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The State and the Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada

In 1997 the U.S. state of Hawaii passed an Act Relating to Unmarried Couples.[1] This law establishes a registration system in which two people who are legally unable to marry for reasons ranging from their being same-sex partners to their being blood relations can agree to share a prescribed set of benefits and decision-making authority that had previously been reserved for married couples. These benefits include hospital visitation and health care decision-making rights, the right to hold property as tenants by entirety (automatic right of inheritance for the surviving partner), and the right to sue for wrongful death. Hawaii's legislation was the first in North America to recognize the legitimacy of nonconjugal relationships. In 2002, the Canadian province of Alberta passed the Adult Interdependent Relationships Act (AIRA).[2] The AIRA entitles two unmarried adults to form a contract to share most of the benefits and obligations that accrue through marriage, but in addition it enables the provincial state to impose (or ascribe) these benefits and obligations on two adults who have substantially shared their lives for at least three years. A determination of conjugality, or a marriage-like relationship, is not required for this imposition of status to occur, nor is the existence of an explicit contract unless the partners are blood relations. To date, this is the only legislation in Canada that extends relationship status to nonconjugal partners.

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[1] *Haw. Rev. Stat. Ann.* §§ 572C, 1–7 (1997). A similar law exists in Vermont and has been contemplated in Oregon and Colorado. Domestic partnership or civil union laws that provide legal recognition to same-sex couples exist in Vermont, California, Connecticut, and New Jersey.

[2] *Adult Interdependent Relationships Act, Statutes of Alberta* 2002, c. A-4.5.

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Much of the journalistic and scholarly commentary on these developments concerns judicial requirements for the recognition of same-sex relationships as the impetus for the legislation. The nonconjugal dimension of the story is, by contrast, much less developed and is generally cast as a sideshow in the larger struggle for the legitimation of sexual diversity, or, more modestly, the recognition of marriages between same-sex partners. Nonetheless, it is my contention that the provision of legal standing for nonconjugal relationships also represents a radical (if less threatening because less sexual) challenge to the presumed naturalness and ensuing privilege of the heteronormative married family. The meaning of the challenge differs in the U.S. and Canadian national contexts. Whereas U.S. jurisdictions have contemplated the recognition of nonconjugal relationships as a means to thwart marriage for same-sex partners, a move that emphasizes the significance of heterosexuality to the American state, Canadian judicial proceedings that have more or less equated marriage and cohabiting relationships—and have enabled same- and different-sex partners to participate in both relationship forms—have given rise to speculation about what conjugality actually is and why it forms the basis of state interest in relationships in the first place. Heterosexuality still remains the norm of good Canadian sexual citizenship, and, as we shall see, the recognition of nonconjugal relationships in Alberta was as motivated by a resistance to recognizing same-sex partnerships as Hawaii's reciprocal beneficiaries act was. Nonetheless, the differences in the broader political and legal contexts in the countries where these relatively similar pieces of legislation are located shape the meanings of nonconjugal relationships and the possibilities for them to function as a newly legitimated means to organize one's personal life.

The political contexts that give rise to the legitimation of nonconjugal relationships are also rife with contradictions. Conservative resistance to marriage between same-sex partners results in an increase in relationship diversity. Neoliberal efforts to privatize the costs of social reproduction are both facilitated by recognizing more relationships (more kinds of families can provide more care) and potentially thwarted because of increased public and private benefit costs when more kinds of partners gain entitlements. Progressive, neoliberal, and socially conservative forces can simultaneously claim that recognizing nonconjugal relationships denaturalizes the family, reinforces the preeminence of the private sphere in providing social reproduction, and protects the sanctity of heterosexual marriage. Families of choice may, in fact, be constituted by state edict—at least in the province of Alberta. Established rules of kinship strain as new affective ties and formulations of lineage emerge, though they are

still derived from a dyad, or two-person unit.[3] And finally, the idea that political consent forms the basis of liberal democracies confronts the ongoing significance of kinship rules in constituting contemporary political societies (Stevens 1999).

What follows is a mapping of these contradictions, with the use of social theory and political economy to lay the conceptual ground on which to consider laws legitimating nonconjugal relationships and the political and popular debates that surrounded their formulation. I argue that while neoliberalism, as the prevailing mentality of government in North America, may help to explain some of the impetus behind the recognition of more family forms, the contradictions that have emerged in contemporary efforts to (re)constitute the family defy straightforward codification, suggesting points of weakness and contradiction within neoliberalism itself. National and subnational politics surrounding marriage between same-sex partners, the connections between national cultural identity and kinship forms, and the dynamics of modern life are all factors in the swirl of arguments that have given rise to the possibility of recognizing nonconjugal relationships as a legitimate family form. And the paradoxes and confusion that attend these developments create opportunities for substantive debate about the naturalness of the family and increased options for the ordering of one's intimate life. Of course, there are strong reactionary motivations for both the promotion of and resistance to legitimating nonconjugal relationships. Weirdly and perhaps unintentionally, however, it is precisely this conservative reactionism that has provided the impetus for increased family diversity.

This article proceeds by considering the contribution that neoliberalism as a governing project might make to understanding developments in family law. I then provide a brief discussion of the family as a key social institution and a contextualization of the factors that have precipitated contemporary changes in family diversity and the anxiety that has accompanied these changes. My account of the cases of relationship recognition for nonconjugal partners in Hawaii and Alberta follows, with the aim of exploring how neoliberalism has figured into these debates, what other factors have propelled these changes (judicial decisions, social conservatism, public opinion), and, most important, the relevance of conjugality for denoting relationships of significance to the state. Although conjugality

[3] One intriguing exception to this rule emerged in January 2007, when the Ontario Court of Appeal ruled that a child could have three parents. The case involves a lesbian couple, one member of which is the biological mother, and a friend who is the biological father. The ruling extends parental standing to the nonbiological mother.

is popularly understood to refer to relationships that include a sexual dimension, it has a more expansive and much less precise definition in law. In fact, conjugality, as we shall see, is one of those concepts that the law has trouble defining, but apparently the law knows it when it sees it. I conclude with a broader discussion derived from an amalgamation of Jacqueline Stevens's and Pierre Bourdieu's insights regarding the role of the family in constituting the state. Neoliberalism is important here, but potentially more fundamental concerns regarding the identity and integrity of the nation-state are also significant elements in the debates around relationship recognition.

Neoliberalism and family diversity

Situating recent legislative efforts to expand the range of legitimated relationships within the context of neoliberal governance may illuminate some of the motivating forces propelling (qualified and partial) state support for family diversity, including the recognition of nonconjugal relationships. Neoliberalism, as Wendy Larner (2000) has argued, can be understood in various ways. In the context of this article, I am using the term to describe explicit policies of reduced public expenditure, deregulated markets, and the delegitimation of claims making (Yeatman 1994; Brodie 1997). I am also basing my argument on a Foucauldian understanding of the term, in which subjects internalize neoliberalism such that their aspirations and modes of living align with neoliberal tenets of individualism and self-sufficiency (Cruikshank 1996; Larner 2000; Richardson 2005). I want to underscore, though, that the extent to which neoliberalism pervades policy and subjectivity is contingent, requiring particular histories, institutions, and dispositions in order to succeed (Harder 2003; Larner and Craig 2005), and that this contingency makes room for competing explanations, motivations, and governmental impulses.

Jamie Peck and Adam Tickell succinctly unite these understandings of neoliberalism and elaborate its contingency in their delineation of "roll-back" and "roll-out" neoliberalism (2002, 384). Roll-back neoliberalism describes the period of the 1980s during which the postwar compromise of the Keynesian welfare state was dismantled through dramatic and overtly ideological initiatives (2002, 388). The destructive character of neoliberalism in this period was driven, in large part, by global economic and technological forces that in turn incited a rather constrained array of responses from nation-states. Roll-out neoliberalism, also familiar as "the Third Way" (Giddens 1998; Myles and Quadagno 2000) or the "social investment state" (Saint-Martin 2000; Dobrowolsky 2002), has been a

feature of governance, certainly in North America and Western Europe, since the 1990s. This articulation of neoliberalism involves "the technocratic embedding of routines of neoliberal governance" (Peck and Tickell 2002, 384), the establishment of a new common sense through which to undertake public management. In its roll-out iteration, neoliberalism is articulated through a technocratic approach to economic management and the implementation of invasive social policies as a means of internalizing and regularizing the global forces that perpetuate neoliberalism in the first place (2002, 389). Thus, as Peck and Tickell assert, roll-out neoliberalism represents a politically and institutionally mediated response to the failings of roll-back neoliberalism—still within the overarching frame of neoliberal globalism but underscoring both the frailty and the deepening of the neoliberal project (2002, 389–90).

The family—in its historically varied and place-specific iterations—has, of course, been integral to all governing projects. Defined through an ever-changing array of laws, the family has served to reproduce citizens; indeed, how families are articulated in law tells us both who will be and who will not be known as citizens (Stevens 1999). The family has undertaken the work of social reproduction and hence many of the welfare functions that nation-states (and their precursors) require in order to perpetuate themselves. Moreover, the constitution of families—their sexualities, ethnicities, materiality, location, and so on—is seen to be integral in defining the state itself. Consider, for example, the claims made by some social conservatives that same-sex marriage, single motherhood, and even child care contain the seeds of America's demise (see Stacey 1996). Thus, while the specific forms and roles of families may differ across governing projects, there is a sense in which the family also transcends a specific rationale of government. It is this transcendent character that confounds the interpretation of the contemporary politics of the family solely in terms of the politics of neoliberalism, in whatever guise.

The demise of commitment?

Despite efforts to represent the family as a natural, prepolitical, and enduring formation, the historical record is rife with evidence of the changeability of and contestation surrounding the family form (Stevens 1999; Coontz 2000, 2005; Cott 2000). Contemporary debates have tended to mark the current round of changes as beginning in the late 1960s. Political economists have observed that this period marks the decline of the family wage—at precisely the point at which the ideal of the nuclear family headed by a male breadwinner was finally becoming attainable for working-class

families (Stacey 1996)—and hence resulted in a rise in middle-class women's labor force participation. Although this development was inspired by economic circumstances in which increasing numbers of families required two earners in order to maintain a household, the relative increase in autonomy that women enjoyed as a result of their independent earning capacity led women in heterosexual relationships to challenge the patriarchal authority of their male partners. Fueled by the second wave of the feminist movement and the liberalization of divorce laws, cracks in the foundations of traditional marriage began to form.

The 1960s and early 1970s were also an important period of sexual liberation, both gay and straight. The Stonewall riots in New York in 1969 represented the great outing of homosexuality in the United States, although sodomy remained illegal in some U.S. states until 2003, when the Supreme Court ruled in *Lawrence v. Texas* that the criminalization of sodomy contravened the constitutional right to protection of privacy.[4] In Canada, homosexuality was decriminalized in 1969, but the struggle against oppression and discrimination on the basis of sexual orientation, some of which is described below, has been ongoing. For heterosexuals, particularly for straight women, the development of the birth control pill and the decriminalization of abortion inspired a similar revolution in sexuality. Women's capacity to choose if and when to have children gave them greater control over their bodies and more freedom to express and explore the meanings of desire.

Responses to these significant societal shifts in the United States and Canada have varied from apocalyptic visions of end times to the embrace of alternative lifestyles as an expression of freedom. For conservatives, falling marriage rates, high (but plateaued) divorce rates, and increasing numbers of people living together without or before marriage or in other unconventional household arrangements signal a decline in commitment, the failure of the community to enforce moral codes, and a rise in narcissistic individualism (Popenoe, Elshtain, and Blankenhorn 1996; Bauman 2003; Etzioni 2003). For others, these behavioral shifts are seen more positively. Anthony Giddens, for example, celebrates the emergence of "pure relationships"—relationships "entered into for [their] own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfactions for each individual to stay within it" (1992, 58).

Somewhat more recently, Sarah Irwin has argued that the diversification

[4] *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

of family forms represents a reconfiguration of social relations rather than their weakening (2000, 4). On this reading, the level of commitment that adults have for each other is not declining; it is simply being expressed in social forms that do not conform to the narrow parameters of the (hetero)sexual, nuclear, married family. Of course, there is nothing new about friends and relations sharing their homes and their lives in the interests of mutual support, companionship, and resource pooling. Moreover, the acknowledgment of nonnuclear family forms makes sense in the contemporary moment when families are smaller (with fewer children on whom an aging parent can rely), family members are dispersed across the globe, and there is a growing acceptance of diverse living arrangements. Growing diversity in household arrangements might also be read as a queering of heterosexual relationships (Sasha Roseneil, quoted in Williams 2004, 48). As Fiona Williams explains, the centrality of friendship over family of origin within gay and lesbian communities has provided an example and inspiration for straight people (2004, 48). This plethora of ways to organize one's personal life also has implications for kinship. Judith Butler has recently argued that contemporary modes of living create "relations of kinship [that] cross the boundaries between community and family and sometimes redefine the meaning of friendship as well. When these modes of intimate association produce sustaining webs of relationships, they constitute a 'breakdown' of traditional kinship that displaces the presumption that biological and sexual relations structure kinship centrally" (2004, 26). It should not be surprising, therefore, that people who form such households—families of choice, in essence—might desire the capacity to establish legal bonds to order their relationships.

There is an important caveat to introduce here. While legal bonds may certainly be useful for people who want them, legitimation can also include the power of normalization. When we consider the forms of relationships that have attained legitimation in Canada and the United States over the past decade, they look remarkably similar to the norm of heterosexual marriage. In part, this formulation is a product of the extensive benefits—monetary, social, cultural—that have accrued to married couples and thus rendered marriage a status to be extended to others, including same-sex partners. Even the nonconjugal relationship form, as it currently exists in law, can only be constructed between two people, and in the Alberta case, adult interdependent partners are to be recognized as a couple in the community. Thus, expanding the realm of legitimated relationships expands the designation of good sexual citizens and de-eroticized good families to those whose relationships are most similar to the heterosexual marriage norm (Cossman 2002, 491; Lloyd and Bonnett 2005, 339;

Seidman 2005, 225). The potentially transgressive force of these relationships and ways of living, a force that resides most obviously in their thwarting of patriarchal norms and in existing outside the realm of legitimation and heteronormativity, is thus vulnerable to elision with the very institution against which they were articulated (Stevens 1999, 120). Butler offers a more hopeful intervention into this quandary, asserting that when the unreal enters into the domain of reality, "the norms themselves can become rattled, display their instability, and become open to resignification" (2004, 27–28). Somewhat more optimistically, then, to the extent that neoliberal governance persists and continues to organize its governmental practices so that the bulk of caring work is provided and/or financed by families, the fact that more kinds of relationships are legitimated simultaneously destabilizes prevailing norms and provides the state with more sites of regulation and more opportunities to off-load social obligations.

Reciprocal beneficiaries acts: Hawaii

As noted in the introduction, the first North American law to legitimate nonconjugal relationships was passed in Hawaii in 1997. This legislation was a political compromise, arrived at in the context of efforts to block the implementation of same-sex marriage. In 1993, Hawaii's supreme court ruled in *Baehr v. Lewin* that denying same-sex partners the right to marry was a violation of sexual equality rights, a ruling it upheld in 1996 in *Baehr v. Miike*.[5] In response, the state's lower house introduced legislation requiring a statewide referendum on a constitutional amendment enabling the Hawaii legislature to determine the definition of marriage and thus to maintain the traditional definition of marriage as restricted to one man and one woman (Hull 2001, 214). Members of Hawaii's senate did not oppose limiting the definition of marriage to the union of heterosexual couples, but they argued that provisions should be adopted for same-sex relationships, ideally through domestic partnership legislation. The compromise between the house and the senate thus came to be articulated through the Act Relating to Unmarried Couples and was offered as a companion statute to the proposed constitutional amendment.[6] As noted, this law applies to any two people otherwise unable to marry. Thus, it includes same-sex partners within its purview, but it also allows any two same-sex or related people—regardless of whether they

[5] *Baehr v. Lewin*, 852 Haw. P.2d 44 (1993); *Baehr v. Miike*, 950 Haw. P.2d 1234 (1996).
[6] *Haw. Rev. Stat. Ann.* §§ 572C, 1–7 (1997).

share a residence—to register as reciprocal beneficiaries. Notably, the act excludes unmarried, heterosexual couples and different-sex friends, the injunction to heterosexual marriage being a paramount objective in U.S. family law. Even after its passage, legislators were divided about the intent of the reciprocal beneficiaries legislation. The governor and members of the Hawaii Senate argued that the provision should be limited to same-sex couples (Coolidge 2000, 80), while some of its sponsors in the Hawaii House of Representatives resisted this reading, arguing that the law "was never designed to be marriage for those who are not married" (2000, 70).

The process of registering as reciprocal beneficiaries is very straightforward. Each party must attest that he or she is at least eighteen, unmarried, not involved in another reciprocal beneficiary relationship, and consenting without duress and that the parties are legally prohibited from marrying each other (Hawaii State Department of Health n.d.). They fill out their names, have their signatures notarized, and send in a check for eight dollars. Ending a reciprocal beneficiaries relationship requires the completion of a similar form, the signature of only one party, and payment of another eight-dollar fee.

Although the effort to thwart the possibility of marriage between same-sex partners in Hawaii was motivated primarily by social conservatism, the emphasis on limited government through limited public spending that transects neoconservatism and neoliberalism also appeared in the Hawaii debate. Hawaii's lower house responded to the senate's proposal to establish the status of reciprocal beneficiaries by demanding an accounting of the costs that would be incurred by the state and by employer health plans as a result of the likely increase in claims. Members of the senate provided evidence that there would be no increased costs associated with the legislation (Coolidge 2000, 64).[7] Indeed, the limited costs of the legislation were assured when, just as the law was to take effect, Hawaii's district court ruled that private employers were not obliged to provide benefits to reciprocal beneficiaries since this was a matter of federal law and the U.S. federal government recognized only married partners (Goldberg-Hiller 1999, 21–24). Presumably, however, Hawaii's senators had

[7] The Human Rights Campaign (HRC) recently published a study outlining the costs of providing benefits to same-sex partners. The HRC argues that extending benefits to same-sex partners represents a mere 1 percent increase in benefits costs to employers but can be a significant factor in attracting a diverse and talented workforce and expanding markets (Luther 2006). The problem with buying into this neoliberal logic, of course, is the implicit acceptance of the position that higher costs could justify discrimination.

not anticipated that the court would effectively gut the material benefits of the law when they assured the house that the costs of recognition would be negligible (1999, 21).

Hawaii's same-sex marriage debate and the passage of the reciprocal beneficiaries act also involved claims about preserving culture, tradition, and (sub)national identity. Of course, the assertion that marriage between same-sex partners offends the natural and traditional procreative bond between a man and a woman is a staple argument against the extension of marriage rights, and this argument was certainly mobilized in the Hawaiian context (Goldberg-Hiller 1999; Hull 2001). But complicating this assertion was a challenge by the Sovereign People's Movement, whose members observed that legitimating relationships between same-sex partners was a traditional practice of the Hawaiian peoples prior to colonization (Stevens 1999, 234; Link 2004). Further, the coalition Protect Our Constitution—the major proponent of extending marriage rights to same-sex couples in the state referendum on the issue—asserted that Hawaii's commitment to equal rights and "the aloha spirit" (involving inclusion and acceptance of difference) were enshrined in the state constitution (Hull 2001, 215–16). As well, antiracism activists sided with supporters of marriage rights for same-sex couples, observing that African Americans might never have been granted equality if their rights had been put to a referendum (2001, 215) and invoking solidarity in the face of marriage discrimination, a position founded on Hawaiians' experience with antimiscegenation laws. The national debate that surrounded interracial marriages before their legalization in 1967 was keenly felt in Hawaii, where the majority of the adult population formed mixed marriages (Coolidge 2000, 98). This contestation over the meaning of tradition in Hawaii underscores the degree to which our assumptions about what is natural, normal, and universal are achievements of governance. As Stevens observes, political scientists tend to assume that categories such as family, race, and nation are preconstituted, but when the state undertakes efforts to reinforce and/or redefine marriage and kinship structures, the completely constructed quality of these arrangements is laid bare (1999, 56).

The Alberta Adult Interdependent Relationships Act

Alberta's 2002 initiative to legitimate a range of nonmarital relationships was spurred by a series of decisions taken by the Supreme Court of Canada, which found that cohabiting different-sex couples should be considered equivalent to married couples and that different-sex and same-sex cohab-

iting couples should be considered equivalent.[8] Unlike most other Canadian provinces, Alberta had long resisted incorporating different-sex cohabiting couples within provincial law and had also resisted recognizing sexual orientation as a prohibited ground of discrimination within the province's human rights legislation. Nonetheless, it was compelled to take action by the decisions of the federal supreme court. As with the Hawaii legislation, Alberta's AIRA strongly articulated the view that marriage was restricted to the union of one man and one woman but conceded that other kinds of relationships also required recognition. Rather than explicitly including same-sex relationships, however, all forms of close relationships between adults were deemed potentially eligible for recognition. Subsequently, it should be noted, Canada's federal government legalized same-sex marriage, putting paid to Alberta's legal contortions to avoid the recognition of same-sex partners as spouses.[9]

Unlike that of the United States, Canada's family law has extensive provisions for the support of conjugal relationships between unmarried partners.[10] Moreover, Canadian law designates people as common-law partners—it imposes or ascribes this status to couples—regardless of whether the parties in the relationship want their relationships to be legitimated by the state. At the federal level, one year of cohabitation creates the status of common-law spouse (different or same sex), while the length of time required to attain this status in the provinces varies from two to five years.[11] The practice of ascription draws on the Canadian supreme court's conclusion that the state's interest is to "facilitate stability and certainty in relationships . . . [by] providing citizens with mechanisms to . . . meet their needs should they suffer a sudden deprivation of emotional

[8] *M. v. H.* [1999] 2 S.C.R. 3; *Miron v. Trudel* [1995] 2 S.C.R. 418.

[9] Same-sex marriage was legalized in June 2005 through the passage of the Civil Marriage Act. In January 2006, Canada elected the Conservative Party to form the federal government, a party that had included a promise to reopen the same-sex marriage debate in its election platform. In December 2006, the government finessed this commitment by holding a debate on a motion regarding whether the issue should be reopened. The wording of the motion and the growing disinclination among politicians to reconsider the issue led to its defeat.

[10] In Canada, the regulation of marriage is a federal matter, whereas nonmarriage relationships are deemed to fall under the property and civil rights responsibilities of the provinces. For the purposes of federal law, however, Ottawa also defines relationships of interdependence among unmarried, conjugal couples.

[11] Unlike the other provinces, Quebec does not ascribe legal status to unmarried, cohabiting conjugal couples but instead allows them to register their relationships. Nonregistered partners are entitled to make health-care decisions on behalf of their partners, and the federal ascription practices apply to Quebecers for the purposes of federal law.

and economic support resulting from death, illness, injury or the breakdown of their relationships" (LCC 2001, 20). But there is an important economic consideration involved in the state's recognition of relationships as well. In the landmark ruling *M v. H*, the issue was "whether the Ontario legislature was justified in excluding persons in same-sex relationships from the law imposing support rights and obligations on common-law spouses" (2001, 14).[12] Writing for the majority of the court (which determined that the exclusion was not justified), Justice Frank Iacobucci concluded that "the objectives of the statute were to provide for the equitable resolution of economic disputes when intimate relationships between financially interdependent individuals break down, and *to alleviate the burden on the public purse to provide for dependent spouses*" (2001, 14; emphasis added). The sexuality of the partners did not substantively alter the state's objective to privatize responsibility for support.

In developing the AIRA, Alberta then took the legal requirement of equal treatment of relationships beyond the bounds of conjugality and included the full range of adult interdependent relationships within its ambit. More precisely, the law extends recognition and ascription to any two adults who have lived together for at least three years, share each other's lives, are emotionally committed to each other, and function as an economic and domestic unit.[13] The state ascribes status to relationships meeting these conditions, but it is also possible for people to become adult interdependent partners in advance of the three-year limit by forming an adult interdependent partnership agreement, a private contract that lays out a modifiable set of benefits and obligations governing the relationship and its termination. It is important to note that the AIRA does not ascribe status to blood relations. In the case of relatives, parties to the relationship must sign an AIRA agreement in order to attain status.[14] On the other hand, any two people who share a residence and are not related, depending on how they conduct their personal lives, may be deemed interdependent partners in the absence of an agreement or any formal intent. People would likely only become aware of this status in the event that the relationship ended and one member of the couple decided to sue the other for support. Alternatively, if a person applied for social assistance, provincial officials could potentially deem another adult house-

[12] *M. v. H.* [1999] 2 S.C.R. 3.

[13] *Adult Interdependent Relationships Act, Statutes of Alberta* 2002, c. A-4.5. s. 2, 3(1).

[14] Because interdependent partnerships are formalized through private contract, there is no public accounting of the number of these relationships that have been established since the advent of the legislation.

hold member an interdependent partner, presuming that this person would take on some financial responsibility for the social assistance applicant and thus reduce or potentially eliminate the applicant's access to public support. While the government provided assurances during the debate surrounding this legislation that longtime roommates, for example, would not find themselves legally obliged to each other, the legislation is arguably less clear on this point.

Responding to concerns regarding the coverage of the AIRA in the debate surrounding the bill, Alberta's justice minister attempted to clarify the intention of the law by stating that it was designed to address dependencies created by people in close personal relationships, regardless of whether those relationships had a sexual component. He insisted that such dependencies were of a different order than those that arise from a "normal family relationship where family members routinely assist each other, where an adult child moves in with a parent or where a parent moves in with a child."[15] Intriguingly, the interdependencies that arise from a "normal family relationship" are not seen to grant rights or to impose legally enforceable obligations of support. Indeed, as just noted, biological or adoptive family members are explicitly exempted from the ascriptive dimension of the law because they must enter into an Adult Interdependent Relationship Agreement if their interdependencies are to be legally recognized. In sum, the justice minister insisted, an adult interdependent relationship is constituted by a couple that "have the type of relationship where if they ought to have gotten married or they could have gotten married, they should have got married, as some would put it. That's what you're talking about in this situation. It's not about casual, platonic relationships. It's not about two college roommates. It's about those people who have engaged in a close, intense, personal relationship that we now know as marriage or as a common-law relationship and also ought to include other relationships, because it's not up to us to determine what type of relationship you live in."[16]

Of course, if the Alberta government had actually begun its legislative drafting from the position that the form of relationships did not matter, the semantic and conceptual acrobatics at the beginning of the justice minister's explanation would not have been required since, presumably, the legislation would not have used the heterosexual marital form as its

[15] Alberta, Legislative Assembly, *Debates and Proceedings* (November 19, 2002), p. 1388 (David Hancock, MLA).

[16] Alberta, Legislative Assembly, *Debates and Proceedings* (November 27, 2002), p. 1603 (David Hancock, MLA).

point of departure. Nonetheless, in its effort to obscure and diffuse the recognition of same-sex partnerships, the AIRA does manage to diversify the realm of legitimated relationships, thus expanding obligations and access to benefits. But importantly, it also offers the potential to implement a radical privatization of care by imposing obligations of support on people whose willingness to accept those obligations is undeclared. In the case of the Alberta government, then, the progressiveness of recognizing nonconjugal relationships may be overwhelmed by a widely cast net of ascription, creating the potential for a hyperneoliberal, hyperprivatized regime of personal obligation.

In terms of articulating a distinct political identity, the AIRA is indicative of a long-standing tradition of pragmatic political conservatism within Alberta. The province has a history of one-party governance (the Progressive Conservative Party has formed the government since 1971), over the past decade it has enjoyed phenomenal wealth due to its oil and gas economy, and its leaders trade on provincial autonomy from the incursions of the federal government as a means to build solidarity among provincial residents. The province also has a reputation for social conservatism, although the empirical evidence to support this claim is more mixed than casual observers might appreciate (Harder 2003; Harrison 2005). Popular opposition and mobilization do occur, and certainly the issue of same-sex equality rights, including marriage, has been a lightning rod for political debate (Lloyd and Bonnett 2005). Supreme Court of Canada decisions that have read sexual orientation into the equality provisions of the Charter of Rights and Freedoms have fueled mobilization by conservative Christian groups within the province, often supported by their U.S. counterparts. But while the provincial government has regularly expressed its sympathy for the views aired by these groups, it has ultimately chosen not to invoke the charter's notwithstanding clause, a provision that would enable the province to pass legislation that curtails equality rights within its constitutional jurisdiction for a period of five years.[17] With regard to the AIRA, very little popular opposition emerged, with lawyers

[17] The notwithstanding clause may be used to override secs. 2 and 7–15 of the Charter of Rights and Freedoms. These sections pertain to fundamental freedoms (religion, expression, association), legal rights (including arbitrary detention and presumption of innocence), and equality rights (including sex, race, national or ethnic origin, marital status, and sexual orientation). Although Alberta did not have the constitutional jurisdiction to use the notwithstanding clause with regard to the Civil Marriage Act (because marriage is a federal jurisdiction), it did threaten to do so. Again, however, the province ultimately backed away from this threat, recognizing that it could not uphold its position in court and that it could assuage its right flank by blaming the federal government.

practicing in the area of wills and estates voicing the strongest, but largely technical, objections to the bill. Social conservatives were placated by the rhetorical hat tipping to traditional marriage, while progressives were willing to accept the inclusion of nonconjugal relationships in the interest of garnering some provincial legal protections for nonmarital relationships—whether different or same sex. The legislative opposition also supported the act, and indeed, the most vocal Liberal Party member on the issue expressed relief that the law ascribed relationship status rather than implementing a registration system on the grounds of guaranteeing wider legal coverage.[18]

Contesting conjugality

In Alberta, the justification for legitimating nonconjugal relationships was that sex should not matter—that the sexual relationships between adults are no business of the state's and hence that sexual relationships should have no significance in determining one's rights and obligations to one's intimates, a stance U.S. jurisdictions have been unwilling to adopt. Nonetheless, the desexualized category of reciprocal beneficiaries has been offered as a strategy to provide some benefits for same-sex couples without legitimating these relationships through domestic partnership agreements, civil unions, or marriage.[19] Effectively, then, the recognition of nonconjugal relationships was the response offered to quell moral repugnance toward the sexual activities of same-sex partners. In fact, sex mattered so much that it could not matter at all.

But should sex matter? How one answers this question is at least partly tied to the political context that forms the point of reference. For Americans, marriage confers Cadillac citizenship status in terms of access to benefits and social legitimacy. The interest in preserving the sanctity of heterosexual marriage is sufficiently intense that many states have attempted to stave off demands for same-sex marriage by providing some limited recognition to gay and lesbian couples. This form of recognition is not available, however, to cohabiting different-sex couples. Indeed, cohabitation among different-sex couples is still illegal in seven U.S. states

[18] Alberta, Legislative Assembly, *Debates and Proceedings* (November 19, 2002), p. 1389 (Laurie Blakeman, MLA).

[19] Although this was certainly the strategy that was pursued in Vermont, the end result was the creation of civil union status for same-sex partners in addition to reciprocal beneficiaries provisions for people related by blood or adoption (Vermont Department of Health 2000).

while virtually every other state provides fewer benefits and protections in public law to cohabiting heterosexual couples than to same-sex couples.[20] The argument here is that people who can marry should marry (Acs and Nelson 2004; Bowman 2004, 137, 141). It is unsurprising, then, that initiatives proposing to recognize nonconjugal relationships are met with deep skepticism by some members of the American gay and lesbian community. One gets a sense of this skepticism in comments reported in a New Hampshire newspaper concerning Vermont's reciprocal beneficiaries legislation. A Vermont legislator observed that "to gays and lesbians, being thrown in with various nontraditional family groupings 'had this sort of air or whiff of incest that to them was repugnant, and rightly so'" (Wang 2005). At base, advocates of relationship equality are asking that committed relationships between same-sex partners be taken as seriously as heterosexual marriages.[21] As we have seen in the case of Hawaii, reciprocal beneficiaries acts that include nonconjugal partners have been offered as a means to circumvent stronger legal status for same-sex relationships and particularly to block same-sex marriage. Thus the recognition of nonconjugal relationships smells more like a conservative ploy than a progressive effort to increase relational diversity and autonomy and to respect the integrity of committed relationships regardless of who forms them.

In the United States, opposition to the expansion of legitimated relationships is not the sole purview of advocates for marriage between same-sex partners. Many American conservatives also object to initiatives such as reciprocal beneficiaries legislation on the grounds that these provisions diminish the significance of marriage and that relational diversity is bad for children (Cere 2005; Wilson 2005). This tension within the ranks of family values advocates intensified in the spring of 2006 when James Dobson, perhaps the most public face of the U.S. "pro-family" movement, was castigated by his fellow conservatives for supporting reciprocal beneficiaries legislation in Colorado. Dobson's organization, Focus on the Family, argued that the legislation simply made provisions such as power of attorney and medical decision making more easily available to people who at any rate could obtain the same standing through private contract.

[20] The exceptions are Washington, California, and New Jersey, and in the latter two states one member of the couple must be at least age 62.

[21] Same-sex marriage advocates constitute the conservative-to-mainstream wing of the gay, lesbian, bisexual, and transgendered movement. Another significant position in the debate is expressed in a critique of marriage *tout court* and a much more radical sensibility regarding the expression and institutionalization of sexuality (Warner 1999; Butler 2002; Seidman 2005).

Tellingly, a key claim in Dobson's defense was that "the reciprocal-contract law kept Hawaii from becoming the first state in the nation to adopt same-sex marriage." His conservative detractors asserted that he was sliding down the slippery slope of legitimating same-sex relationships and that marriage should remain a heterosexual institution. In the words of Paul Cameron, the head of the Family Research Institute, "If everybody is married, nobody is married."[22]

In Canada, by contrast, progressive voices are much less suspicious of arguments supporting the recognition of nonconjugal relationships because marriage has had less significance in terms of conferring citizenship entitlements. This situation is explained by the relative strength and generosity of the Canadian welfare state, the equation of marriage with common-law relationships (both same and different sex), and the recent legalization of marriage between same-sex partners. This is not to discount the mobilizing efforts of the Canadian gay and lesbian community to have their relationships legitimated. Their victories have not been easy or straightforward, nor are they entirely secured, as attested to by the December 2006 House of Commons debate on reopening the issue of marriage for same-sex partners (the House voted to leave equal marriage intact). Nonetheless, the contrast between the Canadian and U.S. situations indicates that the extent to which sex matters is at least partially determined by the political context in which the debate is taking place and the extent to which recognition has already been attained (Smith 2005).

The relevance of conjugality

Given the relative inclusiveness of Canada's approach to relationship recognition, it is unsurprising that the issue of conjugality's significance in determining the state's interest in relationships has been the subject of extensive consideration by Canadian scholars, even finding its way onto the agenda of the Law Commission of Canada. Unlike that of the legislatures of Hawaii and Alberta, however, the objective of this scholarship is not to construct an elaborate legal edifice that obscures the significance of recognizing same-sex relationships. Instead, this work has been fed by the ambiguity surrounding the term "conjugality" in judicial efforts to define marriage-like relationships. Judicial rulings have identified conju-

[22] These quotations were taken from an article by Pete Winn, "Focus Explains Support for Colorado Benefits Bill," that was posted on the Focus on the Family Web site on February 15, 2006, but has since been removed.

gality as the condition that marks relations of interdependence with their associated conditions of emotional and economic support and vulnerability. As we have already seen in *M v. H*, one of the state's primary interests in these relationships is reinforcing private obligations of support in the event of the undoing of a relationship and thus limiting the burden on the public purse. The use of this argument in the case of *M v. H* is worthy of remark because it concerns a lesbian couple who would not be presumed to subscribe to a gendered division of labor within their relationship, thus standing in sharp contrast to the gendered inequality of wage-earning and caring labor characteristic of many heterosexual couples—the original subject for support obligations. The court's findings in this case were not that the shared gender (really sex) of the litigants obviated the possibility of inequality in the relationship and hence compelled the need for support but that interdependence and hence, potentially, inequality were common features of conjugal relationships. In a manner characteristic of neoliberalism's penchant for gender neutrality, the fact that support obligations in heterosexual marriages have stemmed from women's generally larger responsibility for unpaid, caring labor and their relatively disadvantaged position in the labor market is completely erased in this effort to equate same- and different-sex relationships (Richardson 2005, 519). But of course, the issue is not the equation of same- and different-sex relationships on the grounds that their internal dynamics should be considered equally unequal. Rather, the question to which conjugality has been offered as the answer concerns what qualities define relationships deemed worthy of state legitimation and protection.

Although conjugality is commonly understood to apply to relationships that have a sexual dimension, Canadian courts have largely discounted the significance of sex in determining whether relationships are conjugal. After all, many sexual relationships do not carry expectations of commitment and support from the participants, just as many relationships that do carry such expectations are not sexual. So if conjugal relationships are not necessarily sexual, then what are they, and what distinguishes them from other kinds of relationships? The case of *Molodowich v. Penttinen* is a key precedent in outlining the characteristics of conjugality in relationships of cohabitation.[23] In rendering his judgment in the case, Justice Stanley Kurisko explored the legal precedents to determine the meanings of "cohabit" and "conjugality." His frustration with the imprecision in defining these terms throughout the judicial record is revealing. In his survey of the judicial record, Kurisko notes the following convoluted

[23] *Molodowich v. Penttinen* [1980] O.J. No. 1904 (Ont. Dist. Ct.).

discussion: "Cohabitation does not necessarily depend upon whether there is sexual intercourse between husband and wife. 'Cohabitation' means living together as husband and wife; and, as I endeavoured to point out in *Evans v. Evans* . . . , cohabitation consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should."[24]

Justice Kurisko finally escaped the circularity of this reasoning by outlining seven broad functional attributes that could be used to determine whether cohabiting partners were in a conjugal relationship. These included shelter, personal and sexual behavior, services, social activities, societal perceptions of the couple, economic support, and children.[25] Not all of these factors have to be present. Indeed, how many are required to constitute a conjugal relationship is left to the courts to determine on a case-by-case basis. Moreover, while the point of the exercise was to determine what made a cohabiting relationship similar to a marriage, it is not even clear that all marriages would bear these characteristics, thus prompting Brenda Cossman and Bruce Ryder to query, "What is marriage-like like?" (2001, 269). Conjugality is thus a highly ambiguous concept that raises more questions than it answers.

Unsurprisingly, a tidy solution to the ambiguity of the conjugality standard is to do away with it entirely. Proponents of this view, including the authors of the Law Commission's report *Beyond Conjugality* (LCC 2001), suggest that examining the qualitative characteristics of a relationship, as Justice Kurisko at least partially began to do, is a more appropriate path to follow (Cossman and Ryder 2001, 288, 322; LCC 2001, 15). In this reading, then, the state has a legislative interest in relationships and should be involved in providing benefits and enforcing obligations when people have a long-term commitment to each another, regardless of whether the relationship is conjugal (LCC 2001, 15).

Neoliberalism and/or something else?

If the state's primary concern with regard to the formation and dissolution of intimate relationships is to protect vulnerable people, offset dependency, respect autonomy, and maintain social order, a more appropriate policy response would be the provision of a state-guaranteed level of economic

[24] *Thomas v. Thomas* [1948], cited in *Molodowich v. Penttinen* [1980] O.J. No. 1904 (Ont. Dist. Ct.) at pars. 14–15.

[25] *Molodowich v. Penttinen* [1980] O.J. No. 1904 (Ont. Dist. Ct.) at pars. 17–41.

well-being and the extension of benefits on the basis of individual entitlement rather than relationship status. As the Law Commission of Canada observes, "If individuals are not reliant on family members for basic income security, the likelihood is increased that family relationships will be based on choice rather than economic necessity. . . . Government policy would be more respectful of autonomy and gender equality if it neither assumed nor encouraged economic interdependence in personal relationships" (LCC 2001, 84).

If public policy were to encompass these principles, the possibility of economic dependency within intimate relationships would be greatly reduced and battles over support would be less frequent and less costly. Of course, such provisions would necessarily entail their own governing impulses, normative visions, and potential oppressions. As well, such policies cannot address emotional dependence and its related harms. Still, I would argue, it is not clear whether public policy could ever be devised to address these psychic wounds, nor whether we would want it to. In any event, the establishment of these broader social entitlements is not the policy direction being pursued by legislators debating the foundation of adult intimate relationships. Thus, one might surmise that policy makers are more interested in establishing a social order in which private obligations between citizens are reinforced and social outlays are reduced than they are in ensuring the autonomy of citizens or limiting their vulnerability. As Pat Armstrong and Olga Kits observe, "Under conditions of declining public support, broader definitions of family may simply mean more people are conscripted into care rather than better caregiving or better relationships" (2001, 32).

There is, then, a case to be made for reading the legitimation of nonconjugal relationships as a neoliberal move. But there is a logical shortcoming to this assertion in that the opposite case may also be true—that is, that neoliberal governance may also be used to explain the withholding of or limitations placed on state legitimation of nonconjugal and other types of relationships. As we saw in the case of Hawaii, some legislators argued against the reciprocal beneficiaries act on the basis that the extension of some form of spousal status to unmarried couples would increase the burden on public programs and the benefit packages of private employers, an argument that was quickly justified by the court. And while it is tempting to explain this contradiction by appealing to the respective characteristics of the Canadian and U.S. welfare states, the link between relationship legitimation and increased costs to the state has also been made in Canada. The key example here is the argument presented by the majority of Canada's supreme court justices in the case of *Egan v. Can-*

ada.[26] In this decision, the court held that denying the old-age security spousal allowance to a same-sex partner was a violation of equality rights but that the violation could be justified under section 1 of the Charter of Rights and Freedoms as "a reasonable limit in a free and democratic society" since "the government was not required to be proactive in recognizing new social relationships" and that, in Justice John Sopinka's concurring opinion, "it is not realistic for the court to assume that there are unlimited funds to address the needs of all."[27]

Even if we decide to explain both the acceptance of and the resistance to the extension of relationship recognition to nonconjugal partners as a testament to the flexibility of neoliberalism, there may also be a way to read the legitimation of nonconjugal relationships as a shift away from neoliberalism. To the extent that recognizing family diversity suggests an emerging appreciation for how people care for one another, new relationship forms offer a potentially important expansion of the choices available for ordering one's life. Yet clearly there are many limits remaining. As noted earlier, the recognition of nonconjugal relationships is still based on a dyad, or two-person unit, suggesting that the (heterosexual) marriage model continues to prevail.[28] All the Canadian versions of relationship legitimation, with the intriguing exception of marriage, are based on shared residence. And, as the Law Commission of Canada's study pointed out, the legal distance between conjugal and nonconjugal relationships is actually getting wider rather than narrower (LCC 2001). Alberta is the notable and recent exception. Still, the confused logic and conflicting objectives that infuse the AIRA limit its usefulness as an example of progressive legislation—particularly in light of the envisioned state capacity to ascribe status to nonconjugal relationships. As recent debates, legislation, and court decisions indicate, more forms of relationships are being legitimated, but the current regime and the future prospects for relationship legitimation still envision relatively explicit limits on the ordering of private lives.

For all of neoliberalism's celebration of self-reliance and independence,

[26] *Egan v. Canada* [1995] 2 S.C.R. 513.

[27] Canadian Charter of Rights and Freedoms, 1982 (Schedule B to the Canada Act, 1982 [U.K.]), c. 11, repr. *RSC* 1985, s. 1; *Egan v. Canada* [1995] 2 S.C.R. 513 at par. 516.

[28] One argument for the retention of the dyadic model observes the complications involved in dividing state or private insurance benefits among multiple parties or the difficulties that might arise in a medical emergency if multiple parties had decision-making authority and disagreed about the appropriate course of treatment. But the real stumbling block here is a deep skepticism regarding communal forms of living and the specter of polygamy.

a discussion of relationship legitimation reveals the extent to which the dependence expressed in intimate relationships is integral to contemporary governing projects. This is not a new insight. A substantial body of feminist literature has demonstrated the extent to which liberalism relies on the care and social reproduction carried out in the private realm of the home to sustain the formal, rule-governed, and disembodied public realm. Indeed, this insight forms the basis for the rich and growing feminist literature on care. Moreover, in this article I have relied upon familial provision of reproductive labor as a central explanation for why a neoliberal state might choose to legitimate more kinds of families. The need to ensure that care happens may thus explain why the state is willing to accept an expansion of the realm of legitimated relationships. What, then, accounts for resistance?

Daniel Cere argues that what is at stake in the recognition of family diversity is the public significance of marriage. He charges that the Law Commission of Canada, in *Beyond Conjugality* (2001), and the American Law Institute, in a much more wide-ranging study, *Principles of the Law of Family Dissolution* (2002), view marriage as having no real public content—that marriage, in these authors' views, is "the relational play of highly subjective, diverse constructions of intimacy and love" (Cere 2005, 83). Cere overstates his case to some degree, in that the Law Commission of Canada study actually argues that "the value of relational autonomy and its corollary, the principle of state neutrality, does not mean that governments should never seek to influence relational choices or regulate personal relationships. Rather, autonomy requires that the nature of state intervention should be determined by the qualitative attributes of relationships" (LCC 2001, 18–19). Nonetheless, Cere is correct in observing that these reports decenter heterosexual marriage as the consummate familial institution, which raises the question as to what Cere and other defenders of heterosexual marriage imagine marriage does for the state. And while I do not agree with the fetishization of the marital form, I do concur with Cere's view that conceiving of relationships as merely personal is incorrect and politically naive.

Stevens has argued that state control over the form of intimate relationships has been the key means through which to determine membership in a political society (1999). She contends that the interrelationships among birth, territory, and the state's rules of kinship form the links between citizens and the state in a much more fundamental way than the great abstraction (and myth) of a social contract (1999, 52). Evidence for this claim is abundant. Consider how one's parentage affects one's

citizenship status; how the definition of family determines who can be sponsored as an immigrant; the fact that U.S. and Canadian law deem a husband to be a father to his wife's child, regardless of the identity of the biological father (1999, 222); and that until the Charter of Rights and Freedoms came into force in 1985, a woman could no longer be considered an Indian if she married a white Canadian. Following Stevens, because the state is a membership organization and the rules of kinship are a primary mechanism for constituting membership in a state, the state has an obvious, if generally unacknowledged, interest in family forms.

It is because families—however constituted—are structured by the state and also structure the state (Bourdieu 1998, 67, 71) that there is so much at stake in defining them. As Stevens points out, the particular rules of kinship are what constitute a particular state. American and Canadian conservatives perhaps appreciate this more than most, as is evident in their claim that the demise of the married, heterosexual couple marks the demise of their respective nation-states (Stevens 1999, 235). They are both right and wrong. The augmentation of family forms is not going to undermine the strength of the United States or Canada, since what is being proposed in the legitimation of multiple family forms is not the end of state-sanctioned kinship structures but merely their redefinition. But it is also possible that the legitimation of more family forms will create new social bonds and structures, forms that may in turn alter the national identities of the countries that adopt them.

This article has considered the legitimation of nonconjugal relationships as a policy development paralleling the alleged easing of neoliberal strategies of governing. I have argued that while neoliberalism in both its rollback and roll-out forms can account for part of the rationale underscoring the new legislation, the politics of marriage between same-sex partners and an enduring state concern surrounding the rules of membership are more significant factors in accounting for the recognition of nonconjugal relationships. It is clear that historical and institutional specifics matter in drawing comparisons between the two countries, but the fact that socially conservative politics have inspired policies to increase relationship diversity in both countries suggests a rich source from which to consider the extent and effects of political contingency and struggle in Canadian and U.S. regimes of governance around relationships, the family, and kinship. And while recent legislation and debate suggest some desperation on the part of politicians, policy makers, and social conservatives to solidify a new social order, the increasing pluralization of relationship forms indicates people's active resistance to such attempts. The contemporary moment is

thus highly unsettled, bearing some of the marks of neoliberalism but also offering a number of contradictory, unanticipated, and unanticipatable possibilities.

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