One Step Forward, Two Steps Back?: Relationship Recognition in Canadian Law Post-Same-Sex Marriage

Megan Gaucher is an Assistant Professor in the Department of Gender and Women's Studies at Trent University. Her current research interests focus on the Canadian state's inconsistent treatment of the conjugal family unit in its immigration and refugee policies, and the implications this presents for how we understand Canadian citizenship.

Abstract

This paper argues that same-sex marriage has been legalized through a problematic process of drawing parallels between gay and straight couples, ultimately creating new tensions between the conjugal and non-conjugal. As a result, the Canadian state's continued reliance on conjugality as the primary non-blood relationship has implications for how we understand family. Using a sexual citizenship framework, this paper aims to conceptualize a direction for the Canadian state with respect to relationship recognition and to establish a space for discussing alternative categories of adult personal relationships.

Résumé

Cet article fait valoir que le mariage entre personnes de même sexe a été légalisé par le biais d'un processus problématique qui consiste à établir des parallèles entre les couples homosexuels et hétérosexuels, ce qui finit par causer de nouvelles tensions entre le conjugal et le non-conjugal. Par conséquent, le fait que l'État canadien continue de considérer la conjugalité comme principale relation sans lien de sang a des répercussions sur notre compréhension du concept de la famille. Cet article utilise un cadre de citoyenneté sexuelle pour conceptualiser une orientation pour l'État canadien en ce qui a trait à la reconnaissance des relations et pour créer un contexte de discussion d'autres catégories de relations personnelles entre adultes.

On 24 July 2005, the *Civil Marriage Act* was passed in the Canadian House of Commons, making Canada the fourth country in the world to recognize same-sex marriage. The *Act* was a culmination of legal, social, and political efforts, which resulted in a significant transformation in Canadian law with respect to relationship recognition. While common-law status was already available, the legalization of same-sex marriage not only legitimized homosexual conjugality in terms of state recognition through the provision of rights and responsibilities previously limited to heterosexual couples, but it also made the gendered construction of a relationship irrelevant. A legitimate relationship—as defined by the state—was no longer solely available to cross-sex participants. Ultimately the *Act* challenged the heterosexual marriage model by providing same-sex couples the right to have their relationships recognized by the Canadian state. Or at least some same-sex relationships. While unquestionably progressive, critical legal and queer theorists take issue with the ascription of the opposite-sex marriage model to same-sex couples, particularly with respect to the implications this model holds for family diversity. A major consequence is that only one version of the "queer family" is recognized. As a result, a hierarchy of appropriate homosexual conduct is established, separating the "good" queers from the "bad." For these scholars, the same-sex marriage movement is guilty of reproducing the very systems of normalization they claim to be disrupting, suggesting that "legal victories are never only legal victories" (Cossman 2000, 49).

Building on these two bodies of scholarship, the purpose of this paper is to demonstrate that the Canadian state's reliance on conjugality as the primary non-blood relationship has implications for how we understand family. Put differently, it argues that although same-sex marriage is recognized, this has occurred through a problematic process of drawing parallels between gay and straight couples, consequently creating new divides between the conjugal and non-conjugal. So

long as conjugality remains the root of relationship recognition in Canada, marriage and marriage-like relationships will remain the only state-recognized options for adult personal relationships. Ultimately, this paper questions the current Canadian legal framework's dependency on conjugality as the key indicator of a legitimate relationship and accordingly, its capacity to accommodate for family diversity.

The paper proceeds in three parts: first, I situate my paper within a sexual citizenship framework, examining how same-sex marriage was framed as a claim for citizenship; second, I examine several key cases involving relationship recognition up to and including the legalization of same-sex marriage. This analysis highlights the role conjugality plays within the current legal framework and the resulting similarities drawn between homosexual and heterosexual couples. Finally, I explore three major tensions that are produced and reproduced as a result of conjugality taking primacy in Canadian law and policy. In doing so, this paper aims to encourage discussions about non-traditional families and the role of the Canadian state post-same-sex marriage.

Marriage and Citizenship

Sexual citizenship is not a new concept, nor is citizenship a separate entity incorporated into sexual politics—"all citizenship is sexual citizenship, as citizenship is inseparable from identity, and sexuality is central to identity" (Bell and Binnie 2000, 33). The idea is that if citizenship is grounded in ideals of the family, citizens are constantly being sexed. By establishing specific conditions through this process of sexing, individuals are categorized as "good" and "bad" citizens. These categories are identified through understandings of sexual responsibility; those who are responsible in their sexual endeavours represent ideal sexual citizens. This framework suggests that the state privileges certain sexual relationships in order to enforce citizenship as defined through sexual practice. Conjugality becomes a way in which the "responsible" are separated from the "irresponsible." A sexual citizenship framework therefore poses a new approach to our understanding of the public/private divide: "The sexual citizen makes a claim to transcend the limits of the personal sphere by going public, but the going public is, in a necessary paradoxical move, about protecting the possibilities of private life and private choice in a more inclusive society" (Weeks 1998, 37). Sexual citizenship claims use the public sphere to obtain a secure private space for the individual in question. Relationships that do not fall within the parameters of what is believed to be "normal" are denied space.

This is where the push for same-sex marriage aligns with citizenship claims. It challenges the Canadian state's privileging of a particular sexual citizen: the heterosexual citizen. Throughout the same-sex marriage campaign, advocacy groups and litigants alike framed marriage as the key to gays and lesbians achieving full citizenship, access to marriage being the affirmation of their full personhood (Kelly 2011; Lahey 1999). With the legalization of same-sex marriage in 2005, heterosexuality is no longer the standard for all forms of citizenship, requiring those using this framework to question who is today's ideal sexual citizen and, in doing so, understand who is now being excluded (Cossman 2007). Same-sex marriage has confronted the heterosexual ideal of citizenship; however, it has arguably done so in a way that simultaneously reinforces other sexual ideals including heteronormativity, monogamy, and the focus of this paper, conjugality. Favouring conjugal relationships over non-conjugal relationships has allowed the state to extend certain same-sex couples citizenship—while simultaneously excluding others—enforcing what Puar (2007) terms *sexual exceptionalism*. By examining the impact citizenship has on the creation of sexual identities post-same-sex marriage, it becomes clear that conjugality continues to shape who the ideal sexual citizen is and their relation to the state. This theoretical framework accomplishes the recognition of systems of power and access embedded within state-recognized relationship categories.

Legal History of Relationship Recognition in Canada

The *Molodowich v. Penttinen* (1980) decision established what is referred to as the "functional equivalence" test used to legally determine conjugality. Prior to this ruling, courts used the "subjective equivalence" test—premised on the assumption of a voluntary economic commitment "until death do us part"—to distinguish between conjugal and non-conjugal relationships (Cossman and Ryder 2001, 283). Challenging the definition of "spouse" in the *Ontario Family Law Act*, Tene Molodowich (applicant) sought spousal support following the termination of her longstanding,

non-marital, childless relationship with Lauri Penttinen (respondent). Up until this point, a spouse was defined either as a married man or woman, or an unmarried man or woman who had cohabited continuously for no less than five years. While the couple had lived together off and on for several years, Molodowich claimed that this arrangement took place with what she thought was the intention of a more permanent relationship. Furthermore, the applicant described her relationship with the respondent as "spouse-like," as it involved conjugal elements including cohabitation, sexual intimacy, economic support, emotional dependency, and the division of daily tasks (e.g. meal preparation, cleaning).

The Court's response was the "functional equivalence" test, which expanded the definition of conjugality to include a broader range of relationship characteristics; conjugality would now be determined by the "objectively observable features of the relationship rather than the stated subjective understandings of the parties" (Cossman and Ryder 2001, 287). The newly adopted test recognized the complexity of conjugal relationships and proposed that a series of factors be taken into consideration when attempting to assess the legitimacy of a conjugal relationship, ultimately recognizing that "marital equivalence is situated within a bundle of factors that together indicate the existence of an emotionally and economically interdependent relationship" (Cossman and Ryder 2001, 283). The functional equivalence test involved seven functional attributes perceived capable of capturing the level of personal commitment required for non-married couples to qualify as conjugal. While not all of these attributes need to be present in order for a relationship to be deemed legitimately conjugal, the Court must be convinced that a combination of these characteristics exists. These attributes consisted of the following:

- Shelter: cohabitation, sleeping arrangements, other roommates
- Services: meal preparation, chores, household maintenance
- Social: participation in community activities, familial interaction
- Societal: community perception of the relationship
- Support: financial arrangements, property
- Children: attitude/conduct concerning children
- Sexual/Personal Behaviour: sexual relations, fidelity, emotional intimacy, care

These characteristics distinguished between the conjugal and consequently, the non-conjugal. This is crucial to our legal understanding of conjugality because these attributes show that conjugal relationships are measured against characteristics believed to be part of the ideal marriage. Conjugality thus becomes synonymous with marriage or, more specifically, "how judges imagine marriage ought to be" (Cossman and Ryder 2001, 290). *Molodowich v. Penttinen* (1980) set the tone for legal recognition of intimate heterosexual relationships in Canada by conflating cohabitation and interdependency in order to provide governments guidance when differentiating between legitimate (conjugal) and illegitimate (non-conjugal) relationships.

The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 sparked a flurry of claims concerning the push for same-sex rights. In *M. v. H.* (1999), the Court ruled that the omission of same-sex couples from the *Ontario Family Law Act* violated the right to equality (s.15) on the basis of sexual orientation. This case involved the termination of a ten-year lesbian relationship in which M. claimed the right to spousal support under the *Act*. Upon the dissolution of their union, M. felt she was entitled to spousal support because H. was receiving a higher salary. M. argued that the exclusion of same-sex couples from the definition of spouse violated s. 15 of the Charter. Cossman describes this decision as instrumental because, "for the first time, the Supreme Court recognized the rights of same-sex couples, declaring these couples to be entitled to the same protections as opposite-sex couples" (2002, 490). For Cossman, this was achieved because M. and H. were seen as cohabiting in a conjugal relationship—"The Court recognized that a same-sex couple may, after years together, be considered to be in a conjugal relationship and should therefore receive the same rights as opposite-sex couples" (2002, 490). The allocation of relationship rights to same-sex cohabiting couples was finalized with the passing of the *Modernization of Benefits and Obligations Act* (2000).

As debated in *Molodowich v. Penttinen* (1980), what separates relationships of economic interdepen-

dency from conjugal realtionships is the assumed presence of intimacy as narrowly defined by sexual relations, fidelity, and care (Bala 2003, 94). Following the legalization of same-sex common-law relationships, the Ontario Court of Appeal ruled in *Halpern v. Canada* (2003) that the denial of marital rights to same-sex couples was discriminatory because "same-sex couples have the same aspirations of conjugal bliss and in fact live a life no differently from cross-sex married couples" (Lee 2010, 6). Same-sex marriage was therefore a question of equality and human dignity. In this light, one's dignity is violated when "gays and lesbians are not respected as being equally capable as their heterosexual counterparts of forming committed marital relationships" (Lee 2010, 7). Decisions like *Halpern v. Canada* (2003) paved the way for the legalization of same-sex marriage in Canada by deeming the gendered makeup of a conjugal relationship irrelevant and by conveying the message that the denial of marriage to same-sex couples lacked constitutional backing. The *Civil Marriage Act* (2005) solidified full recognition for same-sex conjugal relationships by acknowledging that same-sex couples were capable of developing intimate relationships similar to those of opposite-sex couples.

The Simultaneous Deconstruction/Construction of Exclusion

While the *Civil Marriage Act* eased certain political and social divides, it reinforced others. The remainder of this paper focuses on the latter, highlighting several tensions inherent within a politics of relationship recognition that remain intact and are arguably strengthened through the provision of same-sex marriage rights.

The Relationship Between Conjugality and Rights Discourse

The incorporation of a rights discourse was arguably the consequence of the Canadian legal system and the strengthened position of the Surpreme Court through the Charter, making this judicial forum the ideal arena for minority groups (Smith 2007a). Marriage itself is not a right, but it became entangled in a discourse of equality, individual liberties, and the capacity for self-realization. This is not to suggest that adopting a language of rights was a poor choice or that the refusal of marital status to same-sex couples is not discriminatory. One implication of this legal strategy, however, is the effect rights talk has on discussions of conjugality.

The same-sex marriage debate in Canada was polarizing: either you were for or against state recognition of same-sex conjugality. Consequently, one's position on this issue was indicative of one's stance on rights more broadly. Anti-same-sex marriage became synonymous with anti-human rights and vice versa. Not only did this polarization further the divide between liberal and conservative groups, it also generated tensions within queer advocacy and legal circles as well. Critical legal and queer scholars and advocates—labelled the "quiet critique" by Kelly (2011) —who questioned the movement's narrowed focus on marriage were not claiming that the language of equality was inherently problematic; rather, they expressed hesitations about relying solely on a formal equality framework that portrayed same-sex relationships as being "just like" opposite-sex relationships. Marriage, as the primary objective, resulted in the exclusion of alternative realtionship forms; same-sex marriage became the sole legitimate option. While the effects of this will be discussed below, interpreting marriage as a right presented same-sex marriage as either-or; a zero-sum debate about which rights trumped others. Absent from these discussions was any questioning of the very nature of marriage as a right: Why is marriage considered a right? Why are conjugal relationships privileged over other personal relationships? Why is conjugality the main objective for same-sex couples? What interest does the state have in preserving conjugality? These questions were posed by legal scholars during the same-sex marriage debates (Cossman and Ryder 2001; Law Commission of Canada 2001); however, the response was that, in order for gays and lesbians to be full citizens, marriage must come first (Lahey and Alderson 2004). With the goal being conjugality, since conjugal relationships are the only personal relationships recognized by the Canadian state, marriage and rights talk became logical bedfellows.

Additionally, in terms of legal strategy, interpreting marriage as a right invokes the trap of equality-as-sameness. *Mossop v. Canada* (1993)—the first Supreme Court challenge for gay and lesbian relationship rights that focused specifically on the allowance of bereavement leave for same-sex partners —provided an opportunity to advocate for the rights of non-tradition-

al families more broadly. While the case was dismissed, Justice L'Heureux Dubé commented in her dissenting opinion:

> Given the range of human preferences and possibilities, it is not unreasonable to conclude that families may take many forms…It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values (*Mossop v. Canada* 1993*).*

L'Heureux Dubé's acknowledgment of the existence of non-traditional families that embody similar characteristics of care and interdependency inherent in the traditional family structure was further supported by the Court's recognition, in *Egan v. Canada* (1995), that sexual orientation was a prohibited ground of discrimination under s.15 of the Charter. The gay and lesbian relationship rights movement could have monopolized on this language of non-traditional families contained in these two decisions; however, advocates and litigants alike maintained their position of formal equality. While the Court ruled in favour of the extension of common-law marital benefits to same-sex couples in *M. v. H.* (1999*)*, a legal distinction remained between married "spouses"—a category reserved for heterosexual couples—and "common-law partners"; the *Modernization of Benefits and Obligations Act* (2000) therefore offered conjugal rights to same-sex couples through a "separate but equal" legislative framework (Kelly 2011). Proving that same-sex conjugal relationships were identical to opposite-sex conjugal relationships and therefore deserving of state recognition thus continued to shape the push for same-sex marriage, framed as the "Holy Grail" of relationship rights recognition (Boyd and Young 2003; Cossman 1994; Kelly 2011; Lahey 1999; Smith 1999).

Marriage as the ultimate goal meant that lesbians and gay men were framed as a minority group seeking access to this particular institution. As a result, marriage continues to be conceptualized as the "neutral" norm when it comes to family formation. The continued normalization of marriage makes the pursuance of difference difficult in that, in order to obtain the right in question, one must be interpreted as worthy of that right. The easiest way to do so is to appear like those already enjoying that right, to present oneself as "normal" with respect to three primary relationship qualities: monogamous conjugality, long-term relationship, and economic interdependency (Kelly 2011). Arguments for same-sex marriage contended that same-sex relationships already existed in marriage-like form; therefore extending marriage would not drastically alter either the institution of marriage or same-sex relationships more generally. This minority rights framework—portraying gays and lesbians as a special "fixed" group in need of protection—is therefore realized at the expense of ignoring the assumptions that produce and reproduce these systems of discrimination in the first place (Herman 1994, 20–3; Hiebert 2002, 164-67; Smith 1999). Additionally, the equality-as-sameness trap runs the risk of replicating problems inherent in opposite-sex marriage, particularly its patriarchal nature. Feminist scholars warned of the implications the extension of marital benefits to same-sex couples would have for lesbian relationships, as the patriarchal family fosters and maintains the subordination of women (Gavigan 1993; Herman 1989; Majury 1994). The fear was that gender imbalances present in heterosexual relationships would be replicated in state recognized homosexual conjugal relationships. The reliance on rights talk—specifically in discussions relating to same-sex marriage—arguably presents limitations for future work on queer relationship recognition.

There are, however, benefits to rights talk in Canada, as made evident by the legitimacy the Charter has provided social-policy reform in the area of gay and lesbian rights (Matthews 2005). In this context, one could argue that the strategy of claiming rights for same-sex couples challenges traditional conceptualizations of the heterosexual nuclear family. The legalization of same-sex marriage presents a counterpoint to the assumed naturalness of the heterosexual married family. This potential for reform explains the support behind using rights talk as a strategy for rectifying social and political discrimination based on one's sexual orientation (Hiebert 1993, 2002; Smith 1999). While the adoption of a formal equality strategy proved to be successful for same-sex marriage advocates and has arguably altered the structure of the heterosexual nuclear family in certain respects, critics of this framework are wary of perceiving it as an end in itself, worried the extension of non-traditional relationship rights will no longer be entertained now that same-sex marriage has

been legalized. The insertion of conjugality into discussions of rights talk has implications—both positive and negative—for same-sex relationships in Canada; it is therefore imperative that we account for these tensions in future conversations concerning queer relationship recognition post-same-sex marriage.

Re-entrenchment of a Conjugal/Non-conjugal Dichotomy

The institution of marriage reinforces selective legitimacy in that this type of relationship is viewed as legitimate at the expense of others. Reflecting this view, Warner argues that "marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives" (1999, 96). Welcoming homosexuals into the world of conjugality perpetuates a similar cycle of exclusion; heterosexuals vs. homosexuals has been replaced with conjugal vs. non-conjugal. This dichotomy is fueled by the power of sexual shame. Sex is governed through a politics of shame that is both explicit (laws) and implicit (silent inequalities, lack of public access). Cossman (2000) highlights this reproduction of sexual shame in her comparison of the Supreme Court's ruling in *M. v. H.* (1999) and a police raid and subsequent charging of 36 gay men with criminal indencency at Bijou, a bath-house-esque gay bar in Toronto, where both events happened in the same month. For Cossman, this illustrates that the gay and lesbian subject recognized by the Court in *M. v. H.* is the desexualized family subject, not the "erotically charged subject of the gay bars and bath houses who remain sexual outlaws" (2000, 54). While *M. v. H.* is considered a victory, Cossman encourages us to consider how these decisions contribute to the complex processes of inclusion and exclusion that state recognition of intimate relationships produces.

Sexual shame establishes a hierarchy of "good" sex and "bad" sex. Conjugal couples (both homosexual and heterosexual) are now viewed as ideal sexual citizens (Bell and Binnie 2000; Phelan 2001; Warner 1999; Weeks 1998). Now that the option of state-recognized conjugality is available to same-sex couples, those couples who opt out are labeled as sexually deviant: a system of regulation that Duggan (2002) terms homonormativity. Warner contends that the push for same-sex marriage goes against the principles of queer theory, specifically its resistance to "any attempt to make the norms of straight future into the standards by which queer life should be measured" (1999, 88). The quest for marital rights creates divisions within the queer rights movement because, instead of deconstructing what constitutes "normal" sexuality, a new "sex public" is created at the expense of those who choose not to fit the conjugal ideal (Warner 1999). Simply put, same-sex marriage does not change the nature of sex; rather, it provides an opportunity to buy a membership to the married club. As Boyd and Young have argued, "Adopting the status quo in terms of the rights and responsibilities that go with spousal status has reinforced the existing system with all its problems" (2003, 771). Of course, this binary mode of thinking cuts both ways. While non-conjugal queers are labeled sexual deviants, conjugal queers are accused by non-conjugal queers of selling out. What Warner (1999) fails to recgonize is that, in his discussion of "good" sex versus "bad" sex, it becomes evident that "good" sex means "bad" queer. Abandoning the theoretical foundations of queer theory for a more heteronormative lifestyle marks same-sex married couples as betrayers of the cause. Warner therefore reproduces dichotomies he aims to disrupt and, furthermore, highlights how same-sex marriage does not eliminate divisions defined by sexuality, but rather creates new ones.

It is important to note that this hierarchy of conjugal privilege does not solely implicate conjugal and non-conjugal same-sex couples. There are many non-traditional personal relationships—including, but not limited to, non-cohabiting couples, polygamous or multi-party families, separated families, reconstituted families, non-conjugal families, multigenerational families, and friendships—that are rendered invisible within the current system of conjugal privilege. The variation in our personal relationships suggests that family composition is not strictly defined by conjugality, but rather, relationships of care (Roseneil and Budgeon 2004; Smart and Neale 1999; Smart 2000; Weeks, Donovan, and Heaphy 2004; Weston 1991). Despite their supportive nature, however, familial arrangements that fail to qualify as conjugal exist outside the realm of state recognition. The upholding of a system of conjugal privilege therefore reinforces these sexual hierarchies, maintaining heteronormative assumptions and norms about kinship and familial networks even if no longer solely defined by one's sexual orientation.

In addition to reinforcing differences in treatment between conjugal and non-conjugal couples, the

push for same-sex marriage had racial and class-based implications as well. The presentation of same-sex conjugal couples as "ordinary" or the same as opposite-sex conjugal couples reinforces systems of heteronormativity and whiteness that guide state treatment of intimate relationships and family composition (Eng 2010; Lenon 2008, 2011; Puar 2001). Racial analogies equating the refusal of same-sex marriage to segregation laws were a common feature in the advocation of same-sex marital rights; critics argued that this comparison relied on the assumed legal family subject being both desexualized and white (Hutchinson 1997; Lenon 2011; Puar 2007). Moreover, these analogies suggest that racism and homophobia are separate systems of discrimination, ultimately ignoring the intersections of race and sexuality. This is compounded by the fact that the face of the same-sex marriage movement itself lacked diversity with respect to a variety of identity-based factors including race, class, ability, and immigration status (Lenon 2008, 2011), reinforcing the message that same-sex conjugal couples (read white, economically interdependent, Canadian-born citizens) are just like their opposite-sex counterparts. The hierarchy of "good" sex and "bad" sex as redefined by the allowance of same-sex marriage therefore cuts across additional identity-based lines as well, suggesting an anti-intersectional approach in analyzing the implications of state relationship recognition.

With respect to claiming gay rights, Canadian history demonstrates a strategy grounded in sameness; however, should a queer policy agenda be desirable, we must recognize the limitations of the current system to accommodate difference. This demands a need to recognize differences within the queer community as well (Smith 2007b). Therefore, challenging the Canadian state's favoring of conjugality requires recognizing the complexity of these new divides and avoiding the re-creation of either-or options with respect to relationship recognition.

The Elimination of Space for Discussing Non-Conjugal Relationships and State Legitimacy

Prior to the legalization of same-sex marriage, the Law Commission of Canada (LCC) issued a report in 2001 that focused on the legal recognition of intimate relationships in Canada. Critical of government policy, the report advocated for a more "comprehensive and principled approach" with respect to recognizing and supporting a wider range of personal relationships (2001, 7). The scope of intimate relationships in this report extended beyond common-law opposite and same-sex relationships to include individuals with disabilities and their caregivers as well as other non-conjugal relationships. The report was met with resistance both from the government and pro-same-sex marriage groups, who promised that a discussion about recognizing non-conjugal relationships through policy would take place once marriage was achieved (Polikoff 2008). At the time, the fear was that too many relationship categories would scare away public support for same-sex marriage and marriage was a way for homosexuals to gain relationship recognition without fundamentally changing the institution of marriage itself to the same extent that recognizing alternative relationships would. Additionally, this discourse of alternative relationships was interpreted by some as a conservative strategy to avoid the legalization of same-sex marriage (Interviews, 2010).

This link between the recognition of non-conjugality and conservative opposition to same-sex marriage is not without merit. Claiming this report as their theoretical framework, the Alberta government introduced the *Adult Interdependent Relationships Act* (AIRA) in 2003, which provided some (but not all) rights enjoyed by married couples to cohabiting heterosexuals and homosexuals, regardless of conjugality. Glennon (2005) argues that this initiative was taken in response to the *M. v. H.* (1999) decision that recognized conjugal-like rights for same-sex couples. The reaction was to give rights to all relationships in order to avoid giving "special rights" to same-sex relationships. For Glennon, this reinforces marriage by limiting the use of "spouse" to married couples and ascribing spousal rights to a range of conjugal and platonic relationships with no mention of same-sex relationships explicitly (2005, 157). Ultimately, same-sex couples became absorbed within a new asexual legal category and were to be treated no differently than roommates, siblings, etc.; the nature of their relationships went from same-sex to no sex (Boyd and Young 2003). This is not to suggest that all proposals of this nature are developed with the intent to block the provision of conjugal rights to same-sex couples; attempts to deconstruct the conjugal family can be genuine. What is problematic about these initiatives, though,

is that while they may be sincere, they also have historically appealed to those who want to keep same-sex relationships invisible in policy.

While the motivations behind passing legislation that recognizes non-conjugal relationships can arguably be considered a strategy to sidestep legalizing same-sex marriage, it is important to recognize the possibilities these policies present for recognition of non-conjugal relationships post-same-sex marriage. From this viewpoint, one could argue that these acts present "a radical (if less threatening) challenge to the presumed naturalness and ensuring privilege of the heteronormative conjugal family" (Harder 2009, 634). With same-sex marriage now legal in Canada, initial motivations behind policies like the AIRA and the LCC's recommendations for law and policy reform are irrelevant. These initiatives, nonetheless, provide a starting point for discussions of relationship recognition post-same-sex marriage.

Discussions of alternative relationship categories post-same-sex marriage have stalled. With the termination of the LCC and the legalization of same-sex, common-law, and marital relationships, the push for recognition of non-conjugal relationships has waned. This should not mean, however, that discussions of alternative relationship categories are off the table. In terms of direction, one option would be to recognize same-sex partners as distinct from those in other interdependent relationships, but still recognize others in non-conjugal interdependent relationships. With the legalization of same-sex marriage in Canada, now might be the opportunity to entertain such an initiative. Doing so requires abandoning a rights framework for one focused on queer culture. The theoretical backing for this frame is the notion that "LGBT (Lesbian, Gay, Bisexual and Transgender) life constitutes a distinctive culture and that LGBT people have citizenship rights based on their belonging to a distinctive cultural community" (Smith 2007b, 99). By queering our understanding of family, we could develop a framework that recognizes kinship as relationships that exist beyond the conjugal couple.

Of course, the assumption here is that individuals want their non-conjugal relationships recognized by the state. Individuals are participants in a variety of relationships from which they can walk away without consequence. With state recognition comes responsibilty, particularly at the point of dissolution (Halley 2001). State recognition of non-conjugal relationships would submit the parties involved to similar accountabilities. Moreover, while all benefits wrapped up in relationship recognition are often perceived as positive, this is arguably not the case (Boyd and Young 2003). One's relationship status impacts access to state provided social security programs including welfare, student loans, and child assistance. This demonstrates how the extension of state recognition to non-conjugal relationships has implications with respect to how we develop and foster our personal relationships, an action made increasingly difficult with state interference. Recognition thus provides both incentives and disincentives (Halley 2001; Smart and Neale 1999; Smart 2000).

Officially extending recognition to non-conjugal relationships allows the state to further privatize dependency, while simultaneously regulating the operation of these relationships in terms of defining which relationships are legitimate and consequently, which ones are not. For many queer theorists, state interference in one's intimate relationships is undesirable: "Many couples who choose to live their lives in different and non-conformist ways do not want to be the 'conventional' couple the law tries to make them be" (Phelan 2001, 158). Answering whether or not individuals want their non-conjugal relationships recognized by the state is not an easy feat. Collectively, these discussions highlight the complexity of recognition and reinforce the point that it is impossible to understand one's personal relationships in either-or terms. It is important to note, however, that when it comes to the politics of relationship recognition, ambiguity should not lead to complacency.

When it comes to examining whether or not it is desirable to have the state present in all personal relationships, the easy answer is this: the state is already present. By establishing a hierarchy of legitimate relationships through Canadian policy, the state regulates familial make-up by recognizing only certain personal relationships as legitimate, ultimately recognizing those in conjugal relationships as "good" sexual citizens. Both conjugal and non-conjugal relationships are therefore politicized. The more difficult answer challenges the state's role in relationship recognition overall. If recognition gives the state power by placing non-conjugal relationships under the same microscope already used to appraise the legitimacy of conjugal relationships, one could argue that state recognition of non-conjugal re-

lationships undermines the most important issue critics have with respect to state privileging of conjugality—the idea that the state should have no place in one's personal relationships (Fineman 2006; Lyndon-Shanley 2004; Stevens 1999). If the issue is state intrusion in the private details of people's lives, then enhancing state power through a policy framework that recognizes non-conjugal relationships is contradictory. Therefore, instead of providing recognition to non-conjugal relationships, conjugality as a marker for state recognition could be eliminated altogether.

Many scholars have argued that so long as conjugality remains an option, there will always be relationship inequality (Metz 2010; Stevens 1999; Warner 1999). The replacement of conjugality with a contract approach in which individuals have the choice to apply for recognition regardless of the relationship's make-up would establish a system in which people who are socially and economically interdependent can choose to be recognized by the state, regardless of whether or not the relationship is sexually intimate. Furthermore, such an approach would represent a shift away from focusing on groups (conjugal, non-conjugal, homosexuals, heterosexuals, etc.) towards focusing on the individual, and would ultimately provide options for those relationships seeking state recognition which fail to satisfy the current criteria of conjugality. Referring to this as the "equality of power" approach, Cooper argues that we need a legal framework of recognition that "looks two ways—on the one hand, to individuals; on the other, to the social inequalities and asymmetries that pattern and organize our society" (2001, 99). The privileging of conjugality is one such process that shapes society in an unequal and inconsistent manner.

What is at stake here is not same-sex marriage, but rather, conjugality being the sole focus of relationship recognition in Canada. This is not to suggest that either all relationships or no relationships should be recognized; this would replicate the polarizing nature of current arguments about relationship recognition this paper aims to challenge. The prescription, therefore, is to reinvigorate the dialogue concerning the role of conjugality in the politics of relationship recognition and to question the gap between state policy's reliance on conjugality as a marker and the realities of family formation in Canada. The adoption of a new legal framework capable of assessing whether adult personal relationships should receive recognition through state policy is required. Admittedly, this is not an easy task, as non-conjugal relationships cannot simply be added to existing family law; furthermore, changes in family law have implications for many other areas of law as well. However, this does not justify shying away from discussions which aim to deconstruct perceived qualitative differences between conjugal and non-conjugal relationships. While same-sex marriage has been recognized in Canada, there remains a place for queer theory and critical legal scholarship with respect to relationship recognition.

Conclusion

Canadian law has undergone a significant transformation with respect to relationship recognition with the legalization of common-law and marital relationships for both same-sex and cross-sex couples. While the state's view of marriage has been altered, this change took place within an already existing framework, one that assumed that conjugal and conjugal-like relationships are the most legitimate non-blood relationship category and are therefore deserving of state recognition. Despite having eased certain divides between homosexuals and heterosexuals, reliance on conjugality has created new tensions in discussions of relationship recognition. So long as this relationship form is favoured, other kinds of relationships are excluded and a specific understanding of sexual citizenship is promoted by the state. By approaching conjugality as an opportunity to discuss its place in state governance, there is the potential to continue the work done pre-same-sex marriage. Creating this space could allow for meaningful discussions about what constitutes "family" and to recognize that, like our familial networks, both queer theory scholarship and Canadian law could be more flexible. Contrary to what the critics say, these two steps back could actually be one giant leap forward.

References

Bala, Nicholas. 2003. "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships." *Queen's Law Journal* 29 : 41–102.

Bell, David, and Jon Binnie. 2000. *The Sexual Citizen: Queer Politics and Beyond*. London: Polity Press.

Boyd, Susan, and Claire Young. 2003. "From Same-Sex to No Sex?: Trends Towards Recognition of (Same-Sex) Relationships in Canada." *Seattle Journal of Social Justice* 1, no. 3 : 757–93.

Cooper, Davina. 2001. "Like Counting Stars?: Re-structuring Equality and the Socio-Legal Space of Same-Sex Marriage." In *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, edited by Robert Wintemute and Mads Andenaes, 75–96. Portland: Hart Publishing.

Cossman, Brenda. 1994. "Family Inside/Out." *University of Toronto Law Review* 44, no. 1 : 1-39.

_____. 2000. "Canadian Same-Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories." *Cleveland State Law Review* 48 : 49-69.

_____. 2002. "Sexing Citizenship, Privatizing Sex." *Citizenship Studies* 6, no. 4 : 483–506.

_____. 2007. *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*. Stanford: Stanford University Press.

Cossman, Brenda, and Bruce Ryder. 2001. "What Is Marriage-Like Like? The Irrelevance of Conjugality." *Canadian Journal of Family Law* 18 : 269–326.

Duggan, Lisa. 2002. "The New Homonormativity: The Sexual Politics of Neoliberalism." In *Materializing Democracy: Towards a Revitalized Cultural Politics*, edited by Russ Castronovo and Dana Nelson, 175-94. Durham: Duke University Press.

Eng, David. 2010. *The Feeling of Kinship: Queer Liberalism and the Racialization of Intimacy.* Durham: Duke University Press.

Fineman, Martha. 2006. "The Meaning of Marriage." In *Marriage Proposals: Questioning a Legal Status*, edited by Anita Bernstein, 29–69. New York: New York University Press.

Gavigan, Shelley. 1993. "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement to Law." *Osgoode Hall Law Journal* 31, no. 3 : 589–624.

Glennon, Lisa. 2005. "Displacing the 'Conjugal Family' in Legal Policy - A Progressive Move?" *Child and Family Law Quarterly* 17 : 141–63.

Halley, Janet. 2001. "Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate." In *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, edited by Robert Wintemute and Mads Andenaes, 97–111. Portland: Hart Publishing.

Harder, Lois. 2009. "The State and the Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada." *Signs* 34, no. 3 : 633–58.

Herman, Didi. 1989. "Are We Family? Lesbian Rights and Women's Liberation." *Osgoode Hall Law Journal* 28, no. 4 : 789–816.

_____. 1994. *Rights of Passage: Struggles for Lesbian and Gay Legal Equality*. Toronto: University of Toronto Press.

Hiebert, Janet. 1993. "Rights and Public Debate: The Limitations of a 'Rights Must Be Paramount' Perspective." *International Journal of Canadian Studies* 7-8 : 117–35.

_____. 2002. *Charter Conflicts: What Is Parliament's Role?* Montreal: McGill - Queen's University Press.

Hutchinson, D. L. 1997. "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse." *Connecticut Law Review* 29 : 561-645.

Interviews with former members of the Law Commission of Canada. 2010. Ottawa.

Kelly, Fiona. 2011. *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood.* Vancouver: UBC Press.

Lahey, Kathleen. 1999. *Are We Persons Yet? Law and Sexuality in Canada*. Toronto: University of Toronto Press.

Lahey, Kathleen, and Kevin Alderson. 2004. *Same-Sex Marriage: The Personal and the Political*. Toronto: Insomniac Press.

Law Commission of Canada. 2001. *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*. Ottawa: Law Commission of Canada.

Lee, Man Yee Karen. 2010. *Equality, Dignity, and Same-Sex Marriage*. Leiden: Martinus Nijhoff Publishers.

Lenon, Suzanne. 2008. "What's So Civil About Marriage?: The Racial Pedagogy of Same-Sex Marriage in Canada." *Darkmatter* 3 : 26-36.

_____. 2001. "'Why is our Love an Issue?': Same-Sex Marriage and the Racial Politics of the Ordinary." *Social Identities* 17, no. 3 : 351-72.

Lyndon-Shanley, Mary. 2004. *Just Marriage*. Oxford: Oxford University Press.

Majury, Diana. 1994. "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context." *Canadian Journal of Women and the Law* 7 : 286-317.

Matthews, J. Scott. 2005. "The Political Foundations of Support for Same-Sex Marriage in Canada." *Canadian Journal of Political Science* 38, no. 4 : 841–66.

Metz, Tamara. 2010. *Untying the Knot: Marriage, the State and the Case for Their Divorce*. Princeton: Princeton University Press.

Phelan, Shane. 2001. *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship*. Philadelphia: Temple University Press.

Polikoff, Nancy. 2008. *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law*. Boston: Beacon Press.

Puar, Jasbir. 2001. "Transnational Configurations of Desire: the Nation and its White Closets." In *The Making and Unmaking of Whiteness*, edited by B. B. Rasmussen, Irene Nexica, Eric Klinenberg, and Matthew Wray, 167-83. Durham: Duke University Press.

_____. 2007. *Terrorist Assemblages: Homonationalism in Queer Times*. Durham: Duke University Press.

Roseneil, Sasha, and Shelley Budgeon. 2004. "Cultures of Intimacy and Care Beyond 'the Family': Personal Life and Social Changes in the Early 21st Century." *Current Sociology* 52, no. 2 : 135-59.

Smart, Carol. 2000. "Stories of Family Life: Cohabitation, Marriage and Social Change." *Canadian Journal of Family Law* 17 : 20–53.

Smart, Carol, and Bren Neale. 1999. *Family Fragments?* Malden: Polity Press.

Smith, Miriam. 1999. *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995*. Toronto: University of Toronto Press.

_____. 2007a. "Framing Same-Sex Marriage in Canada and the United States: Goodridge, Halpern and the National Boundaries of Political Discourse." *Social & Legal Studies* 16, no. 1 : 5–26.

_____. 2007b. "Queering Public Policy: A Canadian Perspective." In *Critical Policy Studies*, edited by Miriam Smith and Michael Orsini, 91–110. Vancouver: UBC Press.

Stevens, Jacqueline. 1999. *Reproducing the State*. Princeton: Princeton University Press.

Warner, Michael. 1999. *The Trouble With Normal: Sex, Politics and the Ethics of Queer Life*. New York: The Free Press.

Weeks, Jeffrey. 1998. "The Sexual Citizen." *Theory, Culture & Society* 15, no. 3/4 : 35–52.

Weeks, Jeffrey, Catherine Donovan, and Brian Heaphy. 2004. *Same-Sex Intimacies: Families of Choice and Other Life Experiments*. London: Routledge.

Weston, Kath. 1991. *Families We Choose: Lesbians, Gays, Kinship.* New York: Columbia University Press.

Decisions Cited

Civil Marriage Act (2005) S.C.

Egan v. Canada (1995) 2 S.C.R. 513.

Halpern v Canada (2003) 225 D.L.R. (4th) 529 (Ont. C.A.).

M. v H. (1999) 2 S.C.R. 3.

Molodowich v Penttinen (1980) 17 R.F.L. (2d) 376.

Modernization of Benefits and Obligations Act (2000) S.C.

Mossop v. Canada (Attorney General) (1993) 1 S.C.R. 554.