marry and what constitutes a valid marriage, while the provinces are responsible for the solemnization of marriages. Both federal and provincial legislation governs the details of divorce settlements. The provinces bear primary responsibility for governing non-marital forms of domestic arrangements, although the federal government does define 'spouse' and 'common-law' partner for the purposes of its own legislation. For example, the federal *Modernization of Benefits and Obligations Act* (2000) provides for the recognition of co-habiting couples after one year of shared residence. Provinces vary with regard to how long a co-habiting couple, for example, must live together before they are recognized for specific purposes under provincial statutes, and indeed, Quebec only recognizes co-habiting spouses who register their relationships with the state.

But what is especially striking about these familial categories and the nuclear norm to which they harken, is the extent to which they depart from virtually everyone's actual experience of family. If you were to define the people closest to you – the people you understand as 'family' whether they are 'related' to you or not – I would wager that very few of us would find all of those people living in the same home. Moreover, many people live in households that would not formally meet the 'census family' definition but would consider their household to reflect at least part of their families. Here, one might consider adult siblings or close friends sharing a residence. It is also likely that some of the most significant people in our lives – who we might describe as 'family' or 'like family' – include people beyond (and perhaps even instead of) spouses/partners, children or parents – as the nuclear model would have it. Undoubtedly, this broad conception of family predates the recent shift away from the traditional nuclear family that the 2006 census data has recorded. But I would argue that the acknowledgement of an increasingly broad array of family forms has become both more frequent and more pressing because of current political and legal challenges to the nuclear norm as well as scientific developments that have unmoored long-standing assumptions regarding parentage and progeny.

In the pages that follow, I map out recent changes in family law that acknowledge some of the variations in Canadians' domestic lives. My aim is to encourage the reader to reflect on the meaning of 'family' in his or her own life, spark conversation about the relationships that matter most in our lives, and consider to what extent the nuclear norm is an accurate reflection of our experiences. If the people we care about and the people we care for are not readily defined by the terms the state sets out for us, there may be some important implications for our capacity to meet our obligations to the people that matter to us, to organize domestic arrangements that reflect our choices, and to have those choices honored and respected. As our population ages, as people establish lives away from their hometowns and forms of 'traditional' familial support, and as we try to devise living strategies that enable us to cope with economic strain, financial volatility and reduced social supports, an appreciation of forms of affective association – or family – that extend beyond a narrowly procreative unit is emerging. It is thus incumbent upon us to think carefully about how to facilitate and recognize the connections and obligations we actually develop, in order to step out of the nuclear shadow.

The analysis proceeds by briefly discussing the history of the contemporary family in order to demonstrate that, despite claims for its timelessness, the 'traditional' nuclear family is a very recent invention. I then explore some of Canada's moves away from the traditional nuclear model.³ The first steps – the recognition of cohabiting relationships between different-sex partners, then the recognition of cohabiting relationships between same-sex partners, and subsequently the extension of marriage rights to same-sex partners – might best be understood as an expansion of the nuclear model rather than its demolition. The idea of a 'conjugal' relationship and the 'marriage-like' quality of these relationships were primary justifications for their recognition. More innovatively, the recognition of non-sexual partners, the Ontario Court of Appeal decision that held that a child could have three parents, and the possibility of designating a person as 'like family' for the federal compassionate care benefits program are bolder steps towards a more flexible approach to family definition. Polygamous relationships have also been a topic of recent interest and contention in Canada. Advocates of the practice assert that willing parties should

³ This paper is by no means a comprehensive survey of all of the legal and legislative developments pertaining to familial relationships. For example, I have noted a few developments concerning step parents as well as adoption, but a separate paper would be required to do justice to all of the complexities surrounding parent-child relationships.

be able to organize their emotional attachments as they see fit. Critics, by contrast, have raised concerns regarding the exploitation of women and children, particularly within closed and isolated religious and cultural communities.

All of these developments, in their own ways, have sparked controversy. Differing social and religious values, disagreements about how best to meet the needs of children, varying conceptions of gendered identities and a diversity of cultural practices infuse our familial arrangements, whether these arrangements have formal recognition or not. My task then, is to provide a clear-eyed assessment of what Canadians would stand to gain and lose if we were to adopt a more formal, choice-driven approach to family forms, what limits on choice would be reasonable, and on what grounds those limits might be justified. Undoubtedly my analysis will incite disagreements of various kinds, but if readers are encouraged to think more broadly about how and why we define our familial attachments, we can then set our sights on policy-making that supports how Canadians actually organize their familial lives.

NUCLEAR POWER

In the contemporary moment, some form of familial legal status now attends to different- and same-sex marriage, different- and same-sex cohabitation, biological and social forms of parent-child relationships and even, in Alberta, to non-sexual, interdependent partners. But while the present seems fresh and new, we should not lose sight of the fact that people have lived in a wide array of family arrangements throughout history (Baker, 2001; Eichler, 1997). As historians and anthropologists have revealed, the emergence of the nuclear family in western liberal democracies, far from being a timeless and universal family form, was the product of the industrial revolution, urbanization and the displacement of the site of economic production from the home to the factory (Coontz, 2005; Cott, 2000; Stacey, 1996). In western Canada, where settlements and industrialization were later arrivals, Sarah Carter notes that even at the end of the 19th century, the region was “home to a diverse population with multiple definitions of marriage, divorce, and sexuality” and that the predominance of the nuclear family model was not a foregone conclusion (2008, 4).

The installation of the nuclear model as the dominant family form in law, if not quite so thoroughly in life, required an impressive mobilization of political, social and religious power. Human reproduction needed to be contained within the heterosexual marital form, a feat accomplished by moral censure of pre-marital sex, harsh punishment of adultery (particularly for women), and laws that deemed children legitimate or illegitimate (‘bastards’) – and thus entitled to, or prohibited, from, claiming citizenship, property, and social standing. Indeed, the legal term for an illegitimate child was *filius nullius*, or child of no one (Mykitiuk, 2001, 781; Polikoff, 2008, 26). In the 19th century, Canada was particularly invested in safe-guarding the marriages of its people against what were perceived as the liberal excesses of its southern neighbour. Canadian politicians felt that the fact that divorce was relatively more available in the U.S. posed a moral risk to Canada (Carter, 2008, 56-59). As a result, divorce laws were so strict and the legal costs of obtaining a divorce were so high, that in terms of managing the practical requirements, it was virtually impossible to obtain a legal termination of a marriage (Carter, 2008, 25). The fact that so much enforcement was required to maintain heterosexual marriage provides strong testimony against the claim that such relationships are natural and universal.

Of course, heterosexual marriage is only one component of the traditional nuclear family. There is also the matter of the status of relationships between adults and children. Here again we find that law and politics have been powerful forces in creating conditions that are deemed to be natural. The definition of fatherhood provides a useful example. In law a male person is deemed to be the father of his wife's child if they were married when the child was born. This is a definition that dates back at least as far as the Napoleonic Code and pertains in both western and non-western states (Freeman and Richards, 2006, 72). This definition emerged out of circumstances in which there were no certain means to determine biological fatherhood. Thus, a legal relationship was created that *assumed* a biological foundation. Today, in Canada, a husband continues to bear the presumption of paternity when a child is born within a marriage. But if his paternity is contested, Canadian law, in fact, declares that no person shall be presumed to be the child's father; for example, the Ontario *Children's Law Reform Act* specifies that "no person is recognized in law to be the father."⁴ Despite the availability of genetic testing and hence the capacity to determine a child's 'natural' father, contested paternity may actually result in a rather unnatural outcome of having no father at all.

By contrast, the law considers the physical act of birth as proof positive that women are mothers. For women, the socio-legal relationship is said to derive from 'the facts.' This definition has become more complicated as reproductive technologies have made it possible to separate the intention to have a child, the genetic material, and the process of gestation while at the same time retaining a social/legal commitment to the idea that a child can only have two parents (Millbank, 2008, 157, 167; Mykitiuk, 2001, 791). In an era in which the parents of a child must be determined from a range of contenders, including the people who put the process of bringing a child into the world into motion (the intentional parent(s)), the genetic contributors, and the woman who gestated the child as well as her spouse, it is not surprising that different countries come to different conclusions regarding who the parents are in such a situation. In Canada and the U.S. for example, the parents are generally understood to be the people who put the process in motion. In Britain, the mother is understood to be the woman who gave birth to the child (Boyd, 2007, 84 fn. 112). But again, with one recent Canadian exception, the idea that there can be only two legal parents remains sacrosanct.

Of course, one need not even set foot in the brave new world of such technologies to be aware of the complicated relationships of care among adults and children. Blended families, step-parent families, adoptions, and various informal arrangements are common. As Veronica Strong-Boag observes: "in individual family histories, the possible permutations by which responsibilities for children and childcare have been allocated have been legion" (2006, 1). Yet despite this widespread diversity of experience, the persistence of the nuclear norm continues to haunt the interpretation of relationships and the assignment of responsibilities. For example, despite the fact that open adoptions are increasingly common, it remains the case that provincial adoption laws require that the names of the birth parents be excised from a child's birth certificate and replaced by the names of the adoptive parents.⁵ Such a requirement perpetuates the nuclear fiction that there can only be one mother and one father, even when such a description is clearly erroneous and potentially – and arguably – harmful to everyone involved.

⁴ *Children's Law Reform Act* (ON) R.S.O. 1990 C. 12 s. 8(3). See also *Family Law Act* (AB) 2005, c. 10. S. 4 s. 8(2); *Family Relations Act* (BC) R.S.B.C. 1996, c. 128 s. 95(3).

⁵ Open adoptions enable an adopted child and his/her biological parents to access information regarding each other and may provide for some degree of contact between the parents and the child at their respective requests. Closed adoptions do not enable such contact and seal the adoption records. It is possible to request that records be opened, but to do so requires the consent of the child and the parent(s).

EXPANDING CONJUGALITY AND CHALLENGING MONOGAMY

It has become increasingly difficult to maintain the seamless relationship among nature, marriage and biological children in the face of scientific developments, challenges by various social groups to the dominance of the nuclear family, and, as the Canadian census data indicates, in light of how people actually live their domestic lives. The social science literature generally links the most recent changes in family form to the challenges to social convention that began in the 1960s. These developments included the contestation of political and religious authority represented by the civil rights movement, peace activists, students, gay rights, and the women's movement. Women's formal legal equality, increased earning power, and control over reproductive capacity are often identified as particularly significant in disrupting the 'traditional' family through increased rates of divorce and lone parenthood (Harder, 2009, 638; Stacey, 1996). These changes paralleled the increased visibility of gay and lesbian relationships spurred on by the decriminalization of homosexuality, in Canada, in 1969. Common-law relationships also became more usual, as young people in particular, grew skeptical of the 'at-all costs' permanence of the marriage norm that their parents had generally espoused even if they were not entirely successful at upholding it. As well, feminists launched a trenchant critique of marriage as an institution that perpetuated gendered identities by, for example, legally empowering men/husbands (but not women/wives) to confer legitimacy and even citizenship on their children. (Bernstein, 2006; Brook, 2007; Polikoff, 2008; Stevens, 1999, 2010).

While legal reform, such as the decriminalization of sexual relationships between people of the same sex and the liberalization of divorce laws, precipitated some of these transformations in family life, it is also true that legal recognition has been long in arriving for the relationship forms that emerged in their wake. In some instances, this delay has been explained by a desire to respect people's choices and preserve individual autonomy. For example, in *Nova Scotia (Attorney General) v. Walsh* (2002), the Supreme Court held that distinguishing between married and co-habiting different-sex couples with regard to marital property was justifiable because it protected the freedom of choice of individuals (para. 5). But the language of choice was also used to justify equating marriage and co-habiting relationships, as we will see below, in the context of the Supreme Court's decision in *Miron v. Trudel* (1995). In most respects and certainly in the context of 'conjugal relationships,' equality, protection against exploitation, and the opportunity to shift state responsibility for social support to a wider array of families have combined to make recognition of non-marital relationship forms possible.

Co-habiting Relationships: Different-sex Couples

With respect to the recognition of co-habiting relationships and the diminished significance of marriage as the state's preferred relationship form among adults, two Supreme Court cases were particularly important: *Miron v. Trudel* (1995) and *M. v. H.* (1999). In *Miron*, the Court held that marital status should be included within the section 15 equality provisions of the *Charter of Rights and Freedoms* and that it would be a violation of equality rights to treat a married spouse differently than a co-habiting partner for the purposes of the *Ontario Insurance Act*. The case involved an insurance claim by John Miron who was injured in a car accident. Since neither Miron nor the driver of the car was insured, Miron submitted an insurance claim under the policy of his common-law partner, Jocelyne Valliere. This

option would have been available to Miron if he and Valliere had been married, but because they were not, the insurance company denied the claim.

The lower courts had held that married spouses should not be equated with co-habiting partners, but the Supreme Court overturned these rulings in a 5-4 decision. For the majority judges, the purpose of the legislation was to sustain families when one of their members was injured in an accident. Excluding co-habiting partners from that protection was counter to the statute's purpose and the discrimination could not be justified (*Miron v. Trudel*, 1995, p. 5). The mutual support of the partners, the presence of children and the relationship of some permanence indicated that the partners' lives were interdependent and 'marriage-like,' and, as a result, their choice not to marry should not have prevented them from enjoying the benefits that result from marriage. The dissenting position also invoked choice. The dissenting justices asserted that people had a choice to marry or not and that marriage, as a 'fundamental social institution' should not be diminished by its equation with co-habitation. In this view, marriage should be privileged and the benefits and obligations it provides should be limited to those people who self-consciously accept them through the public declaration of marriage vows (*Miron v. Trudel*, 1995, pp. 9-10).

Justice L'Heureux-Dubé was particularly critical of this characterization of marriage as a status that parties could freely assume. In her view, the choice to marry was much more complicated. One member of the couple might want to marry while the other was less inclined and thus a common-law relationship provided a compromise. She also noted that many Ontario statutes already extended benefits to common-law couples and that the rationale for this extension was to protect dependent spouses and children who would be disadvantaged by the failure to provide legal status to cohabiting relationships (*Miron v. Trudel*, 1995, pp. 63-65).

The tension between function (what relationships do), and form (how a relationship is categorized) is evident in the justices' arguments, with function ultimately winning the day. Not only did the recognition of cohabiting relationships reflect the important value of respect for diversity in a democratic society (*Miron v. Trudel*, 1995, p. 88) and protect dependent partners from exploitation, it also had the effect of avoiding additional costs to the state (*Miron v. Trudel*, 1995, p. 74). If private insurance companies could cover the costs associated with an injured co-habiting spouse, state provided social assistance and disability pensions would not be required.

Co-habiting Relationships: Same-sex Couples

This combination of equality rights, protection, and an economic rationale for recognizing family diversity was also apparent in the Supreme Court's decision in *M. v. H.* (1999). This decision involved a claim for support under the terms of the *Ontario Family Law Act* between former partners in a lesbian relationship. The outcome of the Court's decision was to equate different- and same-sex common-law relationships, the majority of the justices ruling that not to do so would violate the dignity and respect that should be afforded relationships of mutual commitment, regardless of the sexuality of the participants. As well, extending support obligations to same-sex partners would realize the purpose of the Act in reducing the demands on the public purse.

M. v. H. is an important and interesting decision because of the arguments it inspired regarding gender (in) equality in *heterosexual* relationships and its reflections on the meaning of conjugality. The Ontario government intervened in this case, advancing the argument that the support obligations that flowed from heterosexual marriage and co-habiting relationships should not extend to same-sex partners. The government's claim was that the spousal support regime had been implemented to compensate women who had forfeited full-time paid employment in order to care for their families (*M. v. H.*, 1999, 66). Since same-sex relationships would not demonstrate a similar gendered division of labour, the government argued that the support scheme should not apply to these relationships. However, in the view of the majority of the Supreme Court justices, the legislation could not support this interpretation. It was clear from the legislative history that Ontario's *Family Law Act* had been purposely drafted in gender neutral language in order to ensure equal access to its provisions by both men and women. If the Act envisioned support for anyone, regardless of their sex, in circumstances in which one member of a couple had withdrawn from the labour market in order to provide care, then there was no justifiable reason to deny the benefit of the law to same-sex partners.

In *M. v. H.* the Supreme Court again interpreted the legislation in light of its overall function and 'read in' a relationship form whose function was seen as similar to heterosexual co-habiting relationships. In coming to this conclusion the justices engaged in a fascinating discussion of the meaning of conjugality. Most of us probably understand a conjugal relationship to mean a sexual relationship, but Canadian law has a more complicated definition, established in an Ontario District Court decision: *Molodowich v. Penttinen* (1980). A conjugal relationship involves some undetermined combination of shared residence, sexual and personal behaviour, services (cooking, cleaning, repairing etc), social activities, economic support, children and the societal perception of the couple (*M. v. H.*, 1999, p. 53). In *M. v. H.* the Supreme Court stated that conjugality required a flexible application, noting that a heterosexual couple 'may, after many years together, be considered to be in a conjugal relationship though they have neither children nor sexual relations' (*M. v. H.*, 1999, p. 54). The Supreme Court was not prepared to elaborate on whether this definition might be extended to friends or siblings, or to consider the usefulness of conjugality as a marker of relationships that merit recognition, rights and obligations. Nonetheless, the flexibility and expansiveness of the term, especially once a sexual relationship is not required, provided an opportunity to think more broadly about what characteristics of relationships *should* matter in law.

When Marriage still Matters: Time and Property

As a result of the Supreme Court decisions in *Miron v. Trudel* and *M. v. H.*, the federal government and the provinces undertook a comprehensive effort to reform their legislation to ensure the equality of same- and different-sex co-habiting couples and co-habiting and married couples. At the federal level, this initiative took the form of the *Modernization of Benefits and Obligations Act* (2000). The statute deems couples (both same- and different-sex) to be common-law partners if they have been in a conjugal relationship for at least one year. This status is imposed on couples regardless of whether they choose to be recognized as common-law partners or not. Similarly, in every province except Quebec, two people who live together in a conjugal relationship for a period of time (ranging from two to five years, or sooner if there are children of the relationship) are deemed to be common-law partners. As well, in some provinces (Quebec, Manitoba, Nova Scotia) it is possible to register as domestic partners or adult interdependent partners (Alberta) in advance of the minimum co-habitation period.

It is important to note that, even once the time qualification has been met, some differences between married and common-law couples persist in Canadian family law, notably with regard to matrimonial property. In *Nova Scotia (Attorney General) v. Walsh* (2002), the Supreme Court disrupted the judicial and legislative trend of equating marriage and co-habiting relationships. In the context of property, the majority of the Supreme Court justices held that a distinction between married and common-law relationships in Nova Scotia's *Matrimonial Property Act* did not affect the dignity of unmarried cohabitants and did not deny them access to a benefit available to married couples (para. 2). Writing for the majority, Justice Bastarache contended that the choice to marry or not should be respected, and that if a couple chose not to accept all of the obligations of marriage, they should not have these obligations foisted upon them (para. 35). It should be noted that former co-habiting partners can pursue a claim of unjust enrichment to address issues of property division. Effectively, a court may determine that a 'joint family venture' was established in which both parties made "extensive but different contributions to the welfare of the other, and as a result have accumulated assets..." (*Kerr v. Baranow*, 2011, para. 7). If one member of the couple has retained a disproportionate share of those accumulated assets, the court will reallocate them on the basis of each party's respective contribution (*Kerr v. Baranow*, 2011, para. 53). As well, couples who have co-habited for at least two years in Manitoba, Saskatchewan, the Northwest Territories and Nunavut are included within their respective jurisdiction's matrimonial property regimes, as are registered partners in Nova Scotia and civil unions in Quebec.⁶

Beyond Conjuality?

While Canada's various governments were busy extending status to non-marital conjugal relationships, the Law Commission of Canada embarked on a study of the meaning and relevance of conjuality itself. In the Law Commission's view, the state should be neutral with regard to the roles that people assume in their personal relationships (2001, Chp. 2, p. 4). While there may, indeed, be situations in which the state may need to intervene or influence relationship choices, the basis of that intervention, the Commission argued, should be determined by the qualitative attributes of relationships rather than their legal status (2001, Chp. 2, 5). The Law Commission outlined four questions that it felt should be used to determine whether a relationship was relevant to a specific legislative purpose:

1. Does the law pursue a legitimate policy objective?
2. If the law's objectives are sound, do relationships matter? Are the relationships that are included important or relevant to the law's objectives?
3. If relationships do matter, could the law allow individuals to choose which of their own close personal relationships they want to be subject to the law? If so allow this.
4. If relationships do matter, and public policy requires that the law delineate the relevant relationships to which it applies, can the law be revised to more accurately capture the relevant range of relationships? (2001, Chp. 3, p. 2)

⁶ A useful summary table entitled "Provincial and Territorial Matrimonial Property Laws" can be found at <http://www.aicn-inac.gc.ca/br/mrp/ip/csl/prt-eng.asp>.

The Law Commission's report was also very clear that the existence of a sexual relationship should not be considered relevant to state legislative objectives concerning close relationships between adults and that people should be spared interrogation into the details of their personal sexual conduct as a means of establishing whether a relationship of significance to the state actually existed (2001, Chp. 2, p. 7). Not only was such an interrogation a violation of privacy, it was not clear that sex was an appropriate indicator of the kinds of interdependence that the state would be legitimately interested in regulating.

Intriguingly, the Law Commission's arguments resonated among moral conservatives. In the debate surrounding the *Modernization of Benefits and Obligations Act*, members of the Reform/Alliance Party asserted that if all that mattered to the state was interdependence, then close relationships between siblings and friends should also merit state recognition (Canada, 2000). The Government of Alberta went further, using its *Adult Interdependent Relationships Act* – the legislation it enacted to address the Supreme Court's rulings in *Miron* and *M. v. H.* – to include any two adults who have lived together for at least three years, share each other's lives, are emotionally committed to one another, and function as an economic and domestic unit. It is thus possible for two people who are not romantically involved, and, in fact, who are blood relations, to form an Adult Interdependent Partnership in Alberta (2002, sec 2, 3(1)). The motivation behind the Reform/Alliance argument and the Alberta legislation was not primarily about the recognition of interdependence in a wide range of relationships and a desire to expand legal recognition to a diversity of family forms. Rather, by expanding the range of legitimated relationships in order to include all kinds of interdependencies, these conservative forces were able to avoid explicitly recognizing same-sex relationships and, indeed, to withhold or at least dilute the dignity that same-sex couples had sought in their struggles for legal recognition.

Marriage Between Partners of the Same Sex

The issue of marriage between same-sex partners loomed large in the legislative debates surrounding the *Modernization of Benefits and Obligations Act* and in the provincial legislative reform initiatives that ensured compliance between provincial laws and the Supreme Court decisions in *Miron* and *M. v. H.* When the federal government passed its legislation, then Prime Minister Jean Chrétien assured Canadians that marriage would continue to be defined as “the union of one man and one woman to the exclusion of all others” (Ayed, 2000, A3). But as we know, this claim could not be sustained. In response to decisions by Courts of Appeal in British Columbia and Ontario, which held that the exclusion of same-sex partners from the entitlement to marry was unconstitutional, the federal government announced that it would not pursue further appeals (Canada, 2009). Instead, the federal government referred the issue to the Supreme Court of Canada, asking, among other things, whether it was in the constitutional jurisdiction of the federal government to alter the definition of marriage to include two people, without specifying their sex. The Court confirmed that it was and that to do so would represent a logical application of the equality provisions of s. 15 of the *Charter of Rights and Freedoms*.⁷ In 2005, the Liberal Government of Paul Martin passed the *Civil Marriage Act* enabling same-sex partners to marry, and while the subsequent Conservative federal government promised to re-open the debate, a free vote in Parliament, held in December 2006, rejected this option.

⁷ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

The relative importance of function and form as well as the financial consequences of recognizing an increasing diversity of family forms are central issues in the debates surrounding contemporary family life in Canada. For supporters of 'traditional' marriage, for example, marriage is viewed typically as a sacred institution whose significance as a cultural form extends beyond the care and affection that are central to family function.⁸ From this perspective, it might be possible to extend some legal entitlements to other relationship forms, but marriage itself, the argument runs, should be limited to different-sex, presumably procreative, partners.⁹ With regard to the financial issue, the Supreme Court of Canada's ruling in *M. v. H.*, (p. 93) and Justice L'Heureux-Dubé's dissent in *Nova Scotia (Attorney General) v. Walsh* (p. 116) argued for the recognition of non-marital relationship forms, in part, because to do so would reduce the burden on the public purse by imposing support obligations on former cohabiting partners. In my view, a cost-savings justification for the expansion of the range of legitimated family forms is not especially compelling. As I have argued elsewhere, the freedom of individuals to construct intimate relationships of their choosing would be maximized through policies that promote and support individual economic self-sufficiency rather than private dependency (Harder, 2007). But in the absence of such supports, I personally, would object to denying a former partner access to support solely on the basis that her/his relationship does not meet an abstract standard of appropriateness.

The extension of the right to marry to same-sex partners and the broader issue of choice in relationship formation has expanded the public's imagination with regard to how we might organize our relationships of affection and obligation. Thinking beyond the bounds of monogamy has been a lively site for our creative energies as well.

Polygamy and Polyamory

One of the frequent claims made in the same-sex marriage debate was that if same-sex partners were allowed to marry, the legalization of polygamous relationships would surely follow. In the Canadian context, this was a somewhat ingenuous threat of impending immorality, since a polygamous Mormon sect has been allowed to practice in Bountiful (formerly Lister), British Columbia since the 1950s (CBC, 2007); well before marriage between same-sex partners appeared on the national agenda. Polygamy has been a criminal offence in Canada since 1890 and currently falls under sec 293 of the *Criminal Code*. However, the definition provided in the law is quite imprecise, stating that polygamy is constituted by "any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage" (Canada, 1985, sec 293, para. 1a.ii). This definition appears to be broad enough to include adultery, but the court's decision in *R v. Tolhurst and Wright* (1937) excluded this possibility (Bailey, 2009, 13). Nonetheless, the imprecision of the clause has led a number of legal scholars to express reservations regarding its constitutionality (Bailey, 2009; Bala, 2003; Kaufman, 2005). It should also be noted that polygamy and bigamy are distinct offences. Bigamy entails being formally married to more than one person at the same time (s. 290-291, Canada, 1985).

8 In *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, this position was advanced by a number of interveners, including the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada. See for example, "CCCB Factum to the Supreme Court of Canada Regarding the Federal Government Reference on Marriage," online: <http://www.cccb.ca/site/eng/media-room/official-texts/briefs/1559-cccb-factum-to-the-supreme-court-of-canada-regarding-the-federal-government-reference-on-marriage>. P. 12.1

9 In the United States, the willingness of supporters of 'traditional' marriage to contemplate civil unions, especially for same-sex partners, has led to a rift in the 'pro-family' movement. On the one hand, the argument runs that the only relationship form that merits state support is heterosexual marriage and that to create other legal forms, such as civil unions, is a dangerous concession that will ultimately lead to marriage between same-sex partners. On the other hand, the argument runs, civil unions are advanced as a concession that will halt the demand for the extension of marriage rights to same-sex partners. It should be noted that this debate does not contemplate civil unions for different-sex partners. For 'traditional' marriage proponents, heterosexual partners should be expected to marry. See Harder, 2007.

The law against polygamy was first enacted in response to its criminalization in the U.S. and the immigration of polygamous American Mormons to Canada (Carter 2008, 42-50). However, there has only been one polygamy prosecution in Canada, and that case involved an Indigenous man who had two wives in accordance with his tribal custom (*The Queen v. Bear's Shin Bone* 1899, cited in Bailey, 2009, p. 11). But, as the situation in Bountiful attests, the lack of prosecutions does not mean that polygamy does not exist in Canada. Moreover, Canadian immigration law and the family law acts of Ontario and Yukon contain provisions that explicitly regulate polygamous relationships. While immigration regulations limit family sponsorship by a husband to one wife (Canada, 2006, R 117(9)(c)(i)), other federal and provincial laws recognize polygamous marriages that were validly solemnized in a foreign country (Payne and Payne, 2008, 28). Reflecting the cost-savings rationale for the recognition of a wide-range of family forms, the *Ontario Family Law Act*, for example, entitles polygamous spouses to pursue spousal and child support and to a share of marital property in the event of separation or death (cited in Payne and Payne, 2008, 28).¹⁰

Two sets of responses to the existence of polygamous marriage have emerged in Canada: on the one hand, calls for prosecution, and on the other hand, proposals for decriminalization. It is important to underscore that decriminalization is distinct from legalization. The rationale here is that removing polygamy from the *Criminal Code* would enable women and children to leave polygamous communities without fear of criminal sanction (Campbell, 2005). As it stands, any party to a polygamous relationship is guilty of a criminal offence. Thus, a woman fleeing a polygamous marriage may be reluctant to reveal the relationship for fear that she may be subject to criminal sanction. Decriminalizing polygamy would not entail expanding the definition of marriage to include polygamous marriages. Rather, it would provide a firmer foundation from which to protect women and children in polygamous relationships from exploitation.

More radically, and in contexts in which exploitation is not presumed to be at issue, the question arises as to why polygamy, or perhaps, more aptly, polyamory (literally, many loves) should not be accorded some legal status. If the view of Canadians is, in fact, that the state has no place in the bedrooms of the nation, and that the existence of a sexual relationship is not a pre-requisite to the relationships of interdependency that should matter to the state, what is the basis on which we would articulate a prohibition against intimate relationships involving more than two people? These questions tend to invoke a viscerally negative reaction in many people, but in the spirit of inquiry, I would argue that we should at least consider why that reaction emerges and whether or not there are rational arguments to sustain it (Black, 2006, 498).¹¹

Proponents of polyamory describe this relationship form as 'responsible non-monogamy' (Anapol, cited in Black, 2006, 497). This phrasing challenges the presumption of promiscuity, immorality, and the twinned responses of moral repugnance and titillation that often accompany popular representations of non-monogamous relationships (Myers, 2009, 30). The emphasis on responsibility, and on flexible forms of commitment that are "responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed in cookie cutter fashion on everyone" indicates an effort to balance familial obligations with the aspirations of people to create meaningful lives (Strassberg, 2003, 440). This

10 R.S.O. 1990, c. F. 3.

11 In the *Future Families Project* (Bibby, 2004) conducted under the auspices of the Vanier Institute for the Family, Reginald Bibby found that 20 percent of Canadians were willing to accept polygamous marriages, indicating a strong majority of Canadians did not approve of this particular family form (Bibby, 2005).

definition does not, in fact, depart extensively from the various familial arrangements in which people actually live. Nonetheless, in the popular imagination, the emphasis on the sexual non-exclusiveness of the adult family members looms over all of the other human interactions that occur within this family form. Gretchen Myers observes that this tendency to focus on the sexuality of relationships recurs whenever the focus of attention shifts away from ‘traditional’ marriage. While the marriage of a man and a woman is presumed to be about much more than their sexual encounters, relationships between same-sex partners, inter-racial partners (at least historically), and non-monogamous partners appear to be about illicit sexual deviance rather than love, commitment, or family (Myers, 2009, 25 and 28). Moral retribution and a politics of disgust can then be advanced to limit or disallow these relationship forms.

As both Nicholas Bala and Maura Strassberg observe, political pressure for the legal recognition of polyamorous relationships is non-existent and, indeed, may be logically inconsistent with the freedom that participants in such relationships are seeking (Bala, 2003, 98; Strassberg, 2003, 562). But while recognition of polyamory may not be on the agenda, one can imagine that support for the relationships of interdependency that intimate relationships create – regardless of their sexual content, or the particular arrangement of that sexual content – might be desirable. Indeed, this is the focus of the earlier discussion regarding non-conjugal relationships. If Canada was to extend various forms of entitlements and obligations to people as a result of the existence of interdependence, it may well be that people participating in polyamorous relationships would benefit.

Historically, the Canadian state (and other western liberal democracies) privileged heterosexual monogamous marriage because it was regarded as the most desirable family form (for procreation, social stability, the proper acquisition of gendered identities, transfer of property, etc). But as the Canadian experience with the expansion of legitimated family forms reveals, limiting social supports to relationships that meet the requirements of form without regard to actual practice or function, I would suggest, is both an offence to human dignity and a burden on the public purse (bearing in mind my previously noted reservations). The majority of Canadians may not be ready to grant status to polyamorous relationships, but it is incumbent upon us to weigh the practical and financial harm of denying people access to various forms of care, obligations and entitlements against whatever moral gains may arise from that denial.

PARENTS AND CHILDREN

Recent developments with regard to the relationship(s) between parents and children will round out this survey of contemporary legal and policy changes to the regulation of Canadians’ familial lives. As we have seen, Canadians are living in a wide range of family forms, including an array of social and biological relationships between adults and children. Dependent children and ‘legal’ parents may or may not share a residence, and the homes in which children live may include step-parents, step-siblings, and half-siblings. Same-sex relationships and the advent of reproductive technologies can further complicate lines of filiation (the relationship between parent and child).

Who is a Parent? Birth Registration

As far as the law is concerned, the registration of a child's birth is a central moment at which the parents of a child are named. Presently, all provinces allow the registration of two parents of the same sex, and in some cases, provinces will permit only one parent's name to appear on the birth certificate. This acknowledgement of two parents of the same sex arises as the result of the recognition of same-sex cohabiting partners and marriage between same-sex partners, but this is only a straightforward process in Manitoba and Quebec. In British Columbia by contrast, in a situation involving a lesbian couple in which one woman is the biological mother, the non-biological mother may be deemed a co-parent, but only if the father is unknown, unacknowledged, or the father has refused to acknowledge the child (BC, 2010).¹² As well, the co-parent must be in a spousal relationship with the biological mother and the mother and co-parent must have agreed to be the parents of the child.¹³ Similar rules regarding the lack of acknowledgement by, or of, the father pertain in Nova Scotia, Newfoundland, Ontario, PEI and Saskatchewan.¹⁴ For gay male couples, the situation appears to be even more complex and certainly more opaque. None of the provincial websites outlining the birth registration process specifically addresses requirements for consent or capacity in situations involving two fathers. Indeed, provincial legislation does not contemplate the possibility that a mother could forego her acknowledgement of a child or refuse to acknowledge a child, at least at the stage of birth registration.¹⁵ These distinctions regarding mothers and fathers demonstrate the extent to which motherhood remains tied to biology while fatherhood "can be established in a variety of ways" (Mykitiuk, 2001, 790). As the rules indicate, a mother is always known, acknowledged and incapable of not acknowledging the child. A woman cannot disavow her motherhood, but she can acknowledge the co-parent. But, as we have already seen, this association between biology and motherhood has become more complicated with the advent of reproductive technologies.

As the legal recognition of same sex relationships is relatively recent, the principles supporting the laws that govern parentage in these contexts are actively under construction. The legal record, both within Canada and abroad, indicates a profound conceptual struggle in which the inter-weaving of procreation, lineage, gendered identities and citizenship is being picked apart. Susan Boyd notes, for example, that in a British Columbia case in which lesbian couples were initially barred from naming two women on their children's birth registration, (*Gill and Maher, Murray and Popoff v. Ministry of Health*, 2001 BHRT 34) the provincial Vital Statistics office justified its actions on the grounds that the intent of the registration system was to record genetic (not legal) facts about the parents (Boyd, 2007, 74). This claim failed to persuade the court once it was revealed that Vital Statistics did not insist on genetic evidence of relationship for heterosexual parents, but rather assumed that both parents were related to the child (Boyd, 2007, 74).

12 Vital Statistics Act, R.S.B.C. 1996, c. 479, s. 3(1) [am. 2002, c. 74, s. 3(a), (b)].

13 British Columbia, Vital Statistics Agency. 2010. "How to Register a Birth." Online: www.vitalstats.gov.bc.ca/births/breg.html.

14 See Nova Scotia, Access Nova Scotia. 2010. "Birth Certificate." Online: www.gov.ns.ca/snsmr/access/vitalstats/birth-certificate.asp and see [ans-vstat-birth-certificate-form.pdf](http://www.vitalstats.gov.ns.ca/ans-vstat-birth-certificate-form.pdf); Newfoundland and Labrador, Department of Government Services. 2010. "Birth Certificate." http://www.gs.gov.nl.ca/birth/birth_certificate/index.html#2 and see [application_for_birth_certificate.pdf](http://www.gov.nl.ca/health/index.php3?number=1020358); Ontario, Service Ontario. 2011. "Register Your Newborn Baby, Frequently Asked Questions: Who is Eligible to register a birth in Ontario?" Online: <https://www.orgforms.gov.on.ca/IBR/FAQ.html#eligibilityRegisterBirth> and also R.R.O. 1990, Regulation 1094, Amended to O. Reg. 463/06, s. 2; PEI: www.gov.pe.ca/health/index.php3?number=1020358; Saskatchewan: www.isc.ca/VitalStats/Births/Pages/Register.aspx.

15 Adoption obviously involves the relinquishing of a birth mother's claim to the child, but in the first instance, a child's birth registration will name the gestational mother, and the registration may subsequently be sealed. The adoptive parents may then receive a new birth registration. See, for example, *Vital Statistics Act*, R.S.A. 2000, c. V-4 s. 9-11; *Vital Statistics Act*, R.S.O. 1990, c. V.4 s. 28.

Plural Parentage

Canadian jurisdictions thus indicate a strong preference for a father and a mother, but will accept two parents of the same sex in certain circumstances, or a lone parent in certain jurisdictions and circumstances. Additionally, Canadian law also recognizes situations in which three or more parents may be acknowledged. The most formal, and also controversial, instance of this recognition occurred in an Ontario Court of Appeal decision: *A.A. v. B.B.* (2007). This case involved both members of a lesbian couple, one of whom was the biological mother, and the biological father of the child. The child was a product of their collective intention, and they agreed that they should each be named a parent to the child, that is, that the child should have three parents (*A.A. v. B.B.*, 2007, para. 1). The trial court refused to grant the application for a declaration of parentage by the lesbian co-mother on the grounds that the *Children's Law Reform Act* (Ontario) 'contemplates only one mother of a child' (*A.A. v. B.B.*, 2007, para 18). The trial judge was sympathetic to the situation but felt that granting the request would lead step-parents, extended family members, and anyone else with an interest in a child to claim parentage, complicating custody and access legislation and producing potentially harmful consequences for children if the circumstances were less supportive than those of the case at hand (Payne and Payne, 2008, 561). The Ontario Court of Appeal largely agreed with this decision, but it felt that the court could use its *parens patriae* jurisdiction (through which the state has the power to act on behalf of a citizen who cannot act for him- or herself) in order to grant parentage to all three parties, in this specific instance. As the diversity and complexity of family forms increase, Canadian courts may increasingly resort to inventive uses of legal principles in order to address the unique circumstances of particular family structures, or demand that provincial and federal legislatures directly address the complex issues to which parentage gives rise.¹⁶

The trial judge's concerns regarding the 'slippery slope' of acknowledging three parents turns out to be slightly more complicated when one considers that the law already imposes obligations of support on step-parents (except in Quebec and Nova Scotia in common-law relationships), and on the former co-habitants of a child's legal parents. Categorized as '*de facto* parents,' their financial obligations to the child, as well as their capacity to make claims for custody and access to the child, hinge on the existence of a series of factors that are used to determine whether the individual has a 'parent-like' relationship to the child (*Chartier v. Chartier*, 1999, para. 39). This determination mirrors the approach taken by the courts with regard to determining 'marriage-like' relationships discussed earlier. Among (but not limited to) the relevant factors of a parental relationship are intention (which may be inferred from action rather than explicitly articulated), involvement of the child in the extended family, disciplining the child, representing one's relationship to the child as a parent in the broader community, and the child's relationship to the other biological parent (*Chartier v. Chartier*, 1999, para. 39). But lying at the heart of this determination is not a concern to recognize the social standing of the *de facto* parent. Rather, the motivation behind this definitional exercise is to ensure that a child's financial needs can be met through the private resources of individuals rather than the public purse. Ironically, the effort to reduce demands on public resources has the effect of expanding family forms in ways that supporters of formal recognition of family diversity can only dream about.

¹⁶ See, for example, the Ontario Superior Court's recommendation that the Ontario legislature address the issue of the definition of parentage in the province's Vital Statistics legislation. *Rutherford v. Ontario* (*Deputy Registrar General*) 2006 Carswell Ont 3463.

CONCLUSION

Currently, Canada's law and policy regulating relationships between adults is among the most liberal in the world. It is possible for two people, regardless of their sexual identities to marry, though with some limits regarding age, consent, and consanguinity. Canadian jurisdictions recognize and even impose status and obligations on co-habiting relationships involving any two people who live together in a conjugal relationship for a prescribed period, (and in Alberta any two people in an interdependent relationship). Canada also provides a fairly high level of equality between marriage and co-habiting relationships, although the distinctive treatment of matrimonial property remains an important exception. Polygamy is criminalized, although parties to existing polygamous relationships may have access to some legal protections and entitlements. Moreover, whether the criminalization of polygamy is constitutional or practical (given its lack of enforcement) are open questions. The recognition of same-sex relationships and the effects of reproductive technologies have compelled recent legal developments with regard to parent-child relationships. This is a particularly dynamic area of family law, and one that is likely to encounter future challenges due to its on-going, though weakening, attachment to the idea that a child requires both a mother and a father.

Undoubtedly there are other developments that merit discussion in this context, but my hope is that this brief survey of some of the key cases and legislative reforms in family law will inspire thinking about how and why we understand certain people to be family and what the consequences of being named a family member are or should be. The proposals of the Law Commission of Canada provide one set of suggestions for thinking about how and when relationships should matter in the law. But other, more general alternatives also exist. For example, legal theorist Martha Fineman has proposed that the law should focus its regulative authority on relationships of inevitable and derivative dependency (for example, the inevitable dependence of a minor child on a parent and the derivative dependence of the care-giver on others to sustain him/her in undertaking care work); that care-giving and care-taking should provide the trigger for the law's protection and scrutiny (Fineman, 2000, 18-20). Nancy Polikoff advances three key principles that would enable the valuing of all families: 1) place the needs of children and their caretakers above the claims of able-bodied adult spouses/ partners; 2) support the needs of children in all family constellations; and 3) recognize adult interdependency (2008, 137-38). But regardless of where we would want to put the emphasis – on conjugality, dependency, two or more adults, adults and children – all of these thought experiments encourage us to explore alternatives to the nuclear norm, a task that should be taken very seriously given the diversity of families that populate our country and that seems likely to expand.

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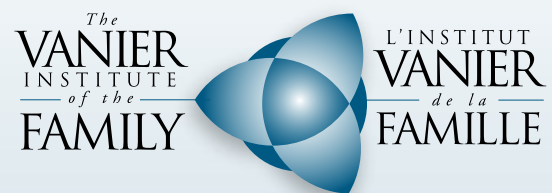
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