Complicated Love: Parentage, Conjugality, and Family Diversity in Canada

by

Margot R. Challborn

A thesis submitted in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

Department of Political Science
University of Alberta

ABSTRACT

The increased availability and use of assisted reproductive technologies, legislative changes that recognize equal marriage, and the expansion of legal parentage beyond "the rule of two" are inviting Canadians to reimagine fundamental questions about kinship, parentage, and legal recognition. My dissertation examines this expansion by asking two interrelated questions: what does the expansion of legal parentage tell us about the Canadian state's interest, and investment, in the governance of kinship? And, what are the possibilities, and challenges, for re-imagining kinship, intimacy, and parentage? I answer these questions through an analysis of three case studies: first, British Columbia's *Family Law Act* ("FLA") and its expansion of the number and identity of people who can be parents; second, and similarly, Ontario's *All Families Are Equal Act* ("AFAEA"); and third, three court cases concerning poly-conjugality: *Reference re: Section 293 of the Criminal Code of Canada* 2011 BCSC 1588 [*Polygamy Reference*], *C.C. (Re)*, 2018 NLSC 71 [*C.C. (Re)*], and *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767 [*BCSC 767*].

These cases enable me to interrogate how intimate "choices" – who is a parent, how one becomes a parent, and how families are formed through parentage – are produced and pre-figured by the state. To do so, I draw on theoretical contributions from critical intimacy studies, critical citizenship studies, queer, feminist, and critical race theory to demonstrate how the Canadian state has always been invested in the production, regulation, and reproduction of heteronormative (and, increasingly, homonormative), nuclear, and private kinship systems. Emerging from these theoretical frameworks, I engage feminist and queer critical discourse analysis and critical policy studies to reveal the possibilities in the expansion of legal parentage, on the one hand, and the ongoing challenges associated with that expansion on the other.

I found that BC's *FLA*, ON's *AFAEA*, *C.C. (Re)*, and *BCSC 767* modestly expand Canada's idealized nuclear family. Indeed, the legislative and judicial successes were made possible by their affirmation of the genetically related, procreative, and "monogamish" family units. These case studies demonstrate that the law is willing to expand legal parentage for poly-conjugal and multi-parent families who do not undermine the (re)production of heteronormativity, mononormativity, and Whiteness. What appears shiny and new in the *FLA*, *AFAEA*, and *C.C. (Re)*, and *BCSC 767* reinforces the historic, and on-going construction of polygyny as deviant. The *Polygamy Reference* affirmed Canada's commitment to monogamy as the pinnacle of liberal democracy, the nation-state, gender equality, and the family itself. Thus, while expansion of legal parentage has the potential to move beyond "the rule of two," I argue that Canadians must also consider the ways in which BC's *FLA*, ON's *AFAEA*, *C.C. (Re)*, *BCSC 767*, and the *Polygamy Reference* reproduce and reinforce the hetero- and homonormative nuclear family. My analysis demonstrates how the law continues to regulate intimacy along lines of sexuality, race, gender, and class and by modestly expanding what forms of relationships constitute the Canadian nuclear family, the state can absorb forms of queer intimacy without dismantling hegemonic Western kinship systems. This assimilation serves to reinforce ab/normal forms of intimacy, thereby determining who, and what, constitutes a family.

And yet, all of us belong to a constellation of relationships loosely called "family." Sometimes we are born into family and other times we choose them. In both cases, our families are governed by liberalism's conceit: the public/private divide obfuscates carefully constructed, and governed, membership rules for forming families and political communities. The *FLA*, *AFAEA*, *C.C. (Re)*, and *BCSC 767* represent the hopeful possibility that there are ways for intimate life to help us flourish. But there is no guarantee that they will.

PREFACE

This thesis is an original work by Margot R. Challborn. The research project, of which this thesis is a part, received research ethics approval from the University of Alberta Research Ethics Board, Project Name “Complicated Love: Parentage, Conjugality, and Family Diversity in Canada”, ID Pro00080629, July 25, 2019.

DEDICATION

I dedicate this thesis to myself, and to those in search of themselves.

ACKNOWLEDGEMENTS

To borrow a phrase from Eve Sedgwick, "I've depended in this writing on gifts of intimacy, interrogation, ideas, and narrative from many people…".[1] Briefly (since I cannot possibly do justice to these gifts here), I will thank those whose intimacy, interrogation, ideas, and narrative nourished me throughout my dissertation.

I extend my deepest gratitude to you, Lois. It is a difficult task to put into words the breadth and depth of your impact. You have been an intellectual touchstone for years; your probing questions, rigorous analysis, attention to detail, patience, kindness, and encouragement are life-affirming. Thank you for seeing me through.

To my committee, Janine Brodie, Catherine Kellogg, Fiona Nicol, and Francesca Scala, I appreciate your dedication to my project, your engaging questions, and the thought-provoking conversation. Thank you for reading my work carefully, enthusiastically, and on an impressive timeline. It was a pleasure and an honour to be in conversation with you at my "dinner party".

To the Social Sciences and Humanities Research Council, the success of my Vanier Canada Graduate Scholarship application enabled me to dedicate myself fully to my research, my scholarly community, and the pursuit of a PhD. I am tremendously grateful to the anonymous adjudicators who believed in this project.

To the Department of Political Science, I am truly fortunate for the opportunity to work alongside, and learn from, such an incredible group of scholars. A special thank you to Yasmeen Abu-Laban, Rob Aitken, Isabel Altamirano Jimenez, Janine Brodie, Siobhan Byrne, Judy Garber, Cressida Heyes, Linda Trimble, Malinda Smith, and Steve Patten – you have been an enormous source of support and inspiration. Thank you also to Caroline Kinyua, Sharina Prasad, and Lihong Yang for your endless administrative assistance, friendly conversation, and encouragement. Finally, Donna Coombs-Montrose and Cindy Anderson, who have since retired, provided a warm smile every time I walked by their offices.

Katie Cuyler, thank you for helping me with fussy citation questions and hard-to-find historical government documents. The research communities at the University of Alberta are fortunate to have such an excellent subject librarian.

Dax, Luke, and Renée, you made the journey rich. Daisy, our friendship inspired me to be more authentically myself (though sometimes I was unclear on who exactly that may be). Eloy, you have kept me afloat and I am forever sustained by your friendship. Justin, your intellectual and moral support were a ballast (as were your timely jokes at my expense). Miranda, I will never forget your loyal friendship, sharp humour, and generosity.

Finally, to my parents Ione and Maureen. I could not have done this without you! Thank you for the abundance of love, support, and guidance. I hope that you can stop worrying about whether I will finish my "homework".

I began my doctoral program naively thinking that my studies existed outside the rest of my life, but as a former student aptly noted, "sometimes intimate life happens when you're studying intimate life." As a result, this dissertation took me longer than expected (as everyone said it would) and there were many moments where I felt like the task at hand was greater than my ability. Alas, I present my thesis as thanks for the many gifts of intimacy I received.

[1] *Epistemology of the Closet*, ix. Berkeley: University of California Press, 2008 (1990).

TABLE OF CONTENTS

CHAPTER 1: A BRAVE NEW WORLD?

> When a particular way of seeing is analyzed, what was accepted as natural is made strange. Part of that strangeness is the realisation that beneath the accepted order of life lie hidden power relations.[2]

1.1 Introduction

As an "ideal type" in the West, the family consists of "a legally married (biologically male) husband and a (biologically female) wife, [and] approximately two children."[3] Families that fall outside the boundaries of the traditional nuclear form contest, to varying degrees, patriarchal assumptions about sexuality, gender, race, and where children are involved, procreation and the "best interest of the child" doctrine.[4] The ideal that each family be a privatized unit, responsible for its own economic well-being (managed by husbands) and emotional health (managed by wives) is challenged by a host of family forms, but those who are targeted for threatening the sanctity of the nuclear family are often recent immigrants, families living in poverty, families who are racialized, and families whose sexual or intimate arrangements are non-nuclear and/or non-heterosexual.[5] Further, legislation that directly impacts families – for example, vital statistics acts governing how many parents can be listed on birth certificates or what types of familial forms will be accorded legal recognition – often reflect the assumption that the nuclear family is the most common (and desired) family form. Legislation (and judicial decisions) contain (explicit and implicit) normative claims about sexual and emotional desire, which are embedded

[2] Katherine O'Donovan. *Sexual Divisions in Law*. London: Weidenfeld & Nicholson, 1985: 59.
[3] Mary Bernstein and Renate Reimann, eds. *Queer families, queer politics: Challenging culture and the state*. Columbia University Press, 2001: 3.
[4] Ibid., 5
[5] Ibid.

in discourses surrounding intimacy, kinship, and family. These discourses are rooted in mythologies about "natural" and "normal" intimate arrangements, like the nuclear family.[6]

Despite the power of its mythology and invocations of its timelessness, the nuclear (private, patriarchal) family is a recent form of social organization.[7] Most families do not (and will never) have the resources to survive without access to wider familial and community support.[8] And yet, more relational family models are actively eschewed or ignored by the state because they challenge the foundations of a kinship system that reinforces the family as a private, hetero- or homonormative, reproductive, genetically linked unit. Clearly, "alternative" kinship systems exist alongside (and pre-date) the private, nuclear family form. And indeed, often our own lives are examples of the possibilities that exist for new ways of thinking intimacy. Yet unsurprisingly, families who receive the most positive public recognition (social and legal) for their "diverse" structures still largely conform to Canada's normative, nuclear family. That said, several Canadian jurisdictions have recently revised their family law legislation to make it possible for a child to have more than two legal parents, affirming many queer family structures. As a result, Canadians now have an opportunity to reimagine answers to fundamental questions about kinship, parentage, and legal recognition. Emerging from this political moment, this dissertation asks two interrelated questions: what does the expansion of legal parentage tell us about the Canadian state's interest, and investment, in the governance of

[6] Deborah Anapol. *Polyamory in the 21st century: Love and intimacy with multiple partners*. Rowman & Littlefield Publishers, 2010; Rambukkana, Nathan. *Fraught intimacies: Non/monogamy in the public sphere*. UBC Press, 2015.
[7] bell hooks. *All about Love: New Visions*. New York: William Morrow, 2000: 132; Coontz, Stephanie. *The Way We Never Were: American Families and the Nostalgia Trap*. New York: Basic Books, 1992. For conservative commentary, see: Cere, Daniel, and Douglas Farrow. *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment*. McGill-Queen's Press, 2004 and Murray, Charles A. *The underclass revisited*. Washington: American Enterprise Institute, 1999.
[8] hooks, *All About Love*, 132.

kinship? And what are the possibilities, limits, and challenges for re-imagining kinship, intimacy, and parentage?

I ask these questions through a critical discourse and intersectional analysis of British Columbia's *Family Law Act* and Ontario's *All Families are Equal Act* as well as three court cases concerning multi-parentage and multi-conjugality: *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588, also known as Canada's infamous "Polygamy Reference"; *C.C. (Re)*, 2018 NLSC 71; and *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767. Although the latter two cases, in which polyamorous parents were granted legal parentage, do not indicate a firm departure from the status quo, they do illustrate a shift in how parentage can be represented in the law. In the background of these legislative amendments and judicial decisions, however, lives the ugly stepsister of multi-parent families and poly-conjugal relationships: polygyny. Canada's long-standing *Criminal Code* prohibition of polygyny was upheld in the *Polygamy Reference*, where Chief Justice Bauman ruled that the prohibition is consistent with *Canadian Charter of Rights and Freedoms*. Specifically, he argued that in a "free and democratic society" criminalizing polygyny supports the "institution of monogamous marriage" and advances Canada's international human rights obligations.[9]

I argue that the expansion of legal parentage (and its subsequent negotiation of what identities and arrangements constitute a family) also requires the enforcement, or re-enforcement, of the familial other; the kinship system against which "good" and "ethical" multi-parent families are measured. In Canada, the condemnation of polygyny as a patriarchal, oppressive, and marginalizing institution is the foil. Further, Canadian discourses surrounding polygamy draw on racialized and gendered constructions that prop-up the idealized, white,

[9] *Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588 [*Polygamy Reference*], at 15, 881, 1351.

monogamous, heterosexual, and homonormative Canadian family. While the idealized Canadian family is white, monogamous, and heterosexual, liberalism's desire to govern kinship requires a modest expansion of the ideal family to include the idealized *queer* family. The idealized queer family is not heteronormative but *homonormative*,[10] a normalizing structure that affirms Canada's national mythologies by venerating discourses of inclusion, diversity, and monogamy (or "monogamish"[11] relationships) without reorganizing the privatized relationship between the family and the state or relationships within families themselves.

As I will detail in Chapter 2, families are an important institution for the state. In addition, familial metaphors are often used by legislators to define the roles and responsibilities of the nation-state to its citizens. For George Lakoff, family is "one of the most common ways we have of conceptualizing what a nation is,"[12] evidenced by phrases like "mother country," "father land," "founding fathers," "family values," and even "sister cities". In the nation-as-family metaphor, the state takes on the role of parent and citizens become its children. While my dissertation focuses more on the relationship between the state and the family (the distribution of rights and responsibilities), the family clearly plays an important role in national identity, too. Recently, Canadians have benefited from their elected officials' expansion of legal parentage, largely prompted by the increased use and availability of Assisted Reproductive Technologies by middle class families (heterosexual and queer). Within this complicated metaphor, my

[10] Lisa Duggan. "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, 175-194. Durham: Duke University Press, 2003.
[11] This term was coined by Dan Savage, an American sex columnist and personality. Savage used the term to describe his own marriage where he and husband Terry Miller "[allow] occasional infidelities, which they are honest about." See Oppenheimer, Mark. "Married, with Infidelities," *New York Times Magazine* June 30, 2011. https://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html
[12] George Lakoff. *Moral Politics: What Conservatives Know that Liberals Don't*, 13. Chicago: University of Chicago Press, 1996.

dissertation examines the expansion of legal parentage and the thorny interventions into intimate life that result.

1.2 Scope and Significance

In British Columbia's *Family Law Act* and Ontario's *All Families Are Equal Act*, I examine the expansion of legal parentage and the new schemas through which children can have more than two legal parents. Both pieces of legislation – which I analyse as separate case studies – include other important elements of family law, like parental access and support as well as inheritance, but I focus exclusively on how the law redefines and expands legal parentage. The third case study brings together the *Polygamy Reference*, *C.C. (Re)*, and *BCSC 767* to examine courts' openness to multi-parentage and poly-conjugality in some circumstances, while continuing to criminalize it in others. My research found that current reforms to legal parentage, and judicial decisions surrounding multi-parentage recognition, still adhere to the nuclear family form.

1.3 Objectives

This project began as an attempt to understand the opportunities that expanding legal parentage posed to non-normative families. At the same time, I wanted to explore the tensions between increasing visibility of multi-parent families, in the context of polyamory, and the ongoing criminalization of other multi-parent families, in the context of Canada's *Criminal Code* prohibition on polygamy. My aim was to reveal the implicit and explicit articulations of discourses related to intimacy, kinship, and parentage as well as the material consequences of legislative changes and judicial decisions.

To conduct my research, I developed a three-part qualitative approach that allows me to investigate and analyse legislative changes and judicial decisions regarding multi-parentage and

reveal material and theoretical sites of support for, and resistance towards, non-normative and poly-conjugal intimate arrangements. The framework, Critical Policy Studies ("CPS") and Critical Discourse Analysis ("CDA"), emerged from my literature review of primary and secondary material surrounding the state, the governance of intimate life, sexual citizenship, and national reproduction. In this study, much of the inspiration for a CPS approach comes from Michael Orsini and Miriam Smith's edited collection *Critical Policy Studies*. In their volume, Orsini and Smith note that public policy study "has undergone significant change, and is gaining increased legitimacy in the field of political science."[13] Further, the subdiscipline of policy studies has started to "embrace radically different theoretical and methodological approaches" that draw from political science's subfields and include "historical institutionalism, feminist analysis, studies of social movements, and Foucauldian analysis."[14] Importantly, the authors note that "Critical policy studies is not an ideological straitjacket" but instead, "an orientation to policy analysis inspired by the Lasswellian tradition and by a desire to speak truth to power."[15]

In this framework, policy documents are both texts for analysis *and* discourses themselves. Sandra Taylor notes that the approach to thinking of policies as discourses requires a textual analysis, ideological critique, deconstruction, or combination thereof to "highlight the constitutive practices texts use."[16] She suggests that thinking of policy documents as texts that *contain* discourses and *are* discourses is useful for identifying and highlighting competing

[13] Michael Orsini and Miriam Smith, eds. *Critical policy studies*, 3. Vancouver: University of British Columbia Press, 2011.
[14] Ibid.
[15] Orsini and Smith, *Critical policy studies*, 1. For a discussion of Harold Laswell's impact on the field of critical policy studies, see: Torgerson, Douglas. "Harold D. Lasswell and critical policy studies: The threats and temptations of power" in *Handbook of critical policy studies*, edited by Anna Durnová, Douglas Torgerson, Frank Fischer, Michael Orsini. Cheltenham: Edward Elgar Publishing, 2015. In sum, Torgerson suggests that the Laswellian approach focuses on "emancipation" as a function of policy studies.
[16] Sandra Taylor. "Critical policy analysis: Exploring contexts, texts and consequences." *Discourse: Studies in the cultural politics of education* 18, no. 1 (1997): 27.

discourses and meanings in policy development and implementation.[17] According to Taylor, theories of discourse have enhanced the scope of critical policy analysis; the increased focus on policy-as-discourse and the ways in which theories of discourses can be used for policy analysis have both enriched the field of CPS.[18]

CDA, while not the first framework to address relationships between language and social life, is the first to develop a more or less "systematic body of theory and research" on the topic.[19] It draws on traditions within linguistics and work in the Western Marxist tradition on "hegemony" and "ideology" by thinkers like Antonio Gramsci and Louis Althusser;[20] the Frankfurt School of Philosophy's work on "critical theory"; Michel Foucault's theorizing of "discourse",[21] and work by others like Mikhail Bakhtin,[22] Pierre Bourdieu ,[23] Julia Kristeva,[24] and Valentin Volishnov.[25] First used in 1985, the term *critical discourse analysis* includes a variety of different approaches from critical linguistics, cognitive psychology, social theory, geography, and the health sciences.[26] As a whole, CDA is an interdisciplinary method that is

> committed to enhancing the capacity of research on the social transformations of the contemporary world… to address how language figures in processes of social transformation.[27]

[17] Ibid.
[18] Ibid., 25.
[19] Norman Fairclough, Jane Mulderrig, and Ruth Wodak. "Critical discourse analysis." In *Discourse studies: A multidisciplinary introduction*, 360. Edited by Teun Van Dijk. London: SAGE Publications: 2011.
[20] Louis Althusser. "Ideology and Ideological State Apparatus." In *Lenin and Philosophy and Other Essays*. London: New Left Books, 1971.
[21] Michèle Foucault. *L'Ordre du discours*. Paris: Gallimard, 1971 and *Discipline and Punish: the Birth of the Prison*. Harmondsworth: Penguin, 1979.
[22] Mikhail Bakhtin. *Speech Genres and Other Late Essays*. Austin: University of Texas Press, 1986.
[23] Pierre Bourdieu. *Language and Symbolic Power*. Cambridge: Polity, 1991.
[24] Julia Kristeva. "Word, dialogue and novel," in *The Kristeva Reader*, edited by Torril Moi. Oxford: Blackwell, 1986.
[25] Valentin I Volosinov. *Marxism and the Philosophy of Language*. New York: Seminar, 1973 [1928].
[26] Ibid.
[27] Ibid.

More specifically, I employ feminist and queer critical discourse analysis to deepen the focus of "social transformation" to gender and sexuality-based systems of power. For example, as Michelle Lazar argues, "gender ideology" is presenting in increasingly subtle ways making it even more challenging to reveal and resist.[28] Thus, the aim of a feminist critical discourse analysis is to examine the ways in which "subtle, and sometimes not so subtle" power relations are "discursively produced, sustained, negotiated, and challenged."[29] This work is rooted in the belief that discourse has "material and phenomenological" implications for people's lives.[30] Further, feminist CDA is also interdisciplinary, lending itself to other approaches like CPS and queer CDA.

Generally, queer theory is committed to deconstructing heteronormative sex and gender binaries.[31] Emerging from this framework, queer CDA might be both a queer study of discourse and a study of queer discourse.[32] In this dissertation, I am engaging with a queer study of discourse and sometimes also a study of queer discourse. This approach analyses "sexuality-related discourse" using queer theory to understand the manifestation of heteronormativity in queer and non-queer spaces.[33] Importantly, the goal of my analysis is not to idealize, or imagine, a discursive space free of "normative influences."[34] In fact, as Heiko Motschenbacher argues, finding a space free of heteronormativity may not be possible and the increased visibility of "non-heteronormative discourses" does not always equate with "an abolishment or weakening of

[28] Michelle Lazar. "Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis." *Critical Discourse Studies* 4, no. 2 (2007): 141-164.
[29] Ibid., 142.
[30] Ibid.
[31] Heiko Motschenbacher and Martin Stegu. "Queer Linguistic approaches to discourse." *Discourse and Society* 24, no. 5 (2013): 520.
[32] Ibid., 527.
[33] Ibid.
[34] Ibid., 524.

normativity as such."[35] Thus, my project is not an attempt to envision a parentage schema that is free of power relations like heteronormativity, but to reveal the ways in which power continues to operate in legal parentage decisions. Moreover, I analyse the significance of these manifestations of power.

1.4 Structure

This dissertation is organized into seven chapters. I begin, in this chapter, by introducing the "problem" of expanding legal parentage and its political significance. In doing so, I introduce my case studies, defined the aims, scope, and significance of the project before turning to the structure (below).

Following the introduction, in Chapter 2, I develop the theoretical framework for my analysis through a wide-ranging comprehensive literature review. I survey scholarship that examines the governance of intimate life, paying close attention to the ways in which kinship can both resist and reproduce dominant systems of marginalization and oppression like race, class, sexuality, and gender. Additionally, I examine how the Canadian state's investment in intimate life creates and reinforces identity categories and pre-figures the intimate "choices" available to citizens.

In Chapter 3 I present my qualitative approach and describe how the theoretical framework, outlined in Chapter 2, formed the foundation of my methodology. This includes, for example, my use of Critical Policy Studies and Critical Discourse Analysis to reveal the implicit and explicit assumptions about Canada's ideal family structure. This chapter offers some reflection on the possibilities and challenges of these methods, including interviews with

[35] Heiko Motschenbacher. "'Now everybody can wear a skirt': Linguistic constructions of non-heteronormativity at Eurovision Song Contest press conferences." *Critical Discourse Studies* 24, no. 5 (2013): 610.

participants on politically sensitive topics, the obstacles of seeking out participants during the COVID-19 global pandemic, and participants' resistance to recognition, via participation in interviews, as a form of resistance to the state's governance of intimate life.

I present the findings from my empirical research in Chapters 4, 5, and 6. Chapter 4 introduces the monumental changes to legal parentage conceived in British Columbia's *Family Law Act*. In 2013, British Columbia was the first jurisdiction in the world to extend legal parentage via legislation to more than two parents (though it had been achieved in *AA v. BB.,* an Ontario Court of Appeal ruling in 2007). The province introduced its heavily revised *Family Law Act* (and related statutes) which, in part, made it possible for a child to have more than two legal parents (up to a maximum of 5) where that child was conceived through assisted reproduction.[36] The *FLA* also clarified legal parentage in the context of surrogacy and sperm/egg donation (namely, surrogates and donors are *not* parents if there is a preconception agreement outlining these intentions),[37] and parents can choose affirming nomenclature (like mother, father, or parent).[38] The *FLA* was the result of several years of extensive provincial consultations, relatively modest critique, and full government support.

I argue that, while significant for some families, the expansion of legal parentage in BC did little to recognize kinship arrangements that fall outside hetero- or homonormative scripts

[36] There continues to be some speculation about the number of possible parents under BC's regime. barbara findlay and Zara Suleman suggest that while the *FLA* seems to envision a three-parent maximum, it is possible for a child to have more than three legal parents. Since the *Interpretation Act* asserts that singular terms may be read as plural, and vice versa, there is no limit to the number of parents understood by the term "intended parents" (with whom a surrogate can co-parent). Specifically, they note that: "Section 30(1)(b)(ii) contemplates an arrangement between a potential birth mother, her partner, and a donor who agrees to be a parent. In this subsection, it is clear that there can be at least four parents: the birth mother and her partner, an egg donor and a sperm donor." Further, they point out that if the *Interpretation Act* was not intended to apply to the *FLA*, the *FLA* would have made that clear (Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act, 2013).

[37] See sections 20, 24(1), and 29.

[38] See Part 3– Parentage. This was made possible several years prior to the *FLA* through a BC Human Rights Tribunal in 2001. See the provincial website for more information: https://www2.gov.bc.ca/gov/content/life-events/birth-adoption/births/birth-certificates.

and reaffirmed the primacy of biological connections while making modest expansions to the idealized family structure. Indeed, my critical discourse analysis revealed four central themes: the primacy of biology (affirming the need for genetic connections between parent(s) and child(ren), preconception intention (the requirement for preconception intention for multi-parentage), when things fall apart (the *FLA*'s inattention to the particular needs of queer families experiencing restructuring), and living outside the law (the expansion of legal parentage cannot capture those who do not wish to be recognized).

These themes illustrated that the *FLA* envisioned only two types of families: first, a heterosexual couple who relied on the altruism of a surrogate or donor to create their reproductive futures or second, a gay or lesbian couple who relied on the same sort of donation. Neither family is a disruption to the private, sexual, and genetic family. BC's *FLA* is significant in that it was the first legislative effort to expand legal parentage, but the limits of the *FLA* leave much to be desired. This was made even clearer in a 2021 court case, *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767, wherein a BC judge found that the *FLA* was not designed to recognize polyamorous parents (explored further in Chapter 6). Thus, the "multi-parent" component of the *FLA* is constrained by the desire to affirm biological connections between parents and children, limit the number of possible legal parents, and require that families are formed through pre-conception intention.

Chapter 5 examines the court cases leading up to Ontario's *All Families Are Equal Act* as well as the legislation itself. Like British Columbia, Ontario embarked on a legislative overhaul of its family law legislation with the *All Families Are Equal Act* in 2016. Notably, though, Ontario was forced into the *AFAEA* by a *Charter* challenge, *Grand v. Ontario*. In *Grand*, Justice Chiappetta declared Ontario's previous family law act unconstitutional on the grounds that it

discriminated against queer families and families using assisted reproductive technologies. While *Grand* was the catalyst for *AFAEA*, the road to equality for Ontario parents was rocky, long, and included decades of ground-breaking court cases and two Bills: *Re K. (1995)*, 23 O.R. (3d) 679 (Ont. Ct. Prov. Div)] [*Re K*], *M. v. H*., 1999 CanLII 686 (SCC), [1999] 2 SCR 3 [*M v. H*], *Halpern v. Canada (Attorney general)*, 2003 CanLII 26403 (ON CA) [*Halpern*], *M.D.R.* v. *Ontario (Deputy Registrar General)*, 2006 CanLII 19053 (ON SC) [*Rutherford*], *A.A. v. B.B.*, 2007 ONCA 2 (CanLII) [*A.A. v. B.B.*], Bill 137, *Cy and Ruby's Act (Parental Recognition),* 2015 [*Cy and Ruby's Act]*, *Grand v. (Ontario) Attorney General*, 2016 ONSC 3434 [*Grand*], and finally, *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, S.O. 2016, c. 23 - Bill 28 [*All Families Are Equal Act*].

The *AFAEA* repealed and rewrote Parts I and II of the *Children's Law Reform Act*, updated parentage legislation to reflect the needs of queer families and families using ARTs, and amended related statues like *Child Support Guidelines*. Regarding legal parentage, the *AFAEA* provides that: a child can have up to four legal parents (if there is preconception agreement) per s. 9, and in some cases more than four if there is evidence of their preconception intention; a birth parent is a parent (except in the case of surrogacy); the birth parent is not defined by gender; someone who provides sperm via sexual intercourse is a parent (unless a preconception agreement provides otherwise); the spouse of someone who gives birth via ART is a parent (unless they did not consent or withdrew consent); and parents can choose affirming nomenclature (like BC's *FLA*).

On the surface, the *AFAEA* might appear more "queer" than BC's *FLA*. Partly, this reflects the subject of court cases that sparked its development as well as the demographic of, and the strategies employed by, its advocates. And yet, the *AFAEA* follows a similar trajectory in

its affirmation of biological connection between parents and children, the requirement for preconception intention, and the limit on the number of possible legal parents. My CDA revealed three key themes: the best interests of the child, equality among families, and defining who is a parent. Advocates drew on normalized, desexualized, and privatized discourses of queerness to assert the importance of legislative change. Critics relied on familiar tropes of queerness as a threat to society and more specifically, to children (society's future). In both contexts, children were positioned as proto citizens whose security hinged on the state's recognition (or not) of their parents, and relatedly, the state's security hinged on the recognition of legal parentage.

Chapter 6 takes up one of the most fascinating pieces of this puzzle: the expansion of legal parentage for some families amidst the ongoing criminalization of other forms of conjugality (and subsequently, parentage). In 2021, a BC Supreme Court judge granted legal parentage to three adults in a polyamorous relationship, noting that the *FLA* clearly did not envision polyamorous relationships. A few years prior, in 2017, a Newfoundland and Labrador Judge made a similar finding. Both judges cited the best interests of the child, the limitations of current legislation, and the need for legislation to catch-up to changing family forms. Both cases cited *AA v. BB*, one of the key decisions leading to the *AFAEA*. Now, in addition to expanding legal parentage to those using ARTs, many of whom are queer families, in some cases the law can envision polyamorous multi-parentage. Although two cases do not indicate a sea change, they are indicators of a shift in the ways in which parentage can be represented in the law. Now parentage need not be rooted in dyadic conjugal relationships, at least in some Canadian jurisdictions, but can allow for tryadic ones, too. The success these happy throuples found in court was, I argue, because of their (flexible) heterosexual configurations. In *BCSC 767*, the parents' gendered configuration is one man and two women and neither woman has a sexual or

romantic relationship with the other. In *C.C. (Re)*, the configuration is one woman and two men, where neither man has a sexual or romantic relationship with the other. In the former, there is an abundance of maternal love and in the latter, an embarrassment of paternity riches.

These legislative changes cast a shadow on another type of multi-parentage and poly-conjugality: polygyny. In the *Polygamy Reference*, Chief Justice Bauman ruled that s. 293 of the *Criminal Code* is consistent with the *Canadian Charter of Rights and Freedoms* (except where it pertains to minors under the age of 18). He argued that where s. 293 breaches freedoms under the *Charter*, they are justifiable in a "free and democratic society," s. 293 supports the "institution of monogamous marriage," and advances Canada's international human rights obligations.[39] The nearly 400-page decision contained numerous "expert" affidavits, largely from those who opposed polygyny. Discussions of polygamy (which are almost exclusively conversations about *polygyny*) often elicit visceral condemnations. I aim to complicate this narrative by drawing from Angela Campbell's analysis. On the one hand, there are important conversations to be had regarding structural inequities that favour patriarchal heterosexuality.[40] On the other hand, these conversations are often approached with a "gross caricature" that ignores polygyny's complexities and paradoxes.[41] As Campbell argues, the 'common sense' narratives surrounding polygyny is that it is "patriarchal, exploitative, sex-focused, backward, regressive, and cult-like".[42] In this way, common sense reflects the power of the dyadic, monogamous, heterosexual nuclear family. On the other hand, casting polygyny as a villainous caricature ignores the

[39] *Polygamy Reference* at 1350-1352.
[40] Nathan Rambukkana. *Fraught intimacies: Non/monogamy in the public sphere*, 78. Vancouver: University of British Columbia Press, 2015.
[41] Angela Campbell. "Bountiful's plural marriages." *International Journal of Law in Context* 6, no. 4 (2010): 345.
[42] Ibid.

presence of "multiple conjugalities" in communities like Bountiful, British Columbia and the ways in which women negotiate their conjugal relationships.

Condemning polygamy as a patriarchal, oppressive, and marginalizing institution is common, culturally reinforced, and historically rooted. Polygamy has been a criminal offence in Canada since 1890, in response to the criminalization of polygamy in the United States and a desire to quash immigration of polygamous American Mormons to Canada.[43] The racialized, polygamist other is inextricably linked with the idealized, white, monogamous, heterosexual, and homonormative Canadian family. Canadians witnessed this juxtaposition under Stephen Harper's *Zero Tolerance for Barbaric Cultural Practices Act* S.C. 2015, c. 29 This monogamous kinship system is produced and reinforced by settler colonialism, liberalism's focus on choice, freedom, and property, and liberal multiculturalism's "tolerance" of diversity. The idealized Canadian family is white, monogamous, and heterosexual, however, liberalism's desire to govern kinship requires a modest expansion of the ideal family to include the idealized queer family. As noted earlier, the idealized queer family is *homonormative*. The idealized Canadian family is shifting to "diversify whiteness"[44] and diversify heterosexuality to capture subtle expansions of Canadian families without reorganizing the relationship between the family and the state or the relationships within families themselves.

In Chapter 7, I conclude by arguing that the nuclear family is still a contemporary kinship structure[45] and one that most families cannot achieve without relying on intimate care from extended familial relationships, friendships, or community support like early learning and care

[43] Sarah Carter. *The importance of being monogamous: Marriage and nation building in Western Canada in 1915*, 42-50. Athabasca: Athabasca University Press, 2008.
[44] Malinda Smith. "Diversity in theory and practice: Dividends, downsides, and dead-ends." In *Contemporary Inequalities and Social Justice in Canada*, edited by Janine M. Brodie. Toronto: University of Toronto Press: 2018.
[45] Coontz, *The way we never were*; hooks, *All about love: new visions*, 132.

programs.[46] Despite this, more inclusive or "promiscuous care"[47] models continue to face resistance by the state for their challenge to the nuclear status quo. Thus, this chapter brings together the empirical and theoretical findings from Chapters 4, 5, and 6 to illustrate how the expansion of legal parentage for multi-parent and poly-conjugal families is congruent with, and a manifestation of, the Canadian state's desire to reproduce itself materially and ideologically.

To conclude the dissertation and highlight areas for future research, I present four hypotheses: first, people who want to transgress the ideal Canadian normative family do not want to be included in the expansion of legislation to capture their intimate relationships. Second, the state's interest in expanding legal parentage is more about finding legal responsibility for *some* children than it is about expanding the legal family. As ARTs and queer families redefine who makes a parent, new financial responsibilities (and possibilities) emerge. The expansion of legal parentage fits within the liberal, and neoliberal, reliance on the private, hyper-responsible individual who governs and manages their own economic affairs and property. Third, the expansion of legal parentage ensures that the ideological future of the Canadian state is secured by managing the reproduction of the future through children. The state has demonstrated little interest in protecting the lives and interests of Indigenous children, children living in poverty, or queer children.[48] The future of the nation-state, secured through "the child," rests on a particular type of child; the white, propertied, hetero- or homonormative, recognition-

[46] hooks, *All about love,* 132.
[47] Andreas Chatzidakis et al. *The care manifesto: The politics of interdependence*. New York: Verso Books, 2020.
[48] Cindy Blackstock. "The complainant: The Canadian human rights tribunal on First Nations child welfare." *McGill Law Journal* 62, no. 2 (2016): 285–328; Blackstock, Cindy, Muriel Bamblett, and Carlina Black. "Indigenous ontology, international law and the application of the Convention to the over-representation of Indigenous children in out of home care in Canada and Australia." *Child Abuse & Neglect* 110 (2020): 1-11; Caldwell, Johanna, and Vandna Sinha. "(Re) Conceptualizing Neglect: Considering the Overrepresentation of Indigenous Children in Child Welfare Systems in Canada." *Child Indicators Research* 13, no. 2 (2020): 481-512.

seeking future citizen.[49] Fourth, polyamory offers the potential for disrupting the hegemonic Canadian family. However, much like mainstream lesbian and gay liberation's push for equal marriage at the cost of affirming diverse queer identities and ways of living, the legal recognition of multi-parentage affirms (still) a narrow form of queer kinship. That is, a queer kinship that still desires the state's recognition and queer parentage that affirms a particular form of property: status contract. As a legal concept, status is a tool to "determine the political, economic, and legal conditions" to which we are subjected, publicly and privately.[50]

In a contemporary context, status functions as a form of property where the "entitlements and privileges that attach to a particular status or arrangement capture the subject in a more totalizing embrace.[51] This embrace has two arms: status contract and free contract. Status contracts include engagements and marriages, arrangements where there are possibilities for property interests in modern common law.[52] Thus, status is a legal standing that can operate as a form of property to determine people's rights, entitlements, and responsibilities as well as their ability to transmit that status (and requisite entitlements) biologically.[53] My findings reveal a status contract logic underpinning the expansion of legal parentage in Canada. The Canadian state articulates parentage as a *form* of status contract and thus, a form of property. Parentage produces property relations and is contained by property relations. Expanding legal parentage ensures that parentage as a form of property is maintained and that certain types of families, as a form of state property, are secured.

---

[49] Kerry Robinson and Cristyn Davies. "Docile bodies and heteronormative moral subjects: Constructing the child and sexual knowledge in schooling." *Sexuality & Culture* 12, no. 4 (2008): 221-239.
[50] Brenna Bhandar. *Colonial lives of property: Law, land, and racial regimes of ownership*, 156. Durham: Duke University Press, 2018.
[51] Ibid.
[52] Ibid.
[53] Ibid., 157

As Brenna Bhandar argues in *Colonial Lives of Property*, property law has the capacity to "transform the established social order" during moments of political change.[54] Though other forms of property practices exist, like cooperative housing, these practices may also be understood as a manifestation of the ability of "hegemonic property relations" to incorporate "minority difference" as a form of property accumulation.[55] Like cooperative housing, polyamory (a form of cooperative conjugality), or monogamous multi-parentage, allows the hegemonic Canadian family to incorporate minority kinship structures to strengthen the idealized family. The presence of difference and "diversity" allows state apparatuses to reinforce the value of state recognition, the illusion of liberal multiculturalism and tolerance, and recreate the immoral multi-parent family (polygamy) as the standard against which the national Canadian family is measured. Thus, unfettered optimism for the expansion of legal parentage disregards the state's reliance on exploiting "diversity" and kinship and ignores kinship practices that eschew non-recognition.

1.5 Conclusion

My research is, in part, inspired by my own experiences "exposing the cracks" in a "coherent system" of kinship.[56] My origin story demonstrated the possibility that families could be designed without a co-parent and more specifically, a co-father. This arrangement is sometimes called "autonomous motherhood" or "single motherhood by choice" and it levies significant challenges to the archetypal nuclear family form.[57] Thus, my interest in how legal parentage is

[54] Ibid., 184
[55] Ibid.
[56] Nausica Palazzo. "What is the "New" Family?" *Legal Recognition of Non-Conjugal Families*, 5. London: Bloomsbury Publishing, 2021.
[57] My Master's thesis, "Autonomous mothers and social policy: how the CCTB, UCCB, and Alberta child care subsidies govern women's autonomy in motherhood" (University of Alberta, 2016), examined the conundrum of autonomous motherhood and the Canadian state's clear preferences for the nuclear family via the Canada Child Tax Benefit, the Universal Child Care Benefit, and Alberta's Child Care Subsidies.

determined as well as the consequences of non-recognition are both a personal and an intellectual pursuit. I was a first-hand witness to, and subject of, the ways in which non-normative parentage is governed by the state and by citizens and my accounts of these experiences formed the basis for my scholarly interest in kinship and parentage.

I have spent the last several years exploring the profound political questions that kinship poses for political scientists, the state, and for those of us who find ourselves (for better or for worse) enmeshed in some sort of kinship arrangement. Conversations with colleagues, acquaintances, and loved ones continue to reveal that the level, and types, of "care and commitment amongst individuals has not diminished" even in spite of a decline in rates of marriage in the West.[58] Instead, people are investing more openly in relationships beyond the traditional nuclear family, like non-conjugal relationships between friends or relatives and polyamorous relationships.[59] These formations may appear new, but there are extensive sociological and anthropological accounts of non-normative kinship arrangements.[60] However, as Nausica Palazzo notes, while not ontologically new, non-normative families are epistemologically new in so far as there is increasing visibility, data, and theoretical tools with which to understand them.[61]

These "new" kinship forms challenge "state-sponsored conceptions of the family" by rejecting or redefining the components of the traditional nuclear family– conjugality, monogamy, heterosexuality, and whiteness.[62] While consensual relationships between adults still garner criticism (for example, see Alexa DeGagne's examination of Proposition 8), these challenges

[58] Palazzo, *Legal Recognition of Non-Conjugal Families*, 46.
[59] Ibid.
[60] Natasha Bahkt and Lynda M. Collins. "Are You My Mother: Parentage in a Nonconjugal Family." *Canadian Journal of Family Law* 31 (2018): 105.
[61] Palazzo, *Legal Recognition of Non-Conjugal Families*, 46.
[62] Ibid., 46-47.

become even more acute for families who have children. In Canada, rules regarding the relationships between adults and children are principally determined by provincial legislatures in parentage policy.[63] Until recently, provincial law assumed that the birth mother and her male partner, if any, were the parents of a child. However, as this dissertation demonstrates, the increasing numbers of queer families and families using assisted reproduction forced courts and legislatures to change the schema for determining legal parentage. In 2009, one Canadian province (Quebec) had tried to address legal parentage, in the context of assisted reproductive technologies, through legislation[64] and by 2016, David Snow found that most provinces had – to varying degrees of success – tried to account for determinations of parentage for children born via surrogacy and/or assisted reproductive technologies (for which the judiciary played a significant role in bringing about legislative reform).[65]

Over the next few chapters, I argue that the *FLA*, *AFAEA*, *C.C. (Re)*, *BCSC 767*, and the *Polygamy Reference* provide an exciting opportunity to examine discourses surrounding multiple parentage, conjugality, sexuality, and gender in Canada. Moreover, these cases reveal the persistence of racial and class-based hierarchies at the intersections of parentage and kinship. As the dissertation unfolds, my research demonstrates that the expansion and regulation of legal parentage for multi-parent and poly-conjugal families in Canada are not simply the result of lesbian and gay activism, or benevolent legislators, but a manifestation of liberalism's move towards inclusion and the reinforcement of intimate nuclearity. The counterbalance, via the *Polygamy Reference*, serves to reinforce the sexually deviant other and reproduce kinship

[63] Dave Snow. "Measuring parentage policy in the Canadian provinces: a comparative framework." *Canadian Public Administration* 59, no. 1 (2016): 6–7.
[64] Fiona Kelly. "Producing paternity: The role of legal fatherhood in maintaining the traditional family." *Canadian Journal of Women and the Law* 21, no. 2 (2009): 185.
[65] Snow, *Measuring parentage policy*, 6. See also: Snow, David. "Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act." *Canadian Journal of Law and Society* 32, no. 3 (2017): 322-3.

systems rooted in heterosexual monogamy. The theoretical and conceptual foundations for this analysis are set out next, in Chapter 2.

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

In this chapter, I present the findings from my literature review. As Roger Pierce argues, a literature review is not merely a summation of relevant themes and concepts, but a process of evaluation wherein the author provides "fresh" critique of extant literature.[66] Drawing on Pierce's conceptualization, this chapter examines current debates within literature on the state and the governance of intimate life, conjugality, and legal parentage and assisted reproductive technologies and identifies sites of contestation, silence, or erasure.[67] To carry out this task, I completed a thorough and critical review of current literature to establish the emergent themes, concepts, and theories in both academic and non-academic writing as they relate to legal parentage. I used multiple "information sources" including books, dissertations, Internet resources, academic journals, periodicals, and publications from research institutes. These sources were accessed through both strategic web searches and databases like Canadian Newsstream, CanLII, and Westlaw NextCanada. What emerged is a dynamic, contemporary debate, about the governance of intimate life in Canada, through the lens of multi-parentage. Notably, this debate is rooted in historical relationships between the Canadian state and its citizens (and those who were not afforded citizenship) and how the state affirmed, denigrated, and regulated intimacy.

As members of political communities, we experience (consciously or otherwise) this governance within our families and kinship systems. And, while the experience of governance is universal (for example, Canadian citizens are all subject to federal laws regarding marriage and

[66] Roger Pierce. "Completing a Literature Review: Accessing Published Information." In *Research Methods in Politics*, 101. London: SAGE Publications, 2011.
[67] Ibid.

divorce), the manifestation of governance is unique (the impact of these laws varies depending on one's race, class, sexuality, for example). Similarly, the experience of having a family, creating a family, and belonging to a family is also paradoxically universal and unique. Scholarly accounts of family and kinship reflect these conundrums. On the one hand, a central theme in the study of families is that "definitions, meanings, interpretations, and experiences of families are not static or universal."[68] On the other, critical race, feminist, and queer theorists have long articulated the ways in which Western ideologies of the family appear fixed in time via the reproduction of the private nuclear family.

In academe, studies of the family are traditionally housed in fields like sociology, anthropology, and gender studies. These disciplines demonstrate that attitudes and ideas about families are always situated in "particular historical, economic, and political conditions and environments" as well as individual lived experience.[69] Moreover, these scholars demonstrate how the family is a site of power, ideology, and contestation.[70] In political science, seminal thinkers like Friedrich Hegel, John Locke, Karl Marx, and Max Weber have also argued that the family is a central unit of political communities.[71] And yet, mainstream political science[72] has

---

[68] Barbara A. Mitchell. *Family Matters: An Introduction to Family Sociology in Canada*, 1. Toronto: Canadian Scholars, 2017.
[69] Ibid.
[70] Naomi R. Cahn. "The new kinship." In *The New Kinship*. New York: New York University Press, 2013; Millbank, Jenni. "The limits of functional family: Lesbian mother litigation in the era of the eternal biological family." *International Journal of Law, Policy and the Family* 22, no. 2 (2008): 149-177; and Nordqvist, Petra. "Genetic thinking and everyday living: On family practices and family imaginaries." *The Sociological Review* 65, no. 4 (2017): 865-881.
[71] See: G. W. F. Hegel. *Elements of the Philosophy of Right*, edited by Allen W. Wood, translated by H. B. Nisbet. Cambridge: Cambridge University Press, 1995; Locke, John. *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press, 1988; Marx, Karl. "The Communist Manifesto." In *Selected Writings*, edited by Lawrence Simon, 157-186. London: Hackett Publishing Company, 1994; and Mill, John Stuart. *The Subjection of Women*, edited by Susan Moller Okin. London: Hackett Publishing Company, 1988.
[72] I draw on Debra Thompson's description of "mainstream" and "other stream" Canadian political science to highlight (but not reinforce) the epistemological, ontological, and methodological differences between what is considered properly political and that which is considered "an apolitical force" ("Is race political?" *Canadian Journal of Political Science* 41, no. 3 (2008): 525). Put differently, Jacqueline Stevens argues that it is the "marked "feminist" political scientist" who studies the family while the "unmarked political scientist writes about the state"

long taken for granted the relationships between family, kinship, and intimacy in political life. Further, mainstream political science has also ignored the historical and contemporary systems and manifestations of settler colonialism and race. To this end, Debra Thompson asserts that the discipline's consideration of "the relationship between race and politics" is "at best, tangential".[73] Nisha Nath poignantly critiques the mainstream's focus on some identities over others, like regions instead of race, and surface discussions of culture over colonialism.[74] Within this context, family, kinship, and intimacy are often conceptualized – by mainstream political science – as if their meanings and composition are transcultural and transhistorical facts; natural and immutable. While the 'naturalness' of the family generally goes uninterrogated in the public realm, when debates do surface, they usually peak during times of social and political change.[75] In these moments, conservatives and progressives alike cling to the language and image of "the family" as central to social and political life. For the former, family is sacred and something worth shielding from change and for the latter, its sanctity is *why* it must embrace change.

While feminist, critical race, and queer theorists assert the persistence of the state in the bedrooms of the nation, its citizens must still make intimate "choices". The increased visibility (and in some cases, numbers) of queer families, adoptive families, and families formed through assisted reproductive technologies raise questions about choice: who, or what, constitutes a family? What and who is a mother, father, or parent? How does the state, and its subjects, form, define, and give meaning to family and kinship? Which types of relatedness – marital, blood, genetic, social – have the most political and social salience? Which types of relatedness can be

(*Reproducing the State*, 53. Princeton: Princeton University Press, 1999). However, I later note, as Stevens does, that the study of family *is* a study of the state.

[73] Thompson, *Is race political?*.

[74] Nisha Nath. "Defining Narratives of Identity in Canadian Political Science: Accounting for the Absence of Race." *Canadian Journal of Political Science* 44, no. 4 (2011): 161-193.

[75] Coontz, *The way we never were*.

legally recognized, and why? How are the boundaries between heterosexual and queer parenthood being redefined? How are these boundaries regulated and reproduced? Finally, how does the state respond to these shifts and what is the significance of that response?

Drawing on the work of theorists like Sarah Carter, Janet Carsten, Lois Harder, Fiona Kelly, and Laura Mamo, I argue that our intimate "choices" – who is a parent, how one becomes a parent, and how families are formed through parentage – are produced and pre-figured by the state. In particular, the regulation and expansion of legal parentage, as part of a broader governance of intimate life, is a manifestation (and contemporary iteration) of a colonial politics of sexuality that relies on settler colonial logics of race, sexuality, gender, and property. I engage with Indigenous, queer, and critical race scholars like Scott Morgensen, Kim TallBear, Angela Willey, and Nathan Rambukkana, to develop a theoretical framework that invites political scientists to think differently about kinship, the role it serves in our political communities, the state's investment in kinship, and what theoretical and material possibilities exist for thinking, and 'doing', kinship outside of a settler colonial, liberal, and neoliberal frame. Thus, this dissertation explores the governance of intimate life – via legal parentage – in Canada and places intimacy at the very centre of the state and political life.

To do so, this chapter surveys four sets of scholarly literature which together lay the theoretical foundations for this dissertation. In each section I pay careful attention to important gaps in the literature, areas of disagreement and contestation, and different conceptual and methodological approaches to understanding the phenomenon I examine. Each section introduces the topic, defines key concepts, provides a critical discussion, and concludes by illustrating its relevance to, and implications for, this research. By engaging with these topics, I model Richard Toracco's assertion that literature reviews are a form of research that "reviews,

critiques, and synthesizes representative literature" in ways that create "new frameworks and perspectives" on a topic.[76]

First, I survey work on the governance of intimate life. This literature allows me to critically theorize how and why the state matters to families; why it is important to examine legislation and case law as forms of governance; and how institutional and discursive elements of the state are intertwined with national reproduction, sexuality, and intimate life. Second, I draw on critical race theory and queer theory to unpack, problematize, and reformulate ideas of family and kinship, paying close attention to the idealization of certain family forms over others. Third, I explore queer and critical sexual citizenship writing on conjugality, focusing on changing definitions of conjugality and the challenge that non-monogamous intimate arrangements pose to the nuclear family form. Fourth, I discuss complex relations of race and class power and privilege inherent in debates surrounding the expansion of legal parentage by engaging critical studies of assisted reproductive technologies and its constituent "genetic thinking". The fifth and final section concludes the chapter by drawing together concepts and themes from each body of literature to demonstrate that thinking about political life and the state requires a consideration of kinship. While often marginalized in the discipline of political science, focusing on intimate life profoundly recasts how we conceptualize what is political (and worthy of consideration by 'political science'), the boundaries and relationships between socially constructed notions of public and private, and the place of the state in systems of power and privilege. Specifically, I posit that intimate life is central to understanding what politics *is* (versus asserting that these concepts are merely important to a study of politics), in sum, while intimate life is at the centre of this project, so too is it at the centre of the study of political science more broadly.

[76] Richard J. Torraco. "Writing integrative literature reviews: Guidelines and examples." *Human resource development review* 4, no. 3 (2005): 356.

2.2 The governance of intimate life

Although the discipline of political science has many approaches to theorizing the state, it is within the critical traditions of feminism, critical race theory, and queer theory that I find the most useful accounts. By exploring the governance of intimate life through these frameworks, this dissertation contributes to wider political theory and gender and politics literature to challenge the assumption that the family is pre-political (or private) and thus properly outside the sphere of state regulation;[77] the role of social policy and legislation in governing intimate life;[78] the importance of conjugality to theorizing intimate relationships;[79] and the privileging of certain forms of sexual/intimate arrangements over others.[80]

2.2.1 Marriage and the state

Given the practical and theoretical difficulty in defining family, provincial and territorial legislation governing family in Canada does not define the term. Instead, relevant legislation defines terms like "spouse", "guardian", "child", and "parent". In other words,

---

[77] Janine Brodie. "Globalization, Canadian family policy, and the omissions of neoliberalism." *North Carolina Law Review* 88 (2009): 1559; Cott, Nancy. *Public vows: A history of marriage and the nation*. Harvard University Press, 2002; Lois Harder. "The state and the friendships of the nation: The case of nonconjugal relationships in the United States and Canada." *Signs: Journal of Women in Culture and Society* 34, no. 3 (2009): 633-658; Christopher Lasch. *Women and the common life: love, marriage, and feminism*. New York: WW Norton & Company, 1997; Meg Luxton. "'Nothing Natural about It': The Politics of Parenting." In *Feminism and Families: Critical Policies and Changing Practices*, edited by Meg Luxton, 162-181. Nova Scotia: Fernwood, 1997.

[78] Carter, *The importance of being monogamous*; Harder, Lois. "After the Nuclear Age?" *Vanier Institute of the Family*, 2011; Harder, Lois. "Rights of Love: The State and Intimate Relationships in Canada and the United States." *Social Politics* 14, no. 2 (2007): 155–81; Kelly, Fiona. "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family." *Canadian Journal of Women and the Law* 21, no. 2 (2009): 315–51; McKeen, Wendy. *Money in their own name: The feminist voice in poverty debate in Canada, 1970-1995*. Toronto: University of Toronto Press, 2004.

[79] Heather Brook. *Conjugal Rites: Marriage and Marriage-Like Relationships Before the Law*. Palgrave Macmillan, 2007; Cossman, Brenda and Bruce Ryder. "What is Marriage-Like Like – The Irrelevance of Conjugality." *Canadian Journal of Family Law* 18 (2001): 269-326.

[80] David Bell. "Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship." *Political Geography* 14, no. 2 (1995): 139–53; Boyd, Susan and Claire F.L. Young. "From Same-Sex to No Sex: Trends Towards Recognition of (Same-Sex) Relationships in Canada." In *Open Boundaries: A Canadian Women's Studies Reader*, edited by Barbara A. Crow & Lise Gotell, 217-229. Toronto: Prentice Hall, 2005; Dreher, Tanja. "The 'Uncanny Doubles' of Queer Politics: Sexual Citizenship in the Era of Same-Sex Marriage Victories." *Sexualities* 20, no. 1–2 (2017): 176-195.

provincial/territorial jurisdictions try to avoid an explicit definition of the family and opt for defining familial relationships instead. Conversely, the federal government defines a "census family" as:

> a married couple and the children, if any, of either and/or both spouses; a couple living common law and the children, if any, of either and/or both partners; or a parent of any marital status in a one-parent family with at least one child living in the same dwelling and that child or those children. All members of a particular census family live in the same dwelling. Children may be biological or adopted children regardless of their age or marital status as long as they live in the dwelling and do not have their own married spouse, common-law partner or child living in the dwelling. Grandchildren living with their grandparent(s) but with no parents present also constitute a census family.[81]

While provincial/territorial legislation focuses on defining intimate relationships, over the intimate unit, federal definitions describe the unit. The former still determines what types of relationships constitute a family and if those relationships are legally recognized while the latter determines the recognition of the whole. Notably, the census family is organized predominantly around a dyadic couple *and* their child/children. In the case of a "one-parent" family or children living with grandparents ("with no parents"), the family is still conceived within the boundaries of nuclearity. As an ideal type, the nuclear family consists of married, monogamous, heterosexual parents and their biological children. While this family form has never actually been the dominant family structure in Canada, it has long been "idealized as the only "right" form of family".[82] Increasingly, our collective experience of who constitutes family is disentangled from traditional understandings of marriage, gender, sexual orientation, and procreation but the legislation which governs the range of possibilities for our intimate lives reaffirms nuclearity.

---

[81] Statistics Canada. "Census Family". Government of Canada, 2021. https://www23.statcan.gc.ca/imdb/p3Var.pl?Function=UnitI&Id=1314048

[82] Liz Borden. "Non/Monogamies in Canadian Children's Picture Books." In *The Space and Places of Canadian Popular Culture*, eds. Victoria Kannen, Neil Shyminsky, 92. Toronto: Canadian Scholars Press, 2016.

One of the of the most significant ways in which the state is invested in defining intimate relationships is through marriage. Indeed, the preamble to the *Civil Marriage Act* states that "marriage is a fundamental institution in Canadian society" and that Canada "has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians."[83] The formulation of marriage as an institution harkens back to an 1866 case, *Hyde v. Hyde and Woodmansee* [L.R.] 1 P. & D. 130 [*Hyde*], wherein Lord Penzance argued that "Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution" that "creates" and "confers" rights, responsibilities, obligations, and status.[84] He acknowledges that the features of marriage vary depending on country, but that there is a universality to marriage under "Christendom." To make this case he cites Lord Brougham in (1835) 2 Cl & Fin 488 [*Warrender v. Warrender*]:

> … But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status from Turkish or other marriages among infidel nations, because we clearly should never recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere…[85]

Lord Penzance's decision was not the first, or last, example of a judicial invocation of Christian monogamy's "explicit association with the politics of European nationalist and imperialist aims".[86] In *Undoing monogamy: the politics of science and the possibilities of biology*, Angela Willey reads the history of monogamy in the West through a queer feminist and critical materialist framework. She argues that to understand monogamy is to understand it as "nature

[83] *Civil Marriage Act* (S.C. 2005, c. 33).
[84] *Hyde v. Hyde and Woodmansee* [L.R.] 1 P. & D. 130 [*Hyde*] at 134.
[85] *Warrender v. Warrender* at 532.
[86] Angela Willey. "Monogamy's Nature: Colonial Sexual Science and Its Naturecultural Fruits." In *Undoing monogamy: the politics of science and the possibilities of biology*, 44. Durham: Duke University Press, 2016.

fundamentally entangled with the politics of race and nation."[87] That is to say, a study of monogamy *is* a study of race and nation. Further, Willey's analysis demonstrates that debates surrounding monogamy (and, of course, non-monogamy) are connected to and "prefigured" by scientific knowledge.[88] In particular, late 19th and early 20th century "sexual science" played a significant role in constructing monogamy as biologically natural and desirable, but also configuring monogamy as the product of Whiteness and civility.[89] Conversely, the practice of non-monogamy was the marker of, as Lord Penzance argued, "infidel nations". In both cases, marriage was understood to be the foundation of a functioning state.[90]

The West's reliance on the public/private myth continues to frame intimacy as a prepolitical or apolitical facet of human life even as the state relies on intimate life for its reproduction. The use of this "heuristic", as Jacqueline Stevens points out, enables political scientists to affirm social contract theories while eliding the actual processes of political membership.[91] For Stevens, political membership is determined through kinship and Canada is no exception. In 1967, Justice Minister Pierre Eliot Trudeau famously declared that "the state has no place in the bedrooms of the nation." He was referring to the extensive *Criminal Code* revisions undertaken via an Omnibus Bill that removed the prohibition on homosexuality.[92] While the revisions did not actually decriminalize homosexuality (and in fact reinforced marginalization for many queer people),[93] the rest of his statement – a more contemporary iteration of Lord Penzance's decree – often goes ignored. He finished his remarks by saying that

[87] Ibid., 26.
[88] Ibid., 27.
[89] Ibid.
[90] Stevens, *Reproducing the State*.
[91] Willey, *Monogamy's Nature*, 51.
[92] "There's no place for the state in the bedrooms of the nation." *CBC Archives*. https://www.cbc.ca/player/play/1811727781
[93] Suzanne Lenon. "'Why is our love an issue?': same-sex marriage and the racial politics of the ordinary." *Social Identities* 17, no. 3 (2011): 351-372.

what happens in private between consenting adults does not concern the state, but "when it becomes public that's a different matter."[94] Trudeau still employed the public/private divide but he also highlighted the state's interest in regulating intimate life. His statement made clear that private life is only private when it aligns with broader social norms. Trudeau's reproduction of liberalism's conceit presents two conundrums: first, intimate life is always private *and* public (since the public/private divide is itself a falsehood) and second, who decides when intimacy is public? The answer to the latter is, of course, the state. The criminalization of certain forms of intimacy – like sodomy or polygyny – are the state's decree that some sex is always public sex.

The state's investment in sex and sexuality is so pervasive that it sometimes seems "unremarkable". As Jyoti Puri explains, "perhaps the spark of sexual desire set off deep within one's core reinforces the belief that sexuality is personal, private."[95] However, the state is involved in the production, reproduction, and regulation of sex and sexuality in determinations of gender and sex markers on government issued identification, defining who and how many people can marry, distinguishing marriage from other forms of intimacy like adult interdependent relationships, and making determinations of parentage. One of the primary ways the state regulates intimate relationships is through marriage (or marriage-like) relationships. Indeed, in a CBC interview, Trudeau senior described the importance of marriage relationships in Canada and his resistance to no-fault divorce:

> A marriage contract, a marriage relationship, is not just a private contract that any person can break. It has to do with public order and we don't believe in divorce by pure consent because we feel this would be the end of marriage…[96]

---

[94] "There's no place for the state in the bedrooms of the nation." *CBC Archives*. https://www.cbc.ca/player/play/1811727781

[95] Jyoti Puri. "Sexuality, state, and nation." In *Introducing the New Sexuality Studies*, edited by Nancy L. Fischer and Steven Seidman, 477. London: Routledge, 2016.

[96] Donald Brittain, dir. *The Champions, Part 2: Trappings of Power* (1978; Canadian Broadcasting Corporation, National Film Board of Canada). Film.

The regulation of marriage enables states to determine the rights, status, and obligations within the marriage relationship and between the state and the marriage relationship. Marriage can determine citizenship, voting, property, and inheritance rights as well as confer social standing and legitimacy. And yet, feminist scholarship has long articulated critiques of marriage relationships and how the primacy of the "conjugal couple" (explored in greater detail in section 2.3) have disproportionately negative impacts on women than men.

As Stevens notes, feminists have articulated a "range of proposals for alternative laws and practices" governing kinship, given the ways in which Western kinship systems "have failed to promote the flourishing of family members and instead tended toward their harm and even death…"[97] Some of these proposals include prioritizing the mother-child relationship and abolishing marriage as a "state-sanctioned contract". This was Martha Fineman's proposal in *The Neutered Mother* (1995), wherein she asserts that the mother-child relationship would become the primary family unit "entitled to special preferred treatment by the state."[98] Instead of legislating sexual relationships, Fineman proposes that the state would intervene only in the relationships between the mother (who does not need to be a woman) and her dependent child.[99] She writes:

> Single mothers and their children and indeed all "extended" families transcending generations would not be "deviant" and forgotten or chastised forms that they are considered to be today because they do not include a male head of household. Family and sexuality would not be confluent; rather, the mother-child formation would be the "natural" or core family unity— it would be the base entity around which social policy and legal rules are fashioned.[100]

---

[97] Jacqueline Stevens. "Abolishing. Marriage." *States Without Nations: Citizenship for Mortals*, 175. New York. Columbia University Press, 2010.
[98] Martha Fineman. *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, 146-147. London: Routledge, 1995.
[99] Ibid., 5.
[100] Ibid.

Though Fineman suggests that the "mother" is not subject to a particular sex or gender identity, Stevens points out that the terminology is exclusionary. Moreover, Fineman's framework is not attentive to the ways in which paternity and maternity are *not* equivalent experiences.[101] More recent writing suggests moving away from the biological family entirely, to recognizing relationships of interdependency and care.[102] For example, the Law Commission of Canada's 2001 report, *Beyond Conjugality*, notes that intimate relationships of all kinds are significant sites of emotional, physical, and economic wellbeing.[103] Queer theorists also assert the necessity of moving beyond marriage and biological conceptions of relatedness to create kinship systems based on expansive emotional ties. As Michael Warner posits, "marriage is the perfect issue for this dequeering agenda because it privatizes our imagination of belonging."[104] Similarly, Judith Butler argues that queer kinship is a "'break-down" of traditional kinship" that decentres biology and compulsory sexuality *and* creates a "domain" for sexual expression that is untethered from kinship.[105] The latter separates sexuality from conjugality so that kinship becomes a community practice that is "irreducible to family."[106]

Drawing on Jasbir Puar's conceptualization of homonationalism, Scott Lauria Morgensen describes the ascendency of queer politics in the United States as a form of "settler sexuality."[107] He argues that "settler homonationalism" describes the way in which colonialism is "a condition of the formation of modern queer subjects, cultures, and politics…".[108] This produces a "settler

[101] Stevens, *States Without Nations*, 177.
[102] Chatzidakis et. al., *The care manifesto*.
[103] Law Commission of Canada. *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships*, 2001.
[104] Michael Warner. *The Trouble with Normal*, 139. New York: The Free Press, 1999.
[105] Judith Butler. *Undoing Gender*, 127. New York: Routledge, 2004.
[106] Ibid.
[107] Scott Morgensen. "Settler homonationalism: Theorizing settler colonialism within queer modernities." *GLQ* 16, no. 1-2 (2010): 105-131.
[108] Ibid., 106.

sexuality" wherein "white national heteronormativity" governs "Indigenous sexuality and gender" through settler colonialism's "sexual modernity."[109] Even though settler colonial constructions of sexuality and gender were developed for "Euro-ethnics," they worked to expunge other ways of knowing such that settler colonialism has n ow "conditioned the formation of modern sexuality" even in queer contexts.[110]

The state's regulation of marriage is a way to regulate sexuality and the future of the nation.[111] Absent the ability to produce children, Stevens suggests that laws governing marriage and parentage are a way to make men into fathers. Because of their inability to bear children, men "compensate by presiding over entire reproductive units" which are transformed into political societies through law.[112] Further, kinship rules – flowing from marriage – reflect "men's desire to control by law intergenerational attachments available at birth only to mothers."[113] For Stevens, this is the only way through which men can "secure intergenerationality." The transmissibility of intergenerationality through "nationality, ethnicity, caste, clan, and… race" are demonstrations of men's mortality and the way in which "men assure themselves through law the feeling of security they feel is denied by anatomy."[114] Further, nation-states that rely on the law to create relationships between men and children, where there is no genetic connection, is social fiction that represents men's "fantasies" about having children as a way to "overcome their finite life spans."[115] Stevens' arguments extend her analysis in *Reproducing the State* wherein she argues that "intergenerational groups", like family, nation, ethnicity, and race, are not

[109] Ibid.
[110] Ibid.
[111] Stevens, *States Without Nations*, 3.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.

"natural" but created and cemented through kinship laws.[116] One of the ways that states make families is through the regulation of marriage and membership in political communities.

The possibility for Canadians to have legally recognized marriage was, until quite recently, reserved for heterosexual couples. I was in high school when equal marriage was being debated in the House of Commons and my parents, two women, were often queried by their friends (lesbian or otherwise) how quickly they would choose to marry if the legislation passed. They did not, and likely will not marry, but for many lesbians and gays, equal marriage was a significant personal and political achievement. In her study of Proposition 8, Alexa DeGagne found that public debate was polarized between social conservatives and mainstream lesbian, gay, and bisexual ("LGB") activists.[117] The former argued that marriage was a "sacred, traditional institution" for men and women and the (American) state was responsible for ensuring the heterosexual exclusivity of the institution of marriage.[118] The latter, drawing on social conservatives' articulation of "moral, normal and responsible" citizens, argued that homosexual citizens were "normal and equal" to their heterosexual peers, and equal marriage was the final frontier for LGB equal citizenship.[119] To refuse equal marriage would be the state's refusal of LGB equality and justice.[120]

In Canada, similar debates surfaced between conservatives and progressives. Critics articulated concerns over "threats to the institution of heterosexual marriage", particularly disturbing since they viewed marriage as a "stabilizing force in society".[121] Moreover,

---

[116] Stevens, *Reproducing the State.*
[117] Alexa DeGagne. "Investigating Citizenship, Sexuality and the Same-Sex Marriage fight in California's Proposition 8," (PhD thes., University of Alberta, 2015): 5.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Mary C. Hurley. "Bill C-38: The Civil Marriage Act." Legislative Summary, Parliamentary Information and Research Service.

conservatives raised issues of religious freedom and expression citing the legislation's failure to "adequately protect clergy and other public officials, such as civil marriage commissioners, who do not wish to recognize or officiate at same-sex marriages."[122] Finally, those opposed to equal marriage also spoke about the harms to children who would be negatively impacted by having parents of the same gender.[123] Thus, the debate is largely skewed between lesbian and gay rights organizations and activists who viewed equal marriage as a long-overdue recognition of equality and social conservatives who feared that equal marriage would bring about social degradation. Notably, both groups relied on the conjugal couple and nuclear family to advance their claims. This reflects DeGagne's findings that social conservatives and mainstream lesbian and gay activists articulate similar "beliefs about sexuality, the ideal citizen, [and] the role of the state…".[124] Mainly, that both groups articulate a vision of equality that continues to exclude those who do not conform to "normalized sexualities and family forms."[125]

Margaret Denike suggests that conservatives' "homophobic outbursts" put mainstream LGB advocates in the "ironic circumstance" of making monogamous marriage the focus of LGB activism.[126] Conveniently, this also allowed the Canadian state to expand sexual citizenship to include not just the heteronormative citizen but now the idealized *homonormative* citizen. The homonormative citizen – embodied by mainstream LGB activism and discourse – is *not* the "queer citizen". The term queer is used as both a sexual identity and a descriptor for certain types of activism. Drawing on DeGagne's formulation of queer critique, I suggest that debates surrounding the expansion of rights for LGB citizens – like the expansion of legal parentage – in

https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/381LS502E#:~:text=Bill%20C%2D38%20defines%20civil,11%20May%20through%2014%20June.

[122] Ibid.

[123] Ibid.

[124] DeGagne, *Investigating Citizenship*, 6.

[125] DeGagne, *Investigating Citizenship*, 6.

[126] Margaret Denike. "The Racialization of White Man's Polygamy." *Hypatia* 25, no. 4 (2010): 852-3.

Canada is mostly an expression of mainstream LGB activism and not queer activism. This dissertation similarly challenges the homonormative framework of mainstream LGB activism by employing a queer critique. In this context, DeGagne describes queer as:

> political projects that challenge, complicate and dismantle intersecting and normative categories, hierarchies and exclusions that are manifest through sexuality, gender, race, ability and income and/or occupation. [127]

Queer theory and activism was sparked by the HIV/AIDS crisis but has been heavily influenced by intersecting critical race, feminist, sexual liberation, Indigenous, and critical disability movements.[128] Queer theorists have engaged with intersectionality – a theoretical and methodological framework developed Kimberlé Crenshaw – to demonstrate that people's experiences of gender- and sexuality-based oppression are co-constructed by race, gender, class, and ability. Thus, queer and critical race theories provide the conceptual tools to understand how the expansion of legal parentage for lesbian and gay families and polyamorous families continues to reinforce a kinship system that privileges or excludes people based on their sexuality, gender, race, class, and family form.[129]

Specifically, the concept of heteronormativity is useful for describing how sexual and gender identities are governed by the idealization of heterosexuality, monogamy, and binary sex and gender categories.[130] The concept was first introduced by Michael Warner and Stephen Seidman in 1991 to describe the governance of queer lives through "enforced normativity".[131] The term emerged in conversation with other theorists, like Michele Foucault, Gayle Rubin,

---

[127] DeGagne, *Investigating Citizenship*, 6-7.
[128] Sara Ahmed. *Queer Phenomenology*. Durham: Duke University Press, 2006; Robert McRuer. *Crip theory: Cultural signs of queerness and disability*. New York: New York University Press, 2006; and Sherene Razack, Sunera Thobani, and Malinda Smith, eds. *States of race: Critical race feminism for the 21st century*. Between the Lines, 2010.
[129] DeGagne, *Investigating Citizenship*, 8.
[130] Morgensen, *Theorising Gender*.
[131] Michael Warner, ed. *Fear of a Queer Planet: Queer Politics and Social Theory.* Minneapolis: University of Minnesota Press, 1991.

Adrienne Rich, and Judith Butler, whose work examined the socio-political significance of sexuality (in particular, as a site of governance), compulsory heterosexuality, the heterosexual sex/gender system, and presumptive heterosexuality, respectively.[132] As Joseph Marchia and Jamie Sommer note, heteronormativity's intellectual "lineage" demonstrates that sexuality must be disentangled from gender but also that sexuality and gender cannot be isolated from one another. As Butler, Rich, and Rubin's work shows, sexuality and gender are mutually constitutive.[133] Extending their analyses, Seidman presents a framework for heteronormativity in Warner's foundational text *Fear of a Queer Planet: Queer Politics and Social Theory*. He argues that heterosexuality "is built on the exclusion, repression and repudiation'' of homosexuality such that heterosexuality and homosexuality "form an interdependent, hierarchical relation of significance."[134] This hierarchy is what produces homosexuality as "the subordinated other" through its relationship to heterosexuality.[135] He details this relationship by introducing the concept of heteronormativity:

> The social productivity of identity is purchased at the price of a logic of hierarchy, normalization, and exclusion. Furthermore, gay identity constructions reinforce the dominant hetero/homo sexual code with its *heteronormativity*. If homosexuality and heterosexuality are a coupling in which each presupposes the other, each being present in the invocation of the other, and in which this coupling assumes hierarchical forms, then the epistemic and political project of identifying a gay subject reinforces and reproduces this hierarchical figure.[136]

[132] Judith Butler. *Gender Trouble*. London: Routledge, 1990; Rich, Adrienne. "Compulsory heterosexuality and lesbian existence." *Signs* 5, no. 4 (1980): 631–660; Rubin, Gayle. "Thinking sex: Notes for a radical theory of the politics of sexuality." In *Pleasure and Danger: Exploring Female Sexuality*, edited by Carole S. Vance. London: Routledge, 1984.
[133] Joseph Marchia and Jamie M. Sommer. "(Re)Defining Heteronormativity." *Sexualities* 22, no. 3 (March 2019): 267–95.
[134] Stephen Seidman. "Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes." In *Fear of a Queer Planet: Queer Politics and Social Theory,* 130. Edited by Michael Warner. Minneapolis: University of Minnesota Press, 1991.
[135] Marchia and Sommer, *(Re)defining Heteronormativity*, 274.
[136] Seidman, *Identity and Politics*, 130. Emphasis added.

Seidman clearly articulates that heteronormativity is the process through which the hierarchy of sexuality is produced and affirmed. Subsequently, heterosexuality becomes normal, natural, and desirable and homosexuality is the "other" against which heterosexuality is affirmed. Put differently, heterosexuality *requires* homosexuality to know itself. As I argue later in this chapter, and throughout my dissertation, a similar process is at play with the expansion of legal parentage. "Good" multi-parent poly-conjugal families are knowable and recognizable *because* of the deviant (polygynous) "other". Thus, Canada's sexual citizenship is premised on a heteronormative script that idealizes heterosexuality, and with that, its attendant manifestations like monogamous marriage, compulsory reproduction, private property, and sex/gender/sexuality hierarchies. In the following section, I extend my analysis of marriage and the state to examine the connections between family, race, and property.

2.2.2 Family, race, and property

Any analysis of the governance of intimate life in Canada that does not centre race would lack analytical clarity and contribute to the reproduction of settler colonial projects of sexuality, race, gender, and class. And yet, the concept of race has been grossly underrepresented in political science.[137] Rupert Taylor notes that when race has attracted attention, it has largely been understood as an independent variable used to explain political behaviour and not as a lens with which to view the state's participation in the production of race and race-based hierarchies. Similarly, Thompson notes that despite the increasing relevance of race in Canada, Canadian politics has been neglected the relationships between race and politics.[138] She argues that the dissonance between the prevalence of race in our society and what is said in political science

[137] Thompson, *Is race political?*; Taylor, Rupert. "Political science encounters 'race' and 'ethnicity'." *Ethnic and Racial Studies* 19, no. 4 (1996): 884-895.
[138] Thompson, *Is race political?,* 525.

scholarship begs the question "is race political?"[139] For Thompson, despite the near-silence on the topic in both Canadian and American political science, race is "undeniably political both in content and consequences."[140] She concludes that the assumption that racism does not exist is the result of the reproduction of myths surrounding race and ethnicity, methodological barriers, and "colour blindness" inherent in Canadian political science.[141]

Complicating the already near silence, Canada's "peacemaker myth" props up an idealized narrative of Canada that glosses over the atrocities of colonialism and genocide while also failing to account for the ways in which contemporary political life is structured in racialized ways. This peacemaker myth is part of the "common-sense knowledge" that cuts across Canadian society and is present in conversations about multiculturalism and diversity in Canada.[142] Thus, while Canada boasts a (thin) veneer of acceptance and diversity, fears about how families are changing and what that means for contemporary Canadian society run deep and are intertwined with race thinking.

As Denike argues, the history of marriage in the United States and Canada is "mired in nationalist and racist sentiment."[143] In fact, analyses of marriage history in these two countries reveals that intimate relationships were the site of debates surrounding "the origins, allegiances, and distinctions of blood" which worked to "naturalize racial difference and racial hierarchy."[144] The "tireless struggle" to regulate legally recognized relationships demonstrate state-sanctioned efforts to "legitimize, institutionalize, and naturalize a Christian sexual morality of (white)

[139] Ibid., 525-9.
[140] Ibid., 526.
[141] Ibid., 534-8.
[142] Paulette Regan. *Unsettling the settler within: Indian residential schools, truth telling, and reconciliation in Canada*. Vancouver: University of British Columbia Press, 2010.
[143] Denike, *The Racialization*, 853.
[144] Ibid.

heterosexual monogamy" and to "delegitimatize" and erase other forms of intimacy.[145] This commitment was especially pronounced when "other" forms of intimate arrangements were connected to religious practice (however marginally practiced).[146] This included plural marriage within immigrant and Indigenous communities, "spiritual" marriage in some fundamentalist Mormon communities, and polyamorous intimacy.[147] In Sarah Barringer Gordon's study of the United States' anti-polygyny efforts, she argues that the "campaign against polygamy" was responsible for a second "reconstruction" of the West wherein the United States forcibly redesigned marriage in the 19th century.[148] In fact, anti-polygyny sentiment was so prevalent in the United States that polygyny was "ridiculed" in newspapers, legislative debates, and public forums. The power of anti-polygyny thinking enabled the federal government to criminalize polygamy (and those practicing it), deny them voting rights, apprehend children, and seize church property.[149]

In Canada, and particularly in the West, marriage anxiety was pronounced since marriage between European settlers and Indigenous women had been occurring for over two hundred years.[150] Post-1970, there were persistent efforts to enact legislation that would "prohibit and police" marriage between settlers and Indigenous peoples.[151] The federal government's goal was to naturalize and normalize the monogamous heterosexual marriage and ensure its centrality as the "economic and social building block of the west."[152] The purpose of the white, heterosexual, monogamous (nuclear) family was to grow crops *and* grow the future "race" of Canadians to

---

[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Sarah Gordon Barringer. *Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 26. Chapel Hill: University of North Carolina Press, 2002.
[149] Ibid.
[150] Carter, *The Importance of Being Monogamous*, 8.
[151] Ibid.
[152] Ibid.

populate the west. The physical and ideological "health and wealth" of Canada's West (and by extension, the entire country) was understood to rest on the "white life for two" (the life-long, Christian, heterosexual, monogamous marriage).[153]

However, among the Siksika, Piikani, Kainai, Dakota, îyârhe Nakodabi, Nehiyawak, Nakoda Oyadebi, and Tsuut'ina peoples – commonly referred to as "Plains" people – there were a variety of permissible marriage-like relationships. These included laws that permitted divorce and remarriage and, unlike the Common Law tradition, there was no concept of illegitimate children.[154] However, these customs were constructed, by the Canadian government, as institutions predicated on the "exploitation and subordination of women." Polygamy was judged more harshly for its tendency to leave wives "wretched and jealous" because they were "hoarded by a male elite."[155] Through a combination of legislation, criminalization, and social attitudes, Indigenous peoples were "compelled" to practice the model of monogamous marriage or face the consequences of incarceration or social marginalization. For example, women who had sex before – or outside of marriage – were considered "utterly destitute of moral principle."[156] The Canadian state's commitment to enforcing Christian monogamy was so successful in part because of the institutionalization of settler colonialism, through state apparatuses like the Department of Indian Affairs.[157] Importantly, non-monogamous intimacy was not eradicated. Indigenous peoples continued to live according to their laws and in some circumstances, Canadian courts were open to recognizing Indigenous marriage law (but not divorce).[158]

---

[153] Carter, *The Importance of Being Monogamous*, 8.
[154] Ibid.
[155] Ibid., 10.
[156] Ibid., citing Terry L. Chapman. "Women, Sex, and Marriage in Western Canada, 1890-1920." *Alberta History* 33, no. 4 (1985): 2.
[157] Carter, *The Importance of Being Monogamous*, 10.
[158] Ibid., 10.

Recognizing marriage still enabled the Canadian state to enforce the private nuclear family in cases where its decision would otherwise lead to unmarried women.[159]

Denike asserts that "effectiveness" of anti-polygyny "campaign[s]" is evident in Canada today. The fact that most Canadians "can continue to talk today as if there was only ever one definition of marriage, namely, "the voluntary union for life of one man and one woman,"" signifies the power of state-led efforts to marginalize, stigmatize, and criminalize non-monogamy.[160] The governance of intimate life along lines of conjugality rendered "non-monogamous intimate relations outside of the state's basic religious sexual morality" and thus an anathema to its "racial destiny and national identity."[161] Non-monogamy was evidence of both moral impurity *and* racial degradation such that it became, as Denike argues, "the next destination on the often traveled slippery slope of moral decrepitude" that starts with "letting gays marry."[162] This reflects Meg Luxton's assertion that debates about the nature of intimacy often play out on, or near, changes in family life. According to Luxton, the biggest change affecting families in the last 50 years in Canada has been the "gradual uncoupling of socially acceptable sexuality, marriage, parenting and cohabitation."[163] And while families have never embodied the conservative myth of the nuclear ideal,[164] the increasing visibility of 'diverse' family forms has pushed Canadians to rethink what families should or should not look like, what responsibilities families have to themselves and to their communities, and what responsibilities governments – at all levels – have to families. These changes challenge (or ought to challenge) governments, legislators, and scholars, to re-think hegemonic assumptions about 'the family.'

---

[159] Ibid., see also *Connolly v Woolrich and Johnson et al. [1867]*.
[160] Denike, *The Racialization*, 853-4.
[161] Ibid.
[162] Ibid.
[163] Bell, *Pleasure and Danger*, 7.
[164] Stephanie Coontz. *Marriage, a history: How love conquered marriage*. New York: Penguin, 2006. and Harder, *After the Nuclear Age*.

This re-thinking is mitigated, however, by Stephanie Coontz's assertion that in austere times, people's investment in both the familial ideal and in their own families also comes from a "remarkable lack of alternatives" – universal childcare or living wages, for example – in meeting our care needs.[165] So, while there is considerable diversity in family form and collective living arrangements, families are still expected to provide when and where the state cannot, or does not. Although families have always, and will always be, diverse, the social, political, and economic need for families has not changed.

Currently, Canada is experiencing both an expansion in the range of family forms and increasingly, provinces are also expanding the recognition of intimate arrangements. Canada's legalization of equal marriage in 2004 is one example, as well as the Canadian state's move towards "ascribing status to relationships."[166] That is, federal and provincial governments "assign benefits and obligations to specific types of relationships" whether or not parties to the relationship "agreed to these responsibilities or desire public acknowledgment of their relationship status."[167] Lois Harder notes that critical engagements with changes to relationship recognition have largely stayed within legal scholarship, with a focus on the "evolving legal regimes surrounding recognition of various relationship types" and the disjuncture between what intimate arrangements look like in practice and the legal structures that support (or not) these arrangements.[168] That said, political and social theorists have paid special attention to politicising intimacy with respect to equal marriage and non/monogamy.[169] This literature draws readers' attention to a broad understanding of 'family diversity,' including single and married

[165] Ibid.
[166] Lois Harder. "Rights of love: The state and intimate relationships in Canada and the United States." *Social Politics* 14, no. 2 (2007), 155-181.
[167] Ibid., 156.
[168] Ibid.
[169] Ibid.

households; single and multiple (two or more) parent families; same-gender relationships; and non-conjugal relationships to highlight the "myriad ways of organizing one's intimate life and commitments to loved ones – whether or not the state, and society generally, recognize the legitimacy of these arrangements."[170] As Harder does, I draw on these contributions to explore the implications of changing norms in the recognition of intimate life in Canada. In so doing, I wish to examine the presumption that expanded legal recognition of intimate arrangements is automatically 'good' and the extent to which recent legislative changes affirm or undermine the nuclear family. To the first point, Harder suggests that

> the legal recognition of a broad array of relationships indicates a regulative framework that is more sensitive to individual autonomy... The story becomes more complicated, however, when we consider the work that intimate partnerships are expected to perform within the broader regime of governance in which they are situated.[171]

Here, Harder points out that "neoliberal freedom slides from paradox to incoherence."[172] Canada is willing and able to recognize and affirm the rights and responsibilities of heterosexual and lesbian and gay marriage, which on the surface, appears to be relatively liberal, especially when compared to countries that only recognize heterosexual marriage. However, this only affords freedom for those who "embrace the status that the state imposes."[173] To nuance this further, a diminishing social safety net means that people must increasingly rely on loved ones to care for them, in which case the state's expansion of relationship recognition may be informed by logics of privatization and retrenchment, rather than the expansion of liberal equality. As such, Harder posits that the recognition of diverse intimate arrangements may be read as a "progressive cover for a more nefarious effort to broaden private obligations of care."[174] Harder's examination

[170] Ibid., 156-7.
[171] Ibid., 156.
[172] Ibid., 157.
[173] Ibid., 158.
[174] Ibid.

speaks to a recurring theme in the literature addressing the governance of intimate life: developments in policy and law must be examined critically and closely for what they say, and do not say, about relationship recognition. As Harder demonstrates above, it can be challenging to identify the logics behind the 'smoke and mirrors' of the state. However, it is necessary to do so because:

> the capacity for an adult to choose if, with whom, and how one wants to share one's personal life is fundamental to autonomy, full personhood, and liberal democratic citizenship. Such a decision would appear to be profoundly and necessarily private, yet it is an act of much interest to the state.[175]

Integral to my examination of how, and why, intimacy is of interest to the state are approaches to theorizing the state that focus on gender, race, class, and sexuality. These grounding concepts provide a powerful case for expanding examinations of the state beyond institutional formulations and, instead, making note of how the state categorizes, recognizes, and produces identities and creates systems of hierarchy, exclusion, and idealized personhood as a result. The state privileges some while excluding others, and as Colin Hay argues, a "political analysis that restricts its field of vision to the formally (and legally) codified as such is… complicit in the exclusion which such a formal politics sustains."[176] That is to say, theorizing the state without considering intersections like gender, race, class, and sexuality fails to acknowledge the ways in which the state brokers power and produces hierarchies and subjugation based on intersections of identity.

In particular, I posit that the state is interested in intimate life because the scene of domesticity is key to the production and reproduction of particular ideological values and citizenship, and it allows the state both stenographic and pornographic access to documenting

[175] Ibid., 155.
[176] Colin Hay. *Political analysis: a critical introduction*, 71. London: Palgrave Macmillan, 2002.

and regulating choices around sexuality, parentage, and family.[177] Providing status to the heteronormative procreative family model allows for the state to reproduce heterosexuality as privileged and 'normal', reinforce economic units that support the privatization of wealth and property accumulation, and "diversify whiteness" by redefining the boundaries of the racialized other. By extending recognition to the homonormative procreative family model, the state actively participates in the production of discourses of normality and deviance to ensure that the hetero- or homo-normative procreative family has status and remains desirable. Families that do not mirror this model must work to emulate it or risk falling into precarity, insecurity, or non-acknowledgement. The inclusion and exclusion of different family forms in legislation mean that the state renders certain intimate relations possible and valued while others are improbable or impossible, and devalued – judgments that significantly impact the life prospects and wellbeing of citizens, and the collective imagination of what is possible for our intimate arrangements.

2.3 Conjugality

In 2001, the Law Commission of Canada ("LCC") published a report arguing that while Canadians have a variety of close personal relationships, the "diversity" of which is a "significant feature of our society", many of those relationship structures are not legally recognized. The report encouraged governments to rethink the governance and regulation of intimate relationships to include non-conjugal relationships.[178] But what *is* conjugality and why is it privileged? While the term "conjugal" may bring forth descriptions of "conjugal visits" or the "conjugal bed", in *M v. H*, the Supreme Court of Canada ("SCC") decided that conjugality is not solely about sexual intimacy. The SCC adopted a list of factors by drawing on an Ontario Court of Appeal decision in *Moldowich v. Penttinen* which include: shared shelter; intimate

[177] Stevens, *Reproducing the State*.
[178] Law Commission of Canada. *Beyond Conjugality*, ix.

and/or sexual behaviour (like expressions of commitment and/or feelings towards one another); services (like sharing household duties); social activities (how the couple conducts themselves within their families and communities); economic support (like owning property together or share financial responsibilities); having, or thinking about having, children; and how the couple is perceived socially.[179] Notably, conjugality usually implicitly and explicitly defined around the conjugal *couple*.[180]

M. v. H. highlighted that the recognition and regulation of non-conjugal relationships is another site of policy debate in Canada; while law is beginning to expand its definition of marriage, the state continues to focus on conjugality as its baseline for understanding adult relationships, a criteria that fails to accord full legal recognition to the diversity of kinship arrangements that exist.[181] As Nicholas Bala notes, during Canadian debates surrounding legal recognition of equal marriage, another proposal surfaced: changing laws so that conjugal relationships were not privileged over non-conjugal relationships.[182] The LCC's report argued that conjugality was a "poor means of isolating those relationships that are likely to give rise to household economies"[183] and proposed a wholesale review of all legal and policy frameworks that were based on marital or common-law status. The purpose of doing so would be to determine whether the rights and obligations attached to marriage-like relationships should be attached to other "close personal adult relationships" that "share the functional characteristics of emotional and financial interdependence,"[184] like two siblings who live together or friends who co-parent (as in the case of Elaan Bahkt and his "co-mammas," discussed further in Chapter

[179] *M v. H* at 59.
[180] Law Commission of Canada, *Beyond Conjugality*, ix.
[181] Ibid.
[182] Nicholas Bala. "Controversy over couples in Canada: the evolution of marriage and other adult interdependent relationships." *Queen's Law Journal* 29 (2003): 97.
[183] Law Commission of Canada, *Beyond Conjugality*, 81.
[184] Ibid.

5).[185] Although Bala is more reserved in his theorizing about conjugality than the Law Commission's report, he notes that one of the challenges of thinking about conjugality is that the term is not clearly defined and is not actually exclusively defined in sexual terms (although in lay terms conjugal is often understood as sexual); it is established by a combination of sharing of economic, social, and emotional lives. In M *v.* H, the Supreme Court said that the generally accepted characteristics of a "conjugal" relationship include some combination of "shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple."[186] And so, the ways in which the presence/absence of conjugality is taken up, implicitly or explicitly, in legislation and social policy plays a large role in determining the types of relationships that legislative changes make possible or intelligible. The study of policy then helps to uncover modes of governance and approaches to social regulation that, among other things, contribute to the social construction of identity and shape peoples' experiences of citizenship and belonging.

The LCC's report presents a set of suggestions for re-thinking when, and under what conditions, intimate relationships should matter in the law.[187] Scholars have also suggested other ways of theorizing how the law ought to think about intimate arrangements. For example, Martha Fineman posits that the law should focus its authority on relationships of dependency: for example, the dependence of a minor child on a parent and the dependence of a caregiver on others to sustain them in undertaking care work. Fineman argues that the caregiving/caretaking dynamic should be the law's focus for the protection and scrutiny of intimate arrangements.[188]

---

[185] "Raising Elaan: Profoundly disabled boy's 'co-mammas' make legal history." *CBC News*. February 21, 2017. www.cbc.ca/news/raising-elaan.
[186] *M. v. H.* at 59, citing *Molodowich v. Penttinen*, cited in Bala, *Controversy*, 104.
[187] Harder, *After the Nuclear Age*, 15.
[188] Martha A. Fineman. "Cracking the foundational myths: Independence, autonomy, and self-sufficiency." *Journal of Gender, Social Policy, and Law* 8 (2000): 18-20.

Additionally, Nancy Polikoff proposes three principles that recognize and encompass all familial forms. These are: first, placing the needs of children and their caretakers above the claims of able-bodied adult spouses/partners; second, supporting the needs of children in all family constellations; and third, recognizing adult interdependency.[189] However, as Harder argues, wherever the emphasis lies – on conjugality, dependency, two or more adults, or on adults and children – the necessity of families to our personal lives, communities, and the state, behooves us to continue to explore non-nuclear forms of intimate life and how we might reorganize political and social life to affirm these arrangements.[190]

Observing that feminist critiques of marriage had "become exhausted," Heather Brook turned to the concept of "conjugality" as a way in which to investigate "all… forms of relationship and their regulation."[191] She explores "why and how conjugal relationships are regulated through law and government," paying particular attention to how the forms of regulation shift over time, and are contextually specific depending on "where, when, and whom its subjects are."[192] I follow Brook's aim in that, instead of "fixing the continent of conjugality," I "[tour] the territory" to consider how conjugality has been understood in feminist theorizing and where it appears as a form of governance.[193] Brook considers legal discourse to play an important, albeit partial, role in governing conjugality and in illuminating this governance. Further, investigating conjugality opens possibilities for disruption (like Rambukkana's call for resistance) "social order" by its connection to areas like: "cultures of love and romance;

[189] Nancy D. Polikoff. "Law that values all families: Beyond (straight and gay) marriage." *Journal of the American Academy of Matrimonial Lawyers* 22, no. 1 (2009): 85-104.
[190] Harder, *After the Nuclear Age*, 15.
[191] Heather Brook. *Conjugality: Marriage and Marriage-like Relationships Before the Law*, 2-3. New York: Palgrave Macmillan, 2016.
[192] Ibid., 4.
[193] Ibid.

reproduction and child rearing; domestic and other sexual divisions of labor; and economic relations of wealth, welfare, and dependence."[194]

Shifting norms around marriage – namely that "marriage is not quite as compulsory as it once was – indicates that in countries like Canada, "conjugality is less prescriptive and more flexible" with "diverse provisions governing a whole range of intimate relationships"[195] Feminist and gender studies scholarship has long been concerned with theorizing marriage to demonstrate that it is not "simply private" but instead a "social relation emblematic of relationships between men and women more generally."[196] Indeed, Brook finds that feminist theory has never actually taken a "uniform approach to conjugality" – with some scholars defending marriage as a form of protection for women and others crediting marriage with exploitation.[197] That said, Brook posits three main sites of feminist engagements with marriage: first, work on legal reform that sets husbands and wives on more equal terrain; second, critiquing the privileged place of marriage as a "cultural artefact" (especially for its ability to prop-up masculine privilege); and third, critiques of institution's exclusivity on the basis of sexual orientation.[198]

In theorizing conjugality, Brook posits three dimensions worthy of consideration. First, that "marriage, in its various degrees and guises" ought to be understood as a "relation of government."[199] In this way, marriage is a:

---

[194] Ibid., 9.
[195] Ibid., 11.
[196] Ibid,
[197] Ibid., 12.
[198] Ibid., 13. For more on legal reform, see: Brake, Elizabeth. *Minimizing marriage: Marriage, morality, and the law*. Oxford: Oxford University Press, 2011; Brook, Heather. "Just married? Adversarial divorce and the conjugal body politic." *Feminism & Psychology* 14, no. 1 (2004): 81-99; and Chunn, Dorothy E., Susan Boyd, and Hester Lessard, eds. *Reaction and resistance: Feminism, law, and social change*. Vancouver: University of British Columbia Press, 2011.
[199] Brook, *Conjugality*, 23.

> socially constructed creature that is subject to… a kind of governmental husbandry, involving corralling and containment, as well as promotion and endorsement, always in the service of some vision of social (or even biopolitical) thrift.[200]

Here, the reference to marriage as a form of government pertains both to the "obviously political bodies" but also, to draw on Michel Foucault's work, the "conduct of conduct."[201] This point bears some expansion. Governing conduct includes, as mentioned, political institutions– like bureaucracies – but also to "less overt directives internalized by the populace" (which includes private life). Indeed, as Jane Lewis notes, "the married couple has been viewed as the *polis* in miniature."[202] Thus, one should not reduce marriage to *only* governance but viewing it as a site of governance is useful. Brook notes several benefits to examining marriage in this way. I focus on two: first, it highlights the "overtly political nature of conjugality."[203] Marriage is regulated through government acts, statutes, and policies and, as Nan Hunter highlights:

> [Western] [m]arriage is, after all, a complete creation of the law, secular or ecclesiastical. Like the derivative concept of illegitimacy, for example, and unlike parenthood, it did not and does not exist without the power of the state (or some comparable social authority) to establish, define, regulate, and restrict it. Beyond such social constructs, individuals may couple, but they do not "marry."[204]

In examining the governance of conjugality, it is important not to assume that "married subjects are… passively inscribed with governmental regulations." Governance does not exist "outside or above" its subjects; indeed, intimacy is constantly "produced, reiterated, and contested" by the very subjects it governs.[205] The second benefit to examining marriage as a site

---

[200] Ibid.
[201] Ibid., citing Mitchell Dean. *Governmentality: Power and Rule in Modern Society*, 2. Toronto: John Wiley & Sons, 1999.
[202] Ibid., citing Jane Lewis. *The End of Marriage? Individualism and Intimate Relationships*, 161. Cheltenham: Edward Elgar, 2001.
[203] Ibid., citing Ruthann Robson. "Compulsory Matrimony." In *Feminist and queer legal theory: intimate encounters, uncomfortable conversations*, edited by Martha Fineman, Jack E. Jackson, and Adam P. Romero, 328. London: Routledge, 2016.
[204] Nan Hunter. "Marriage, Law and Gender: A Feminist Inquiry." In *Sex Wars: Sexual Dissent and Political Culture*, edited by Lisa Duggan and Nan Hunter, 110. London: Routledge, 1995.
[205] Brook, *Conjugality*, 25.

of governance is for a focus on the governance of bodily conduct ("corporeality").[206] For example, in the governance of marriage, the body is subjected to "regulatory and heavily sexed inscriptions" in that marriage is the "scene" of "productive" and "proper" sexual relationships."[207] In this way, marriage can be understood as a place where proper and productive citizens are produced. However, the production of idealized citizenship necessarily depends on a very particular form of governance.

While many non-conjugal relationships are absent from social and legal recognition, poly-conjugal relationships are seemingly less intelligible to the law. I use the term poly-conjugal to refer to the diversity of plural conjugal relationships. These include various forms of non-monogamies that are still rooted in conjugality like polyamory, polygyny, polyandry, and group marriage. Scholars like Nathan Rambukanna and Christian Klesse also note that "cheating" is a form of non-monogamy, though it is contrasted with "ethical" forms of non-monogamy, like polyamory.[208] In fact, the LCC's report contains no references to polyamory (nor does it mention monogamy) and its only reference to polygamy is a footnote indicating that the report "does not address the issue…"[209] The absence of discussion on polyamory likely reflects the publication date. While polyamory is not a new practice, it was less visible in mainstream dialogue in 2001 than in 2021.[210]

Notably, there are connections between the LCC's report and queer theory. Queer theory has demonstrated that an exclusive focus on sex and sexuality is a limited way to conceive of

---

[206] Ibid.
[207] Ibid.
[208] Rambukkana, *Fraught Intimacies* and Christian Klesse. "Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance." *Sociological Research Online* 24, no. 4 (2018): 625-643.
[209] Ibid., 134.
[210] Cossman and Ryder explain this silence by suggesting that the report was "already controversial" and "on the cutting edge of the imaginable." Moreover, given that critics of same-sex marriage often made the "slippery slope" argument that polygamy was next to be legalized, the report's silence on the topic was pragmatic ("Beyond Beyond Conjugality." *Canadian Journal of Family Law* 30, no. 2 (2017): 227).

intimacy.[211] To that end, Lauren Berlant suggests that rethinking intimacy requires an acknowledgement that intimacy itself is produced by "very public and life-long, even multigenerational, desires for constructing "a life" and having a family…"[212] In part, she developed this analysis based on conversations with her students around feminist and queer pedagogy. She writes,

> I learned to think about these questions in the context of feminist/queer pedagogy; and how many times have I asked my own students to explain why, when there are so many people, only one plot counts as "life" (first comes love, then…)?[213]

To ensure that marginalized family formations do not become "unimaginable", Berlant calls for "transformative analyses" of structures that "enable hegemonic fantasies to thrive…"[214] The "hegemonic fantasies" to which Berlant refers are the heteronormative logics – wherein heterosexuality is the "standard for legitimate and expected social and sexual relations"[215] – that govern sexuality, sexual activities, and kinship possibilities. Though insidious, these logics are not merely ideology, but a set of beliefs embedded in the law's conception of what types of sexual and intimate relationships are desirable, normal, and possible.[216] Rambukkana suggests that another form of "hegemonic fantasy" is the "arbitrary categorical distinctions between sexual and non-sexual forms of intimacy."[217] The distinction between "sexuality and other intimacies obscures their continuity with each other" and props-up heteronormativity.[218] There

---

[211] Rambukkana, *Fraught Intimacies*, 12.
[212] Ibid.
[213] Ibid.
[214] Lauren Berlant. "Intimacy: A Special Issue." *Critical Inquiry* 24, no. 2 (1998): 286.
[215] Chrys Ingraham. "One is not born a bride: how weddings regulate heterosexuality." *Introducing the New Sexuality Studies*, edited by Fischer, Nancy L. and Steven Seidman, 496. London: Routledge, 2016.
[216] Jessica Penwell Barnett. "Polyamory and criminalization of plural conjugal unions in Canada: Competing narratives in the s. 293 reference." *Sexuality Research and Social Policy* 11, no. 1 (2014): 63-75; Pascoe, Cheri J. *Dude, you're a fag: Masculinity and sexuality in high school*. Berkeley: University of California Press, 2011; Mimi Schippers. *Beyond Monogamy Polyamory and the Future of Polyqueer Sexualities*. New York: New York University Press, 2018.
[217] Rambukkana, *Fraught intimacies*, 13.
[218] Ibid. Lauren Berlant and Michael Warner define heteronormativity as: "the sense of rightness – embedded in things and not just sex – is what we call heteronormativity. Heteronormativity is more than ideology, or prejudice, or

are additional dimensions of this hegemony: first, the assumption that only particular forms of intimate arrangements can be "articulated together to constitute coherent or desirable life structures."[219] Second, intimacies that do not fit into this narrow structure are "divided off as inconceivable or unstable."[220] Third, generally there is room for only one "intimate life narrative as right and true" (as Berlant says "first comes love, then"…). The implication of this dimension of hegemonic fantasies are that many people do not think remaining single or celibate are "viable life choices" and why many think same-sex, single-parent, or multiple-parent households are necessarily poor parenting arrangements and that a life without "true love" is not a life worth living.[221] Through this research, my dissertation participates in the project of "rethinking intimacy" to demonstrate that hegemonic fantasies of intimacy are not "compulsory"[222] though they are compelled. In the following section, I examine another dimension of intimacy – non-monogamy – that challenges and expands hegemonic narratives about sexual and emotional intimacy.

2.3.1 Polygyny in Canada

Canada is no "strange bedfellow" to non-monogamous kinship. The term "non-monogamy" may prompt Canadians to think of present-day Bountiful, British Columbia – a community of Fundamentalist Church of Jesus Christ of Latter-Day Saints observers – however, the history of polygamy and other forms of non-monogamous relationships pre-date confederation. Usually

phobia against gays and lesbians; it is produced in almost every aspect of the forms and arrangements of social life: nationality, the state, the law' commerce; medicine; and education; as well as in the conventions and affects of narrativity, romance, and other protected spaces of culture" ("Sex in public." *Critical inquiry* 24, no. 2 (1998): 554).
[219] Rambukkana, *Fraught intimacies*, 13.
[220] Ibid.
[221] Ibid., 13-14.
[222] Ibid., 14.

referenced as "polygamy", polygyny is the practice of one man having several wives. Another form of polygamy is polyandry, where in one wife has many husbands.[223]

Currently, there is no evidence in Canada of polyandry, but under international human rights law, there is a consensus that polygyny "violates women's right to be free from all forms of discrimination."[224] While there is a significant body of literature on the harms of polygyny to women and girls, there are significant critiques of states' condemnation of polygyny on the grounds of "harms to women" since women lack other forms of de facto equality like pay equity, freedom from violence, access to education, and affordable childcare (among other measures). A narrow and exclusive focus on the harms of polygyny to women ignores sources of women's oppression outside the family and that harms against women can be (and are) perpetrated in every type of conjugal relationship. Carissima Mathen argues that this lens "distorts the reality of gendered oppression within marriage" to make the case of "the feared and hated practice of polygamy."[225] As a result, "women's inequality is erased from juridical consciousness" in service of monogamy.[226]

For this dissertation, my interest in polygyny is two-fold. First, I am curious about the work that polygyny does to prop up the Canadian state's identity as an egalitarian nation with progressive sexual mores. Second, I am interested in the ways in which multi-parentage is conceived under polygyny. Why is multi-parentage in the context of polygyny a moral taboo, and *crime*, while legal parentage is being expanded in other contexts? In my analysis, I am attentive to the ways in which discussions of polygyny, including the cultures and people who

[223] Generally, when speaking about *polygyny*, the term polygamy is used. In this dissertation, I use the term polygyny unless directly quoting, for accuracy or historical reference, the use of "polygamy."
[224] Canada. "Polygyny and Canada's Obligations under International Human Rights Law." Department of Justice, 2006.
[225] Carissima Mathen. "Reflecting Culture: Polygamy and the Charter." *Supreme Court Law Review* 57 (2012): 360-361.
[226] Ibid.

practice it, are racialized and discussed through the discourse of harm. But, as Angela Campbell's work demonstrates, there are a multiplicity of ways in which members of polygynous communities experience their lives. The "assumption that all of polygamy's stories are reducible to one master-narrative" undermines the autonomy, independence, and diversity of participants' experiences. In her cross-cultural study of the lives of women and children in polygynous families, Campbell found that it was "extremely difficult" to find a "single, unqualified conclusion as to how women experience polygamy."[227] For example, her study revealed that some women experience emotional and financial hardship while others do not.[228] Thus, like any other relationship form, the way in which its participants experience their intimate arrangement largely depends on socio-cultural factors outside of the relationship itself. In Campbells work, she found that polygynous wives' experiences depended on the number of "co-wives" in her relationship, "cultural perceptions of polygamy," and her "role and responsibilities within her marriage and family."[229]

Taking Campbell's assertions seriously, this dissertation is attentive to the "complex and complicated, fraught and frustrating intimate spaces" [230] of polygyny to work against the scholarly and social tendency to conflate this intimate practice with harm, deviance, and barbarism. While there is a need to critique structural inequalities inherent in a system that is almost exclusively polygynous, the attention to structural inequity must not be approached through "a gross caricature" of polygyny that erases "subtleties" and "complex power dynamics."[231] This caricature relies on the persistent belief that polygyny is inherently and

[227] Angela Campbell. "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis" in *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports*, Report #1, i–63. Ottawa: Status of Women, 2005.
[228] Ibid.
[229] Ibid.
[230] Affidavit #1 of Angela Campbell, June 4, 2010, at 48.
[231] Ibid.

exclusively "patriarchal, exploitative, sex-focused, backward, regressive, and cult-like."[232] Campbell asserts that there is also a need to examine the "multiple conjugalities" in spaces like Bountiful, British Columbia.[233] For example, Campbell's own research in Bountiful found that women have, and express, sexual autonomy which challenges the assumption that they are forced into polygynous marriages. Additionally, Bountiful women (like women in other religious communities) have a range of opinions, experiences, and values regarding marriage and intimacy. In some of their relationships, the formality of spiritual marriage was very present while in others it seemed less important. Contrary to how polygyny is represented, overall, in the *Polygamy Reference*, Campbell's research reveals spaces wherein women in Bountiful have "tolerance and diversity" for different theological teachings and interpretations.[234]

Notably, Campbell's interview participants said that polygyny only works if "everyone wants it" – that is, both husband and wife must agree on the arrangement, on who else enters the marriage, and the additional wife must consent to join.[235] Further, participants indicated that if these elements are not present in the marriage, monogamy is the best option.[236] By this formulation, polygyny appears to have more in common with polyamory than many polyamorists would care to admit– the arrangement is premised on consent, equal participation, and shared desire. And yet, polygyny is cast in distinctly deviant terms in a way that polyamory is less likely to incur. Partly, this is the result of a longstanding history of racializing the practice of polygyny (even though its practice in North America is conducted almost exclusively by whites).

---

[232] Ibid.
[233] Ibid.
[234] Ibid. Campbell's Affidavit also provides evidence that while plural marriage is a prerequisite for "spiritual fulfilment", some community members still feel like they can choose monogamy or polygyny. Moreover, those who practice monogamy still understand themselves as FLDS followers (at 18).
[235] Ibid., at 48.
[236] Ibid.

According to Denike, North America's "political obsession" with polygyny began with rumours of Joseph Smith (the founder of Mormonism) and his plural wives. Amongst (white) North Americans, polygyny was deemed an "extraordinary aberration" that had no place in the "civilized world" but was commonplace ("natural") in Asian and African countries.[237] *Reynolds v. United States* was the first US Supreme Court case to uphold the constitutionality of anti-bigamy laws. In that case, Chief Justice Waite argued that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[238] Despite the overwhelming whiteness of polygynous communities, the legacy of racialization is a persistent feature of its deviance. In fact, the strength of anti-polygyny sentiment is bolstered by implicit and explicit discourses about its barbarism, linked to non-white races.[239] One feature of this was the connection between polygyny and slavery that was used during the 1856 Republican presidential campaign.[240] The campaign presented polygyny and slavery as "twin evils of barbarism" and vowed to eliminate it from the United States.[241] This strategy was effective in constructing polygyny as "beneath a noble republican nation" but "natural to savage races, including slaves themselves."[242] Indeed, Denike points out that polygyny is still understood as "white slavery" wherein polygyny is a form of "treason" against the white state and the white

[237] Denike, *The Racialization*, 855.
[238] Ibid., citing *Reynolds v. United States* 1878 at 164.
[239] Suzanne Lenon. "Polygamy, State Racism, and the Return of Barbarism: The Coloniality of Evolutionary Psychology." *Studies in Social Justice* 16, no. 1 (2022): 143-161.
[240] Denike, *The Racialization*, 856.
[241] Ibid.
[242] Ibid.

race.[243] By this formulation, polygyny was fundamentally at odds with the idealization of the monogamous "white life for two."[244]

Felicity Nussbaum suggests that polygyny's perceived deviance is a result of what it makes visible about monogamous relationships and the history of racism, slavery, and genocide in the United States. For Nussbaum, polygyny reveals that white men have long claimed Black women "as their sexual property."[245] Anti-polygyny discourse has both exaggerated the differences between monogamy and polygyny *and* justified these differences on account of race.[246] Further, the way in which polygyny is represented, in both Canada and the United States, depicts it as a threat to social order and the nation-state.[247] For example, Carter's study of the history of monogamy in Canada notes that polygyny's representation in legislative debates was through language like "epidemic," a "national ulcer," a "threat to the social fabric."[248]

2.3.2 Polyamory in Canada

While polygyny still generates disdain, another form of non-monogamy – polyamory – is receiving more positive public attention. Television shows about polyamory ("You, Me, Her"), articles in newspapers like New York Times ("Polyamory Works for Them" and "My Boyfriend Has Two Partners. Should I Be His Third?), and dozens of podcasts (including episodes that feature scholars like Kim TallBear) demonstrate an increased visibility and curiosity of, and

[243] Ibid., citing Martha Ertman. "Race treason: The untold story of America's ban on polygamy." *Columbia Journal of Gender and Law* 19, no. 1 (2010): 287.
[244] Cott, *Public vows*.
[245] Felicity Nussbaum. "The other woman: Polygamy, Pamela, and the prerogative of empire," in *Women, "race," and writing in the early modem period*, edited by Margo Hendricks and Patricia Parker, 146. London: Routledge, (1994).
[246] Denike, *The Racialization*, 856.
[247] Denike, citing Christine Talbot. "Turkey is in our midst": Orientalism and contagion in nineteenth-century anti-Mormonism." *Journal of Law and Family Studies* 8, no. 2 (2006): 363-89.
[248] Carter, *Beyond Monogamy*, 45.

openness to, (some forms of) non-monogamy. In fact, at the time of writing, there are two Canadian decisions featuring polyamorous families. In 2018, a Newfoundland and Labrador judge recognized three adults, in a polyamorous relationship, as a child's legal parents[249] and in 2021, a British Columbia judge also granted legal parentage to three adults in a polyamorous relationship.[250] As John-Paul Boyd's study reveals, polyamorous relationships appear to be on the rise in Canada.[251] In this dissertation, I argue that polyamorous kinship raises important questions about the legal recognition of intimacy and the potential of polyamory to challenges dominant ideologies of the family, including compulsory monogamy, heteronormativity, and homonormativity.[252]

According to many polyamory scholars, activists, and practitioners, there are several important distinctions to be made between polyamory and the practice of polygyny. Those in polyamorous relationships (according to recent Canadian survey data), are deeply concerned with the equality of their partners, regardless of gender, sexuality, or parental status and place a high value on the equality of their partners, regardless of gender or parental status.[253] However, just as polygyny is not immune from expressions of autonomy (as Campbell's research highlights), nor is polyamory exempt from reproducing inequalities or imbalances of power. As I explore further in Chapter 6, despite the resistance that polygyny and polyamory pose to compulsory monogamy, polyamorists often regard polygyny as a "regressive, even barbaric" practice. Moreover, they argue that polygyny is antithetical to the advances in formal rights won

[249] *C.C. (Re)*, 2018 NLSC 71. See also: Hodder, Jonny. "All in the family: meet 3 parents who won a historic legal victory for polyamorous families." *CBC News*. June 20, 2018. https://newsinteractives.cbc.ca/longform/polyamory-parents-birth-certificate
[250] *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767.
[251] John-Paul Boyd. "Polyamory in Canada: Research on an Emerging Family Structure." *The Vanier Institute of the Family.* April 11, 2017. https://vanierinstitute.ca/polyamory-in-canada-research-on-an-emerging-family-structure/
[252] Ibid.
[253] Ibid.

by women, children, and queers in the 19th and 20th centuries.[254] This trend is present in both popular discourse and scholarly literature, centering "polyamorists as potentially queer revolutionaries" while polygamists are the "abject Other".[255] This is grounded, in part, by polyamory's central role in sexual liberation ideology that, as Jin Haritaworn et. al. argue, "profoundly shaped the cultural practices and political debates in many social movements."[256] "Commune movements" in the 1960s and 1970s were key sites for experimenting with new relationship forms, household organization, and sexual politics, often drawing on feminist, gay, and socialist critiques of the family, monogamy, and private property.[257]

Against this backdrop, polyamory emerged through several "sexually emancipatory discourses", however, its utopian-seeming genesis does not preclude imbalances of power privilege. In fact, Nathan Rambukkana posits that a study of non-monogamies should be approached through the lens of "intimate privilege.[258]" Privilege, he notes, comes from the Latin word "privilegium" meaning "private law;" "a special right, or advantage, or immunity granted or available only to a particular person or group of people."[259] Intimate privilege is reinforced through ideologies like heteronormativity, wherein "only certain forms of intimate discourse, expression, subjectivity, or embodiment are seen as normal, healthy, moral, or ethical."[260] In this vein, laws and norms govern relationships to "[organize] and legitimate" intimacy in ways that idealize some relationships and denigrate others (even in the context of a presumably emancipatory relationship structure).[261] To address complex questions of intimacy that a case

[254] Shelley M. Park. "Polyamory Is to Polygamy as Queer Is to Barbaric?" *Radical Philosophy Review* (2017): 298.
[255] Ibid., 299.
[256] Jin Haritaworn, Chin-ju Lin, and Christian Klesse. "Poly/logue: A critical introduction to polyamory." *Sexualities* 9, no. 5 (2006): 518.
[257] Ibid.
[258] Rambukkana, *Fraught Intimacies*, 23.
[259] ibid., 29 citing *New Oxford American Dictionary*, 2005.
[260] Ibid., 34.
[261] Ibid., 36.

like non-monogamy presents, the concept of "intimate privilege" enables an accounting of the types of intimate privilege at play and also an analysis of the "intersecting nature of privileges that affect people's intimate lives."[262]

According to Haritaworn et. al., polyamory works to give language and "ethical guidelines" for intimacy that challenges compulsory monogamy.[263] At its core, polyamory is a form of intimacy that affirms the validity and worthiness of intimate relationships (sexual and/or loving) with more than one person.[264] Despite these egalitarian convictions, polyamorists, and polyamorous communities more broadly, must contend with "monogamist normativities" that "[pathologize]" polyamorists as "untrustworthy partners and dysfunctional parents."[265] Pat Califia argues that these presuppositions are born from a wider politics of "sex negativity" that denigrates a variety of sexual practices, desires, and bodies.[266] Importantly, the types of changes that emerge from diverse "intimate and sexual cultures" present key insights into several intersecting political and legal issues like: the socio-cultural construction of families and kinship; changing norms and expectations around parenting practices; expanding understandings of sexual identities and the ways in which heteronormativity governs intimate possibilities; new ways of theorizing sex positivity; and challenges in family law and social policy.

An analysis of polyamory (and non-monogamy more broadly) helps illuminate forms of "intimate privilege" that are otherwise obscured by mononormativity. By theorizing polyamory through this lens, I explore the possibilities that polyamory presents to deconstruct assumptions about intimacy, sexuality, and conjugality that are connected to a national imaginary about

---

[262] Ibd., 38.
[263] Haritaworn et. al., *Poly/logue*, 518.
[264] Ibid.
[265] Ibid.
[266] Patrick Califia. *Public sex: The culture of radical sex*. San Francisco: Cleis Press, 2000.

citizenship, gender, race, class, and sexuality. Thus, questions of polyamorous intimacy are also questions about understanding membership in the nation state. Second, an analysis of polyamory helps to identify the ways in which families continue to be governed by sex, class, race, and gender norms surrounding conjugality. However, while appearing to push-back against normative understandings of intimacy and sexuality, polyamory is not necessarily the bastion on the queer horizon that much of the literature contends it to be. Throughout this dissertation, I argue that polyamory is not *necessarily* a challenge to hegemonic conceptions of conjugality and its radical potential is circumvented by systems of power and privilege in which it exists. That said, it remains important to highlight and explore these so-called "alternative" forms of intimacy and kinship so that people are exposed to multiple conceptual and material possibilities for intimate life. To explore these two points, I begin with the challenge that polyamory poses to the nuclear family.

Although the nuclear family is no longer the statistical norm in Canada[267] it is an idealized form in both public policy and law.[268] While multiple forms of parenting and relationships are becoming commonplace (for example, single parents by choice, co-parenting among divorced parents, or guardianship) the "dyadic" heterosexual and monogamous parental and intimacy structure continues to govern Western kinship forms.[269] The disjuncture between

[267] Anne Milan. "Marital Status: Overview, 2011." *Statistics Canada*. Ottawa: Government of Canada, 2013. https://www150.statcan.gc.ca/n1/pub/91-209-x/2013001/article/11788-eng.htm; Scoffield, Heather. "Census: Nuclear family is no longer the norm in Canada." *Toronto Star*. September 19, 2012. https://www.thestar.com/news/canada/2012/09/19/census_nuclear_family_is_no_longer_the_norm_in_canada.html#:~:text=Statistics%20Canada%20found%20that%2044.5,per%20cent%20increase%20from%202006.

[268] Maureen Baker. *Families, Labour and Love: Family Diversity in a Changing World*. Vancouver: University of British Columbia Press, 2001; Harder, *After the nuclear age*; Law Commission of Canada, *Beyond Conjugality*; Mykitiuk, Roxanne. "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies." *Osgoode Hall Law Journal* 39 (2001): 771-815; and Polikoff, *Beyond (Straight and Gay) Marriage*.

[269] In the process of writing this dissertation, more Canadian jurisdictions have followed in British Columbia and Ontario's footsteps. Saskatchewan, Alberta, and now Manitoba (Manitoba's legislative change was in 2021 and used Saskatchewan and Ontario as examples as the basis for their new parentage provisions). Nonetheless, when addressing the possibility of multiple parents, made a very pointed decision to limit parentage to two people.

Canadians' lived experience and the idealization of their experience in law and policy is startling. This becomes even more striking when we consider the ways in parents perform their caregiving and how parentage is defined and recognized by the law. Until quite recently,[270] a child in Canada could only have two legal parents, despite there being several obvious examples of families containing more than two parents. Let us examine a common-enough scenario: A and B are a couple and have a child together, called E. Later, A and B divorce, share custody, and begin new romantic relationships; A is now in a relationship with C and B is in a relationship with D. The child, E, spends time with the parents of 'origin' and their new partners. Of course, not all partners become step-parents, but depending on the age and needs of the child and the parents, it would not be unreasonable to anticipate that the partners of A and B are involved in the child's life in parent-like roles. In this scenario, there are now four adults who are, in some way, parents to a child. At one point in Canada (perhaps when no-fault divorce law was fresh and new) this scenario would indeed have been strange, and perhaps even worrisome to some. However, this scenario is unlikely to raise eyebrows in Canada today.

In contrast, another type of configuration with the same subjects, might. Let us imagine that A, B, C, and D are all E's parents of origin – either by pre-conception design, or through the establishment of intimate relationships during E's life. Perhaps A, B, C, and D have relationships with one another (e.g., a 'primary' relationship containing four people) or there are two 'primary' couples who happen to also share emotional and sexual intimacy with each other on occasion, but have agreed to always share parenting responsibilities, regardless of the formulation of the adult relationships. This scenario is much more likely to turn heads (and in fact, until a very recent Newfoundland and Labrador Supreme Court decision, A, B, C, and D

[270] British Columbia was the first jurisdiction in Canada to extend legal parentage to more than two parents. This was achieved, via litigation, in 2007 in *A.A. v. B.B.,* [2007] ONCA 2.

could not have been E's legal parents).[271] One could, of course, devise all sorts of configurations where multiple adults are in caregiving roles to a child. Instead, my intention is to determine why multiple parents is seemingly commonplace, or at least acceptable, in some cases and in others the possibility garners scrutiny.[272] I argue that there are three features of multi-parentage that significantly impact the social intelligibility and acceptability of these intimate arrangements. First, how closely these relationships mirror, or mimic, heteronormative (or homonormative) ideals with respect to sexuality, gender, race, and class. Second, the nature and scope of the conjugal relationships between adults. In other words, adults in multiple, concurrent sexual and romantic relationships with one another are perceived differently than adults in multiple, discrete sexual and romantic relationships. Third, the presence of children and their relationship (genetically or socially) to their parents. I explore these features, and their significance, below.

In spite, or perhaps because of, polyamory's increased visibility, this relationship form is often portrayed negatively. For example, in several news media sources, polyamory is described as "psychologically damaging, immature, and unethical."[273] This representation affirms the presence and power of "mononormativity" – the idealization and privileging of monogamous relationships – and its reproduction in every day life. Léa Séguin argues that mononormativity is "reproduced and perpetuated" in lay conversation as well as mainstream news and popular media

[271] *C.C. (Re) 2018 NLSC 71*, 2018 CarswellNfld 110, 290 A.C.W.S. (3d) 550.
[272] For example, the recent Supreme Court decision was featured in several news media articles including "Three adults in polyamorous relationship declared legal parents of child." *The Globe and Mail*. June 14, 2018. https://www.theglobeandmail.com/canada/article-three-adults-in-polyamorous-relationship-declared-legal-parents-of-2/.
[273] Léa J. Séguin. "The good, the bad, and the ugly: Lay attitudes and perceptions of polyamory." *Sexualities* (2017): 2. See also: Karen Salmansohn. "Do open marriages work?" *CNN*. March 23, 2010. http://www.cnn.com/2010/LIVING/personal/03/23/o.open.marriages.work/index.html; Salmansohn, Karen. "Prince harming syndrome: Break bad relationship patterns for good." New York: Langenscheidt Publishing Group, 2009; Slick, Matt. "What is polyamory?" *Christian Apologetics and Research Ministry*, 2010. https://carm.org/what-is-polyamory.

in their depictions of relationships.[274] She analyses online social and news media sources of record to identify and analyse discourses surrounding polyamory and polyamorous relationships. Her findings illustrate that the very idea of engaging in sexually and emotionally intimate relationships, with more than one person at a time, challenges fundamental sexual mores in the West.[275] Moreover, these sexual mores are what many understand to be the very fabric and (proper) functioning of society.[276] Thus, privileging heteronormativity is intimately connected to monogamy as the idealized intimacy structure in the West. (These ideals are bolstered by a pervasive skepticism around polyamory and even stronger negative reactions to other forms of non-monogamy like forms of polygamy and adultery).[277] The increased representation and study are happening even in the absence of numbers to report how many people are actually engaging in polyamorous relationships.[278]

While the numbers of relationships are unclear, there is a consensus that polyamorous relationships can have a variety of structures and polyamorists themselves use a variety of terms to define their relationships. John-Paul Boyd's 2017 study found that most respondents used the

---

[274] Séguin, *The Good, the bad, and the ugly*, 2.
[275] Ibid.
[276] Of course, as Rambukkana points out, even this claim is shaky, given the proliferation of books and websites that provide how-to guides to effectively carrying out extra-marital affairs, like the infamous Ashley Madison website. But nonetheless, the *ideal* of monogamy remains hegemonic. In fact, Rambukkana suggests that the presence and possibility of adultery serves to "redouble heteronormativity's hold" since, "dallying spouses are good subjects who are misbehaving" and the answer to adultery (a social 'bad') is to reinforce its opposite, monogamy (a social 'good'). Thus, the problem of adultery is 'solved' with better, and more, monogamy (2015, 148-151). See also: Carter, *The Importance of Being Monogamous*.
[277] Séguin, *The good, the bad, and the ugly*, 2. See also: Barnett, Jessica. "Polyamory and criminalization of plural conjugal unions in Canada: Competing narratives in the s. 293 reference." *Sexuality Research and Social Policy* 11, no. 1 (2014): 63-75.
[278] The *Polygamy Reference* draws on demographic data from the United States, in the absence of information in Canada (at 439-440). Elizabeth Brake makes a compelling argument that small numbers of polyamorists – as recorded by surveys in Canada and the United States – is not a strong counterargument for extending minimal marriage rights. First, there are limitations to any form of survey data. Second, polyamorists may not report for fear of stigma and reprisal. Third, and most importantly, a requirement for "extensive documentation of a new (or newly visible) social form" before extending rights (or considering rights claims) forms a bias *against* change (and therefore reinforcing discrimination). In the case of polyamory, Brake argues that existing numbers and accounts of legal and social discrimination are "high enough" to warrant "anti-discrimination measures" ("Recognizing Care: The Case for Friendship and Polyamory." *Syracuse Journal of Law and Civic Engagement* (2015): 8).

term "polyamory" to describe their relationship, but some used terms like "polygamous; polyandrous; polygynous; consensual non-monogamous; and radical relationship" as well as "family, closed poly, polycule, co-journeying, queer platonic..."[279] In scholarly literature, polyamory is defined through its commitment to consensual, equitable, and honest practice of multiple romantic and/or sexual relationships.[280] Notably, the *Polygamy Reference* grapples with defining polyamory and Chief Justice Bauman stated that "a precise definition" is "elusive" given the diversity of relationships and practitioners.[281] However, he includes references to an article by Maura Strassberg, a professor of law and sexuality, describing the tenets of polyamory. She concludes that polyamory is a "form of commitment which is flexible and responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed in cookie cutter fashion on everyone."[282] Moreover, she argues that polyamory (which she calls the "new polygamy") is a "postmodern critique" of institutions and ideologies like "patriarchy, heterosexuality, and genetic parenthood."[283] Strassberg points out that while polyamorous structures might mirror "traditional patriarchal polygamy", they could easily look like one woman with several partners who are men.[284]

Thus, defining polyamory is not about defining a particular relationship structure so much as an approach to romantic and sexual intimacy more broadly. Simply put, Elizabeth Brake defines polyamory as "the practice of having multiple love and sexual relationships."[285] The

---

[279] John-Paul Boyd. "Perceptions of Polyamory in Canada." *Canadian Research Institute for Law and the Family*. December 1, 2017. https://prism.ucalgary.ca/bitstream/handle/1880/107212/Perceptions_of_Polyamory_-_Dec_2017.pdf?sequence=1&isAllowed=y
[280] Rambukkana, *Fraught Intimacies*; Brake, *Recognizing Care*.
[281] *Polygamy Reference* at 430.
[282] Ibid., citing Maura I. Strassberg. "The challenge of post-modern polygamy: Considering polyamory." *Capital University Law Review* 31 (2003): 439-441.
[283] Ibid.
[284] Ibid.
[285] Brake, *Recognizing Care*, 5.

increased visibility of polyamory might be a desirable goal for some polyamorists or those committed to broadening the landscape of socially acceptable intimate relationships. However, Brake also highlights the limitations of "recognizing polyamory", since the purpose of polyamory (for some practitioners) is to evade and resist the state's recognition and regulation of sexuality in the first place.[286] Drawing on Elisabeth Sheff's work, Brake references a study of polyamorists where the majority of respondents "did not see plural marriage as a desirable or attainable goal."[287] If plural marriage is not the goal, there are several other legislative reforms that would create and extend "minimal marriage rights" like the expansion of legal parentage, employment and health care benefits for multiple partners, eligibility for immigration, and decriminalizing bigamy and polygyny.[288] For Brake, minimal marriage rights are those that support intimate, interdependent relationships whether or not they are nuclear and/or sexual or romantic (for example, caring relationships between friends).

Several other scholars, like Glen Coulthard and Audra Simpson, discuss the limits of a politics of recognition.[289] Coulthard argues that Canada's shift from assimilation to recognition is not a decolonial strategy because recognition is an iteration of colonialism.[290] In Cressida Heyes' summary of Coulthard's argument, she notes that the discourse of recognition "covers up" the "patriarchal, racist, and colonial relations" between Indigenous communities and the Canadian

[286] Ibid.
[287] Ibid., citing Elisabeth Sheff. "Polyamorous families, same-sex marriage, and the slippery slope." *Journal of Contemporary Ethnography* 40, no. 5 (2011): 487-520.
[288] Ibid., 6.
[289] Glen Coulthard. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis: University of Minnesota Press, 2014 and Simpson, Audra. "The Ruse of Consent and the Anatomy of 'Refusal': Cases from Indigenous North America and Australia." *Postcolonial Studies* 20, no.1 (2017): 18–33. For an incisive overview of recognition in the context of identity politics, see: Heyes, Cressida. "Identity Politics." *Stanford Encyclopedia of Philosophy* (2020): 1-37.
[290] Coulthard, *Red Skin, White* Masks. See also: Coulthard, Glen. "Subjects of empire: Indigenous peoples and the 'politics of recognition' in Canada." *Contemporary political theory* 6, no. 4 (2007): 437-460.

state.[291] For Simpson, a politics of recognition erases the history and context of settler colonialism by assuming that recognition could happen within the context of reconciliation.[292] Coulthard and Simpson's arguments illustrate that the state's recognition is a complicated political project that ignores its own participation in historical and contemporary oppression. Within the context of intimate relationships, Claudia Card, Megan Gaucher, and Lois Harder, also examine the limits of recognition.[293] Card, Gaucher, and Harder similarly argue that state regulation is at stake when intimate relationships are "recognized". Card argues that while "recognition" has a "positive ring", the issue at hand is the state's ability to determine which forms of intimate life count, and which do not.[294] For Gaucher, Canada's recognition of equal marriage continued to rely on a distinction between conjugal and non-conjugal relationships, thus affirming the primacy of the heteronormative nuclear family. She argues that even though equal marriage is now legal, its success relied on a "problematic process" of normalizing mainstream lesbian and gay couples vis-à-vis straight couples.[295] The result was a new "[divide] between the conjugal and non-conjugal."[296] Writing before Gaucher, Harder's examination of Alberta's *Adult Interdependent Relationships Act* revealed that the province's motivation for expanding relationship recognition was a "resistance to recognizing same-sex partnerships."[297] Together, Gaucher and Harder demonstrate the ways in which expanded relationship recognition

[291] Heyes, *Identity Politics*, 20.
[292] Simpson, *The Ruse of Consent*, 23.
[293] Claudia Card. "Gay Divorce: Thoughts on the Legal Regulation of Marriage." *Hypatia* 22, no. 1 (2007): 24–38; Gaucher, Megan. "One Step Forward, Two Steps Back?: Relationship Recognition in Canadian Law Post-Same-Sex Marriage." *Atlantis: Critical Studies in Gender, Culture & Social Justice* 36, no. 2 (2014): 61-72; and Harder, *The state and the friendships*.
[294] Card, *Gay Divorce*, 24.
[295] Gaucher, *One Step Forward*, 61.
[296] Ibid.
[297] Harder, *The state and the friendships*, 634.

still affirmed heterosexuality as the standard against which "good Canadian sexual citizenship…" is determined.[298]

2.4 Legal Parentage and Assisted Reproductive Technologies

The uneasiness surrounding polyamory is rooted in much more than negative social perceptions. The possibility of romantic emotional and sexual intimacy with many instead of "the one" challenges popular narratives about the nature of human sexuality and desire, how families ought to be constructed, what types of intimate relationships are accorded value, and how we understand the role of "human nature" in our relationships with others. Moreover, advances in reproductive technologies have made it possible for reproduction to happen without sex or for sex to happen without reproduction.[299] Much of this expansion has been granted in response to feminist activism for women's reproductive rights. Second-wave feminist movements focused on women's sexual freedom and control over reproduction as key pieces of legal, cultural, and political recognition.[300] Further, prior to ARTs, the argument that kinship was natural and biological was harder to refute. One of the consequences of ARTs are that communities can observe the social construction of kinship more easily.[301]

As Janet Carsten argues, "the more that nature requires technological assistance", especially via parentage legislation, the more difficult it is to argue that kinship is natural instead of social.[302] Drawing on David Schneider's kinship work in anthropology, Carsten asserts that if knowledge of kinship (and kinship itself) was understood as a "direct reflection of nature", then

---

[298] Ibid.
[299] Laura Mamo. *Queering Reproduction: Achieving Pregnancy in the Age of Technoscience*, 225. Durham: Duke University Press: 2007.
[300] Ibid.
[301] Janet Carsten. "Assisted Reproduction." *After kinship*, 167. Cambridge: Cambridge University Press, 2004.
[302] Laura Mamo. "Queering the fertility clinic." *Journal of Medical Humanities* 34, no. 2 (2013): 229.

developments in ARTs "destabilized not just kinship or nature, but knowledge itself."[303] However, Carsten observes a considerable tension in literature on reproductive technologies: on the one hand, scholars suggest that ARTs will radically shift how people understand kinship and their relationships to one another. On the other hand, a seemingly equal number of scholars suggest that, despite medical advances, social and political institutions governing reproduction and kinship are relatively unchanged.[304] I argue that ARTs offer the *potential* to radically shift the ways in which the state and citizens conceive of kinship but the potential is mitigated by contemporary manifestations of eugenics ideologies and the entrenchment and persistence of systems like classism, racism, ableism, and settler colonialism. Thus, the increased use and availability of ARTs exist within systems of oppression that limit and define the possibilities of technologies to support the creation of families. As Dorothy Roberts points out,

> Racism is embedded in unjust political, economic, and social structures. Without an ongoing and vigilant effort to dismantle these structures, perfecting genetic technology will only tighten racism's hold.[305]

And yet, the increased availability and use of ARTs has created opportunities for those in non-normative relationships to conceive, thereby expanding reproductive rights to those who have been historically marginalized or dissuaded from reproducing.[306] Since 2013, some Canadian jurisdictions have grappled with extending legal recognition to more than two parents. British Columbia was the first province to introduce legislation that recognized more than two legal parents and the impetus for this change was families' use of ARTs. Some families wished to recognize the donor or surrogate as a legal parent but were unable to under the province's

---

[303] Ibid., citing David M. Schneider. *American kinship: A cultural account*. Chicago: University of Chicago Press, 1980.
[304] Ibid., 168.
[305] Dorothy Roberts. "Racial Disparity In Reproductive Technologies." *Chicago Tribune*. January 29, 1998. https://www.chicagotribune.com/news/ct-xpm-1998-01-29-9801290086-story.html
[306] Cristyn Davies, and Kerry H. Robinson. "Reconceptualising family: Negotiating sexuality in a governmental climate of neoliberalism." *Contemporary Issues in Early Childhood* 14, no. 1 (2013): 39-53.

previous legislation. At first glance, the expansion of legal parenthood appears to be a progressive step towards inclusion and recognition. News media coverage of BC's legislation featured the smiling faces of Anna Richards, Danielle Wiley, Shawn Kangro and their baby, Della Wolf, as the poster family for three legal parents. As noted earlier, legal parentage is a significant form of recognition– different from guardianship– that carries distinct legal and social responsibilities. The opportunities for lesbian and gay families to affirm their roles is still understood, by mainstream lesbian and gay rights movements, as a critical step in lesbian and gay equality (in fact, in chapter 5 I examine this argument with respect to supporters of Ontario's *All Families Are Equal Act*). However, as Carsten and Roberts caution, ARTs must be carefully examined within existing systems of privilege and oppression.

Laura Mamo's study of lesbian parents' use of ARTs found that, like their heterosexual counterparts, lesbian parents practice a form of "donor matching".[307] Donor matching is a process wherein intended parents look for donors who share similar physical or imagined genetic traits, shared ancestry, or idealized and desired qualities (musicality, for example). In heterosexual relationships, the practice of donor matching allows intended parents to "conceal" their use of ARTs. However, lesbians do not have the choice to conceal their use of a donor and yet, Mamo's findings illustrate that many lesbians practice donor matching anyway.[308] Mamo describes these as "pragmatic negotiations" where intended parents are working to construct, via their children, emotional and physical relatedness in the past, present, and future.[309] Through her qualitative interviews, she found that lesbians' interactions with sperm-banks represented their negotiation of the "known" and "unknown" role of genetics and the cultural stories surrounding

[307] Mamo, *Queering Reproduction*, 190.
[308] Ibid.
[309] Ibid., 191.

"genes, genetics, and heredity."[310] In lieu of "traditional" forms of conception (that is, within the bounds of heterosexual nuclearity), lesbians in Mamo's study found other ways to reproduce these ties because the ties themselves – real and perceived – remained significant.

Her research emerged out of her own desire to provide her daughter – a daughter of lesbian mothers – ways to understand her experience. Mamo notes that even within a lesbian family, children experience their lives through the lens of heterosexuality and that Mamo's own choice to become a mother affirmed dominant ideologies of motherhood and heterosexuality (that women ought to reproduce and that it is their moral and gender imperative to do so).[311] To examine the persistence of heterosexuality, even within lesbian existence, Mamo asks two interrelated questions: first, how do lesbians' "reproductive practices" unsettle or dismantle heterosexuality? Second, how do lesbians' reproductive practices reinforce heterosexuality (thereby reaffirming the existence of a "deviant other")?[312] She contends that the transition of ARTs from "do-it-yourself" insemination to "biomedicalized reproduction" illustrates a "normalization process" within fertility medicine more broadly.[313] This process is about affirming and supporting heterosexual sex, and heterosexuality more broadly, such that heterosexuality is "what needs to be controlled and/or assisted."[314] For Mamo, this process affirms the "hegemony of heterosexuality" as well as, per Adrienne Rich, compulsory "heterosexuality".[315] Even more concerning is that medical treatments for "infertility" intertwine compulsory heterosexuality with "compulsory reproduction" thereby enforcing the belief that "If you can achieve pregnancy, you must procreate."[316] Compulsory reproduction is an iteration of

[310] Ibid.
[311] Ibid., 225.
[312] Ibid.
[313] Ibid., 227.
[314] Ibid., 228.
[315] Ibid., citing Adrienne Rich. "Compulsory Heterosexuality and Lesbian Existence." *Signs* 5, no. 4 (1980): 631–60.
[316] Ibid.

nuclear family ideologies which dictate that sex is (or ought to be) reproductive and that reproduction ought to occur within the context of a nuclear family. The homonormativity of some lesbian and gay families does not disrupt compulsory reproduction. Drawing on Lisa Duggan's work, Mamo argues that the mainstream LGB's focus on equal marriage and parenting rights mirror heteronormativity to produce *homo*normativity.[317] Like heteronormativity, homonormativity governs sex, sexuality, gender, and kinship to produce an idealized "queer" citizen.

In the last decade, several jurisdictions in Canada have undertaken studies (and in some cases, legislative change) to examine the responsibility of governments with respect to ART. The Manitoba Law Reform Commission prepared a report in 2014 to address the province's legislation and found that:

> The concept of 'family' is fluid, and continues to evolve in law. It has always been necessary to accommodate diverse social relationships, but advances in assisted reproductive technologies in recent years now allow the creation of family structures that formerly were not possible. These advances in technology raise new social and legal questions about what constitutes a family, and what it means to be a parent.[318]

Legal parentage is defined by provincial or territorial legislation and carries significant legal, social, and economic responsibilities. Legal parentage is a "lifelong immutable declaration of status"[319] that impacts several areas of a child's life, affecting identity, citizenship, inheritance and dependents' relief rights, entitlement to benefits under federal and provincial laws, obliges parents to provide certain types of care and support, and determines their ability to "participate fully" in their child's life (including making decisions around health, travel, and education.[320] The ethical considerations surrounding parenthood apply "not only to daily acts of decision-

[317] Ibid., 581.
[318] Manitoba Law Reform Commission. "Assisted Reproduction: Legal Parentage and Birth Registration." 2014: 1.
[319] Ibid., citing *A.A. v B.B.*, 2007 ONCA 2, 83 OR (3d) 561 at 14.
[320] Ibid.

making by parents and prospective procreators" but also to law and public policy.[321] As my findings in Chapter 4 and 5 demonstrate, shifts in kinship structures and advancements in assisted reproductive technologies have raised important philosophical questions about parental rights and responsibilities and the role of the state in supporting or facilitating kinship. As Elizabeth Brake highlights, some of these questions also involve state intervention, the limits of parental autonomy, and whether society "owes" parents (and I suggest, if parents owe anything to society).[322]

These questions are challenging on their own, but the fact that "parenthood" has different meanings – biological, social, legal, and moral – complicates matters further."[323] Legal parentage, the focus of this dissertation, involves "two distinct relationships": a "custodial" relationship between parent and child and "a trustee relationship between the parents and the larger society or other collective."[324] A legal declaration of parentage "is a lifelong immutable declaration of status from which flows some of the most significant societal rights, benefits and obligations."[325] Legal parents can make decisions regarding their children's life largely free of outside intervention by others (even those who have a significant relationship with the child) or by state authorities.[326] Additionally, the absence of legal parentage can have staggering effects

---

[321] Elizabeth Brake and Joseph Millum. "Parenthood and Procreation." *Stanford Encyclopedia of Philosophy*, 2018: 1.
[322] Ibid.
[323] Ibid., 2.
[324] Ibid., 37.
[325] *AWV JEW*, 2010 NBQB 414, [2011] WDFL 2307 at 22 [*JAW*], citing in support *A.A. v B.B.*, 2007 ONCA 2, 278 DLR (4th) 519 at 14 [*AA*] and referring to *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 SCR 835.
[326] There are several important exceptions to this, people of colour, those with disabilities, or those living in poverty are not granted the same level of parental autonomy or privacy. For example, Indigenous women routinely face increased levels of scrutiny from strangers and state authorities that range from invasive questioning to child apprehension (Kline, Marlee. "Complicating the ideology of motherhood: Child welfare law and First Nation women." *Queen's Law Journal* 18, no. 2 (1993): 306-342; Sinclair, Raven. "The Indigenous child removal system in Canada: An examination of legal decision-making and racial bias." *First Peoples Child & Family Review: An Interdisciplinary Journal Honouring the Voices, Perspectives, and Knowledges of First Peoples through Research, Critical Analyses, Stories, Standpoints and Media Reviews* 11, no. 2 (2016): 8-18).

for parents and children alike ranging from citizenship status and custodial access to social stigma.[327] Until quite recently, determining parentage was relatively straightforward – there were two parents, one of whom was a woman and the other was her married or cohabitating male spouse. Based on this assumption, legal parentage was granted in very narrow circumstances and was automatically given to the birth mother and to the birth mother's husband or male partner (unless there was a rebuttal of paternity, which only became widely available in the 1980s).[328] Historically, three legal doctrines influenced the determination of legal parentage and rights associated with parentage: *fillius nullius*, *patria potestas*, and *parens patriae*. In what follows, I provide a brief history of each doctrine and note its influence on social and legal interpretations of parentage.

Until the 1990s, Canadian common law dictated that a child born outside of marriage was *fillius nullius* (a "child of no one"). This presumption had severe social and legal consequences because it was a "presumption of statutory interpretation and the construction of wills that any reference to a "child" excluded an illegitimate child."[329] Illegitimate children had no inheritance rights and no right to parental support.[330] Additionally, parents had no custodial or guardianship rights of their own illegitimate children. The provinces developed a variety of "elaborate legislative systems" aimed at collecting financial support from fathers, which reflected the idea that men were financial providers, not care givers.[331] As Lori Chambers'

[327] Karen Busby. "Of surrogate mother born: Parentage determinations in Canada and elsewhere." *Canadian Journal of Women and the Law* 25, no. 2 (2013): 290. For a thorough review of the history of presumptive and judicially ordered parentage, see Mykitiuk, *Beyond Conception*.
[328] Busby, *Of surrogate mother born*, 290.
[329] Susan Boyd and Jennifer Flood. "Illegitimacy in British Columbia, Saskatchewan, Ontario, and Nova Scotia: A Legislative History." 2015: 1.
[330] Ibid., citing Law Reform Commission of Nova Scotia. *Final Report: The Legal Status of the Child Born Outside of Marriage in Nova Scotia*. Government of Nova Scotia, 1995: 6.
[331] Boyd and Flood, *Illegitimacy*, 2. See also: Collier, Richard. "'Waiting Till Father Gets Home': the Reconstruction of Fatherhood in Family Law." *Social & Legal Studies* 4 (1995): 5-30.

research demonstrates, these efforts were not particularly interested in supporting abandoned or unwed mothers so much as minimizing the state's responsibility to provide its own financial support.[332] Additionally, in provinces like British Columbia, illegitimacy laws were also designed to support a particular (White) nation building project.[333] Thus, the goals of illegitimacy laws were not to protect women and their children but to privatize the costs of child rearing and to regulate the sexual and intimate lives of unwed parents.

Susan Boyd and Jennifer Flood explain that "the legislation demonstrated a paternalistic, judgmental, and often punitive approach to unwed mothers"[334] and this "both reflected and reinforced the discursive construction of the 'good' mother as Anglo-Saxon and legally married."[335] Authorities were also concerned that legally recognizing "illegitimate" children might dissuade adults from marrying in the first place.[336] In 1758, Nova Scotia enacted *An Act to provide for the support of Bastard Children, and the punishment of the Mother and reputed Father*, based on English common law.[337] As Peter Ward argues, the purpose of the Act "was not to obtain support for unmarried mothers but to protect local governments from the costs of illegitimacy by requiring fathers to indemnify the organizations that cared for illegitimate children."[338] Indeed, the Act required that if a woman was pregnant with a "bastard child" she had to provide the father's name in writing, and under oath, before a Justice of the Peace.[339] Over

[332] Lori Chambers. *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969*. Toronto: University of Toronto Press, 2007.
[333] Chris Clarkson. *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862-1940*. Vancouver: University of British Columbia Press, 2007.
[334] Boyd and Flood, *Illegitimacy*, 3.
[335] Chambers, *Misconceptions*, 167.
[336] Clarkson, *Domestic Reforms,* 161.
[337] *An Act to provide for the support of Bastard Children, and the punishment of the Mother and reputed Father*, SNS 1758, c 19 [*NS Bastard Children Act*].
[338] Peter W. Ward. "Unwed Motherhood in Nineteenth-Century English Canada." *Historical Papers* 16, no.1 (1981): 40.
[339] Boyd and Flood, *Illegitimacy*, 5; *NS Bastard Children Act*.

the course of several decades, provinces and territories began to amend illegitimacy laws by "imposing liability" on parents to support their children, by legitimating children whose parents went on to marry, and finally by abolishing the concept of illegitimacy entirely.[340] For example, *The Legitimacy Act*[341] in Ontario "provided for the legitimation of children born of voidable marriages and some void marriages."[342] Additionally, if an illegitimate child's "natural parents" married, their marriage would legitimate that child.[343] The language of "illegitimate" and "bastard" children is now passé, however, the legacy of these concepts prevail in significant ways.

While *fillius nullius* clearly relies on the *absence* of a legally recognized father, *patria potestas* signifies the power that a legal father had over his family. *Patria potestas* was the legally conferred, and generally unrestricted, power that the *pater familias* had over the physical property and spiritual welfare of his family.[344] *Pater* refers to the "male begetter of children" over whom he may, or may not, have held *patria potestas*.[345] *Pater familias* describes a man who had *patria potestas*. However, because a man could have *patria potestas* over people other than his biological children, he could be a *pater familias* without being a *pater*.[346] A (free) man became a *pater familias* when his own *pater familias* died or emancipated him. The *familia* over which he had *patria potestas* included "unemancipated descendants, adoptees, wife, slaves,

[340] Boyd and Flood, *Illegitimacy*, 2.
[341] *Legitimacy Act*, RSO 1970, c 242.
[342] Freeda M. Steel. "Recent Family Law Developments in Manitoba." *Manitoba Law Journal* 13 (1981): 348.
[343] Ibid.
[344] Marshall Buchanan. "The Father of His Country, Being a Brief Study of the Intersection of Fatherhood and the Rhetoric of State Power in the Late Republic and Early Principate of Rome," (MA thes., University of British Columbia 2016): 5-6. See also: McGillivray, Anne. "Childhood in the Shadow of Parens Patriae." In *Multiple lenses, multiple images: Perspectives on the child across time, space and disciplines*, edited by Hillel Goelman, Sheila Marshall, and Sally Ross. Toronto: University of Toronto Press, 2004.
[345] Ibid.
[346] Ibid.

and property."[347] Obviously, property ownership was a key feature of *patria potestas* but even further, this power was lifelong and also entailed *vitae necisque potestas* ("power of life and death").[348] *Vitae necisque potestas* permitted the *pater familias* to kill any member of his family, regardless of their age (thus, his power over his children continued into the children's adulthood).[349] To acquire property or pursue marriage, children needed their *patria potestas'* permission.[350] These far-reaching powers mirror historical and contemporary manifestations of state power, especially with respect to the formation of families.

Questions about the role of Roman doctrines such as *patria potestas*, are explored by Anne McGillivray in her examination of the child, the role of the family, and changing responsibilities of the states towards the family. For example, she demonstrates that in Rome, children were understood merely as property; an idea that persisted well into the common law era. Indeed, Roman doctrines continue to "[cast] a long shadow over contemporary childhood" observable in the "doctrine, principle, power, jurisdiction, concept, or ideology of *parens patriae*…"[351] *Parens patriae*, or, "the state as the father of the people" originates in Roman law, mirroring *pater familias* and his *patria potestas*.[352] Anne McGillivray highlights the evolution of 'the child' from property under Roman and common law, a "vehicle of state interests in the nineteenth century", and more recently, as a "rights-bearer."[353]

Parens patriae "refers to the state's authority and responsibility to protect the best interests of vulnerable persons."[354] The source of *parens patriae* jurisdiction was described by

[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] Ibid., 38.
[352] Ibid.
[353] Ibid.
[354] Margaret Isabel Hall. "The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court." *Canadian Association of Comparative and Contemporary Law* 2, no. 1 (2016): 190-191.

the Supreme Court of Canada in [1986] 2 SCR 308 [*Re Eve*] as "lost in the mists of antiquity", though some propose Edward I took over the authority from feudal lords "who would naturally take possession of the land of a tenant unable to perform his feudal duties."[355] People unable to perform these duties were labeled "lunatics" (those who lost "mental capacity" at some point in their lives) or "fools" (those deemed never to have had "mental capacity").[356] The doctrine of *parens patriae* has evolved over many decades of common law and now much of its exercise surrounds the care of children, primarily through legislatures and courts.[357] One example is where judges make decisions about children's legal guardians (as I demonstrate in Chapter 6), though its scope can include the authorization and consent for a child's medical treatment, in lieu of a legal guardian's ability (or presence) to do so.[358]

McGillivray argues that early common law legislators and "influential English writers" often turned to Roman doctrine to construct understandings of "childhood and capacity."[359] Given that *parens patriae* "concerns the welfare of the population as well as those adversely affected by law" it remains under the jurisdiction of the state to care for children or "others disabled by law."[360] Importantly, because "legal disability" can change, McGillivray argues that

[355] Ibid., at 32. In 1979, Eve's mother applied to the Supreme Court of Prince Edward Island, requesting that her daughter Eve "be declared a mentally incompetent person pursuant to the provisions of The Mental Health Act of Prince Edward Island", that she "be appointed Committee of the estate of Eve", and that she be authorized to consent to her daughter's sterilization. The case eventually made its way to the Supreme Court of Canada which, in 1986, found that there was no "legislation authorizing the Court or Committee to consent to a non-therapeutic sterilization on behalf of Eve" and that *parens patrice* "should never be used to authorize the non-therapeutic sterilization of a mentally incompetent woman" (*E. (Mrs.) v. Eve*, 1986 CanLII 36 (SCC), [1986] 2 SCR 388). See also, Anne M. Bolton. "Whatever Happened to Eve." *Manitoba Law Journal* 17, no. 2 (1988): 219-226; McGillivray, *Childhood in the Shadow*.
[356] Sir James Munby. "Protecting the Rights of Vulnerable and Incapacitous Adults – The Role of the Courts: An Example of Judicial Law-making." *Child & Family Law Quarterly* 26 (2014): 66. See also: McGillivray, *Childhood in the Shadow*.
[357] David C. Day. "The Capable Minor's Healthcare: who decides?" *Canadian Bar Foundation* 86, no. 3 (2008): 380.
[358] McGillivray, *Childhood in the Shadow*, 44.
[359] Ibid., 40.
[360] Ibid.

parens patriae has "frightening potential for almost limitless legal intervention into people's lives."[361] The origin of *parens patriae* was less concerned with care for children as it was concerned "children's estates and the profits to be had from them" and children without estates were "rarely of interest."[362] The focus on property, both property that children inherited and children as a form of property, was also central to Roman conceptualizations of "legal capacity and responsibility."[363] In Roman law, children were owned by their fathers and when integrated into English common law, the "Crown asserted its power of guardianship and assignment of wardship to protect the property and persons of minor children" if the father was absent or dead. Wardship became such a lucrative business that "trade or holding in wardship underpinned the [13th century] English economy."[364] The 13th century statute, *Praerogativa Regis* (Prerogative of the King), formalized the king's power as "father of the people" and in doing so, established placing orphaned children under his guardianship, assigned wards, and put children's estates into his trust.[365] This was done in the name of *parens patriae* but the primary interest was the accumulation of wealth in the form of property and persons. McGillivray quotes from a West Virginia court:

> much of the sovereign's revenue came from feudal incidents resulting from the King's control of persons under disabilities, the most well known of which were the wardships and marriages of the minor heirs ... there was a thriving open market in much the same sense that there is a futures market today ... [T]he early development of parens patriae was in no way evidence of the sovereign's solicitude for the welfare of unfortunate subjects, but rather was the result of the King's need for revenue combined with medieval restraints upon the alienation of land which left valuable life estates in the hands of born incompetents ... [I]n those days it can be said with ironic force that the law was no respecter of persons.[366]

[361] Ibid.
[362] Ibid.
[363] Ibid.
[364] Ibid., 44.
[365] Ibid.
[366] Ibid., 44-45.

From the time of the Tudors until the 1990s in Canada, "the social problem posed by childhood was the incipient criminality of fatherless and impoverished children."[367] The *Poor Relief Act* (1536-1601), as well as a series of statutes called the *Tudor Poor Law*, were the only piece of "social legislation" in England and in the eastern colonies of Canada.[368] The doctrine of *pater familias* saw a resurgence during Protestant Reformation to "bolster the…father" during a time of political and religious chaos.[369] This served a very particular purpose, for the "closed nucleated father-headed family" could "be constrained and manipulated."[370] The genesis of the relationship between family, children, and nation dates back centuries, and yet, there are contemporary echoes in debates surrounding multi-parent kinship (which I explore this further in Chapter 6).

Legal parentage, for multiple co-parents, presents many practical challenges. With respect to government services and the law, polyamorous families must determine (in very different ways than dyadic relationships):[371]

- Who will schools recognize as parents and guardians, entitled to pick-up children from school or talk to teachers about academic performance?
- Who can get information from, and give instruction to, health care providers?
- Who can receive benefits from an employee's health insurance? Who will be covered under provincial health care plans? Who can claim Canada Pension Plan survivor's benefits?
- What are the rights and responsibilities of multiple adults under provincial legislation (wills and estates) or federal legislation (immigration)?
- How many adults can participate, and on what grounds, in the legal parentage of a child? And how does legislation around adoption or assisted reproductive

[367] Ibid., 52.
[368] Ibid.
[369] Ibid., 42.
[370] Ibid.
[371] Boyd, *Polyamory in Canada*, 6-7.

technologies factor in multiple parents?

- What are the rights and responsibilities of individuals who are leaving a polyamorous arrangement, under provincial legislation?

As one can see from the above considerations, the presence of children adds several layers of complication to the polyamory puzzle. Séguin's study examines several online social and news media sources of record to identify and analyse discourses surrounding polyamory and polyamorous relationships. One such belief was that "polyamory inevitably causes, or leads to, relationship dissolution" and that this "causes unstable or 'broken' homes, and is thereby detrimental to the children of those engaged in such relationships."[372] One such comment reads:

> There is over 25 years of hard data proving that children have the best outcomes when raised in intact homes. Anything that promotes the destruction of the family should be of grave concern from a sociological perspective because children from broken and single-parent homes are far more likely to become engaged in violent crime, perform poorly academically, become impoverished as adults and for girls specifically, are 75% more likely to end up divorced themselves, thus perpetuating the cycle.

Séguin observes that this commentator's association of polyamory, divorce, and family breakdown was linked to the idea that "polyamory is harmful to the very fabric of society." This comment reflects the hegemonic logic that "the intact nuclear family … [is] one of the building blocks of a healthy society" and the "erosion," necessarily by the presence of polyamorous couples and families "would lead to a number of societal ills and to chaos."[373] Her research also identified discourses of polyamory being linked to "amorality." Another commentator said:

> This type of 'hook up with whoever you want to whenever you want to' attitude will damage families. Of course there is no law against it so it is legal, but that does not mean it is right, helpful to society, or even beneficial to the people involved [...] God's morality protects us from harm and brings blessing and are given out of love and concern for us. He gives His blessing on the gift of sex He has given to us, but as anything, it can be misused and turn into a curse. [...] Costs to society from polyamory could include more

[372] Ibid., 11.
[373] Ibid.

> divorce, more [sexually transmitted infections], an overall weakening view of marriage and family in society, as well as a continuing moral breakdown in individuals.[374]

In this formulation, polyamory is linked to the "disintegration of society,"[375] demonstrating the affective ties between family, society, and nation. These ties are so profound that changes in familial structures can signal, to some, that the very foundations of society are in danger. Séguin found that those involved in polyamorous relationships are assumed to be "active participants in the promotion of polyamory" and therefore the undoing of society.[376] While some, myself included, find the upsurge of public conversations of polyamory a (generally) positive change, Séguin found that others are less than enthusiastic. One of the comments to this effect reads:

> I have noticed that the media has been relentless in promoting this lifestyle of late. I have to say that no matter how aggressive they get in trying to ram it down our collective throats, I will never accept this lifestyle. It's unethical no matter how much they try to rationalize it. Not falling for the propaganda, sorry.[377]

Séguin asserts that negative societal attitudes towards polyamory have led to the stigmatization of polyamorous relationships and of polyamorists themselves.[378] Additional studies found that polyamorous individuals face stigma outside of their communities from friends, family, therapists, and employers because of their relationship configuration (I explore this point further in Chapter 6).[379] Importantly, she found that the stigma is more acute for families with children. She hypothesizes that the increased level of stigma may be attributable to people's assumptions that having sex with more than one partner is "highly stigmatized both in the context of

---

[374] Ibid., 12.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Ibid., 3.
[379] Ibid., see also: Elisabeth Sheff. *The polyamorists next door: Inside multiple-partner relationships and families*. Rowman & Littlefield, 2013; Weitzman, Geri. "Therapy with clients who are bisexual and polyamorous." *Journal of Bisexuality* 6, no. 1-2 (2006): 137-164; and Young, Jessica M. ""We Are Pioneers": Polyamorists' Stigma Management Strategies." (PhD diss., Southern Illinois University, 2014).

committed relationships ('cheating') and casual sex scenarios ('hooking up')."[380] Interestingly, this attitude is illustrated, and perhaps also normalized, by the "the sheer number of studies investigating attitudes towards sexual and emotional non-monogamy (i.e. infidelity), which are grounded in the premise that such behaviours are inherently upsetting to the other partner."[381] The findings from these studies are buttressed both by cultural resonance and their theoretical framework of evolutionary biology, which posits that emotions like jealousy and attachment are "the products of successful survival and reproduction over the course of human history" and are thus both natural and necessary.[382]

I now return to Rambukkana's work for his insightful analysis of power and privilege in intimate life. He posits that a study of non-monogamies should be approached through the lens of "intimate privilege."[383] What is important to note here is that privilege is available to some and not others and that there is "system of ordering advantage."[384] In Rambukkana's formulation, privilege "[takes] up space… materially, practically, or conceptually" so "that there is not enough space left for others to inhabit."[385] Thus, "the reality that underlies relationships of privilege is that it is only by foreclosing others' access to a resource that privileged subjects can maintain their artificially inflated advantage."[386] As I described earlier, heteronormativity is one

[380] Ibid., see also: Pepper Mint. "The power dynamics of cheating: Effects on polyamory and bisexuality." *Journal of Bisexuality* 4, no. 3-4 (2004): 55-76 and Laura Hamilton and Elizabeth A. Armstrong. "Gendered sexuality in young adulthood: Double binds and flawed options." *Gender & Society* 23, no. 5 (2009): 589-616.
[381] Ibid., 4. See also: David M. Buss and David P. Schmitt. "Sexual strategies theory: an evolutionary perspective on human mating." *Psychological review* 100, no. 2 (1993): 204-232; Carpenter, Christopher J. "Meta-analyses of sex differences in responses to sexual versus emotional infidelity: Men and women are more similar than different." *Psychology of Women Quarterly* 36, no. 1 (2012): 25-37; Schützwohl, Achim and Stephanie Koch. "Sex differences in jealousy: The recall of cues to sexual and emotional infidelity in personally more and less threatening context conditions." *Evolution and Human Behavior* 25, no. 4 (2004): 249-257; and Shackelford, Todd K. and Gregory J. LeBlanc, and Elizabeth Drass. "Emotional reactions to infidelity." *Cognition & Emotion* 14, no. 5 (2000): 643-659.
[382] Ibid., 4. See also: David M. Buss. "Evolutionary psychology: A new paradigm for psychological science." *Psychological inquiry* 6, no. 1 (1995): 1-30.
[383] Rambukkana, *Fraught Intimacies*, 23.
[384] Ibid., 29.
[385] Ibid.
[386] Ibid.

(of many) structures that contours intimate life in Canada; it is a "social and cultural structure through which only certain forms of intimate discourse, expression, subjectivity, or embodiment are seen as normal, health, moral, or ethical."[387] In this vein, the people with whom we have intimate relationships matters and the laws and/or norms governing those relationships "[organizes] and legitimates" certain relationships while ignoring or denigrating others.[388] Further, dominant assumptions about sexuality dictate that sexuality "naturally" follows "a set of rules" – monogamy and heterosexuality – which produce and reinforce categories of inclusion and exclusion.[389] For example, Rambukkana notes that many assume that "some activities or expressions are appropriate to men, whereas others are the purview of women."[390] To address complex questions of intimacy that a case like non-monogamy presents, the concept of "intimate privilege" enables an accounting of the types of intimate privilege at play and also an analysis of the "interlocking and intersecting nature of privileges that affect people's intimate lives."[391]

Intimate privilege is one piece of the puzzle that helps illuminate why some intimate arrangements are understood to be normal while others are aberrant. Further, "intimate privilege" opens a door to exploring the types of material and conceptual consequences of certain intimate arrangements. The second puzzle piece is the connection between intimacy and nation. On this point, Rambukkana draws on Lauren Berlant to note that the "workings of the intimate public sphere [have] a nexus of strong interactions between sex and national fantasy."[392] Berlant writes:

> when the modal form of the citizen is calling into question, when it is no longer a straight, white, reproductively-inclined heterosexual but rather might be anything, any jumble of things, the logic of the national future comes into crisis.[393]

---

[387] Ibid., 33.
[388] Ibid., 36.
[389] Ibid.
[390] Ibid.
[391] Ibid., 38.
[392] Ibid., 28.
[393] Lauren Berlant. *The Queen of America goes to Washington City: Essays on Sex and Citizenship*, 18. Durham: Duke University Press, 1997.

Berlant's comment demonstrates that the private domain of intimate life is, in fact, not private at all; intimate life is inexorably intertwined with the national imaginary and the reproduction of national narratives and citizens. This connection helps to further explain why some intimate arrangements seems to 'matter' in ways that others do not.

Despite the findings from Séguin's study, Rambukkana suggests it would be a mischaracterization to present polyamory as a "suppressed or oppressed" intimate arrangement. First, polyamorists "are not unequivocally or universally oppressed, or even necessarily lacking in privilege." Indeed, privilege and oppression are not zero-sum experiences and the vast and nuanced literature on intersectionality[394] demonstrates that the multiplicity of peoples' identities are made up of both axes of privilege and oppression.[395] Second, polyamory in Canada is "riding a crest of prominence and popularity in the public sphere."[396] The survey data collected and analyzed by the *Canadian Research Institute for Law and the Family* found that 26.3% of respondents "strongly agreed" and 54.3% "agreed" with the statement "people see polyamorous relationships as a kink or fetish" while only 14.3% "strongly agreed" and 13.7% "agreed" with the statement "people see polyamorous relationships as a legitimate form of family."[397] Curiously, respondents residing in Alberta were the most likely (86.8%) to strongly agree with the statement "people see polyamorous relationships as a kink or fetish" (only two respondents

[394] Originally coined by Kimberlé Crenshaw, "intersectionality" highlighted Black women's experiences of oppression which could not be fully theorized by feminism's focus on gender (as a single analytic category) or anti-racist theory's focus on men's experiences (1989). As Leslie McCall suggests, the assumptions that there exist a universal community of women (or, any other identity category) who are universally oppressed in the same way curtails intersectional analyses of oppression by narrowing the scope of identity and marginalizing other axis of oppression like race, ethnicity, geography, class, ability, and sexuality (2005, 1771). Further, as Nira Yuval-Davis notes, "intersecting oppressions are mutually constituted by each other" and that there is no way to understand, for example, being the category of "woman", without understanding the classed and raced dimensions of her subjectivity (2007, 565).
[395] Rambukkana, *Fraught Intimacies*, 38.
[396] Ibid., 124.
[397] Boyd, *Perceptions of Polyamory in Canada*, 80.

from Alberta indicated disagreement with that statement. Respondents from British Columbia, Ontario, and Quebec were lower; their indications of agreement were 82.3%, 81.1%, and 74.2% respectively.[398] Perhaps unsurprisingly then, in response to the statement "public acceptance of polyamory is increasing," respondents in British Columbia were most likely to strongly agree (17.9%) whereas those in Quebec, Ontario, and Alberta reflected less enthusiasm with 12.9%, 9.5%, and 4.4% respectively.[399]

Importantly, this survey notes that the exact numbers of adults in polyamorous relationships is unknown. The absence of polyamory from Statistics Canada's definition of a "census family" means that scholars are unlikely to have concrete data for some time. In turn, the exact number of children in polyamorous families is also unavailable. The survey indicates that 230 children lived, full-time, across 119 households and another 80 children lived part-time across 44 households.[400] Canadian history shows that the presence of children usually serves to complicate debates about families, especially so when law and policy have 'catching-up' to do with respect to the changing needs of Canadian families. The child – both the symbolic figure of the child and the actual presence of a child – carries enormous political and affective force. Indeed, debates about "the best interest of the child" are at play in discussions of polyamory, as evidenced by Séguin's analysis, presented earlier.[401] Despite respondents' concerns that "polyamorous relationships may not be perceived by Canadians as having the same legitimacy as dyadic relationships," this survey data, current academic literature, social and news media, legislation, and case law indicate that the relevance of polyamory, and the number of

[398] Ibid., 80-1.
[399] Ibid., 120.
[400] Ibid.
[401] The discourse frame of "the best interest of the child" appears in multiple bodies of literature and political debates. It is also a legal test frequently used in courts. As a discourse, the figure of the child carries immense cultural weight which I explore in Chapters 4, 5, and 6.

polyamorous families, is increasing in Canada.[402] Indeed, as Naomi Cahn notes, the mere existence of non-normative intimate arrangements "provide empirical, real-life grounding for developing legal categories that recognize the additional members of the family circle."[403] Further, their presence behooves scholars, legislators, and policy makers to consider an expansion of, and rights for, "a wider range of kinship forms."[404]

Contrary to Pierre Elliott Trudeau's famous declaration, the state does indeed have an interest in what goes on in the bedrooms of the nation. Through bureaucratic and legal arrangements, the state is "actively involved in shaping gender relations and regulating women's reproductive work and choices."[405] Family and labour market policies, tax breaks and benefits, and determinations of legal parentage shape people's reproductive possibilities, futures, and experiences of their lives and bodies. Additionally, the state is "directly implicated in the construction of motherhood and gender roles, and in delineating who is included or excluded from these culture representations."[406] In fact, Stephanie Paterson et. al. argue that matters of reproduction are rarely "removed from government and public agendas."[407] Recently, in the wake of family separation in the United States by Immigration and Customs Enforcement, Indigenous and Black scholars and activists are reminding Canadians that we, too, have an (ongoing) history of separating children from their families, as evidenced by the "60s scoop", the extraordinarily high numbers of Indigenous children in "care", and ongoing sterilization of

[402] Boyd, *Perceptions of Polyamory in Canada*, 128.
[403] Cahn, *The New Kinship*, 39.
[404] Ibid.
[405] Stephanie Paterson, Francesca Scala, and Marlene K. Sokolon. *Fertile Ground: Exploring Reproduction in Canada*, 10. Montreal: McGill-Queen's University Press, 2014.
[406] Ibid., 10-11.
[407] Ibid., 3.

Indigenous women in Canada. The link between nation and reproduction is particularly salient and warrants further examination.[408]

During the 19th century in Canada, state interventions linked reproduction with nationalist goals by promoting population growth as a key to national development.[409] Since, population growth has remained an "enduring theme running through reproductive policies" in Canada.[410] This discourse shifted in the 20th century to focus on "quality… over quantity" with policies aimed at "improving reproductive outcomes" through family allowances, eugenics, a state-monopoly of "medical science in the area of obstetric care", and more recently, early childhood development initiatives, and efforts to end child poverty.[411] These policy efforts were shaped by particular ideas of race, class, heteronormativity, and ability that promoted and idealized white, heterosexual, able bodied, and middle- to upper-middle class motherhood and family.[412] Considering this feminist political research should start from the position of

---

[408] For news media articles on family separation in Canada see: Barrera, Jorge. "Indigenous child welfare rates creating 'humanitarian crisis' in Canada, says federal minister." *CBC News*. November 2, 2017. https://www.cbc.ca/news/indigenous/crisis-philpott-child-welfare-1.4385136; Dart, Christopher. "Birth of a Family: The Sixties Scoop Explained." *CBC Documentaries*. November 19, 2017. https://www.cbc.ca/cbcdocspov/features/the-sixties-scoop-explained; Deer, Jessica. "Indigenous activists draw parallels between residential schools and children detained at U.S. border." *CBC News*. June 20, 2018. https://www.cbc.ca/news/indigenous/indigenous-activists-draw-parallels-between-residential-schools-and-children-detained-at-u-s-border-1.4714868; Shingler, Benjamin. "Canada aims to avoid detaining migrant children, but it happens." *CBC News*. June 20, 2018. https://www.cbc.ca/news/canada/montreal/canada-detention-children-united-states-1.4709632; Taylor, Jillian. "Little difference between U.S. child detention and CFS, says Indigenous advocate." *CBC News*. June 21, 2018. https://www.cbc.ca/news/canada/manitoba/cfs-indigenous-manitoba-kids-migrant-detention-centres-1.4716876. For academic discussions, see: Blackstock, Cindy. "The Canadian human rights tribunal on First Nations child welfare: Why if Canada wins, equality and justice lose." *Children and Youth Services Review* 33, no. 1 (2011): 187-194; Spencer, Dale C. and Raven Sinclair. "Settler Colonialism, Biopolitics, and Indigenous Children in Canada." In *The Sociology of Childhood and Youth in Canada*, edited by Xiaobei Chen, Rebecca Raby, and Patrizia Albanese. Toronto: Canadian Scholars, 2017; Kronick, Rachel, Cécile Rousseau, and Janet Cleveland. "Asylum-seeking children's experiences of detention in Canada: A qualitative study." *American Journal of Orthopsychiatry* 85, no. 3 (2015): 287-294; Sinclair, *The Indigenous child removal system*.

[409] Paterson, Scala, and Sokolon. *Fertile Ground,* 4.

[410] Ibid.

[411] Ibid.

[412] Ibid. See also: Katherine Arnup, Andrée Lévesque, and Ruth R. Pierson. *Delivering motherhood: maternal ideologies and practices in the 19th and 20th centuries*. London: Routledge, 1990; Ginsburg, Faye D. and Rayna Rapp, eds. *Conceiving the new world order: The global politics of reproduction*. Berkeley: University of California Press, 1995; Harrison, Laura. "Brown bodies, white eggs: The politics of cross-racial gestational surrogacy." In *Twenty-first century motherhood: Experience, identity, policy, agency*, edited by Andrea O'Reilly, 261-275. New

recognizing the diversity and intersectionality of people's experiences and interests, particularly across identities like race, sexuality, gender, and class.[413] Examining the politics surrounding reproduction and legal parentage provides "fertile ground"[414] for unpacking pressing political questions about intimacy, kinship, and the state.

Families using assisted reproductive technologies to conceive are one type of "newly developing family form" that challenges "conventional" understandings of what families look like, how intimate relationships between adults operate, how parenthood can be established outside of marriage and genetic ties, and the state of legal parentage.[415] The world of assisted reproductive technologies helps show how complex families are and how the meaning of family can shift dramatically.[416] That said, despite these changes (or perhaps despite them) there are enduring common sense understandings of who constitutes a family. Generally, families are understood as those who "[establish] and [maintain] interdependencies between adult partners and/or their children, living together."[417] Although commenting in an American context, Pamela Haag makes an interesting observation on the role of children in a family. She writes that children

> are in some ways the new spouses. They occupy the psychological and sometimes literal space previously occupied by the spouse, or the marriage itself. They're the ones to whom commitment is made, the ones around whom intimacy is defined, the inviolable bond, the affective and even romantic focus of the family.[418]

York: Columbia University Press, 2010; Kallianes, Virginia and Phyllis Rubenfeld. "Disabled women and reproductive rights." *Disability & Society* 12, no. 2 (1997): 203-222; Little, Margaret. *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997*. Oxford: Oxford University Press Canada, 1998; Valverde, Mariana. "'When the Mother of the Race is Free': Race, Reproduction, and Sexuality in First Wave Feminism." In *Gender Conflicts: New Essays in Women's History*, edited by Mariana Valverde, 3-26. Toronto: University of Toronto Press, 1992.

[413] Paterson, Scala, and Sokolon, *Fertile Ground*, 7.

[414] I borrow this phrase from the title of Paterson et. al.'s anthology *Fertile Ground*.

[415] Cahn, *The New Kinship*, 36.

[416] Ibid.

[417] Ibid.

[418] Pamela Hagg quoted in Cahn, *The New Kinship*, 312.

For many, having children "creates kinship" – "the assumption or expectation of the importance of children, along with the norm of creating children through sexual reproduction" continues to animate social and legal thinking about what a family is, or ought to be.[419] In some ways, Nancy Levine notes that the use of assisted reproductive technologies is challenging conventional understandings of "who counts as a family member and how families are formed."[420] On the one hand, ART enables the formation of one parent families, two same-sex parents, or parents who do not have sex (or do not have procreative sex).[421] In this sense, ART brings "ambiguity and uncertainty into kinship relations, including the fundamental categories of motherhood and fatherhood" in a way that "[undermines] the traditional family."[422] On the other hand, given the requisite reliance on biological materials, the use of ART can also "[emphasize]... the biological bond as forming a family" which can uphold "cultural conventions, seeking to replicate the family that would have existed but for the social or medical infertility."[423] The reliance on biological connections is concerning; as Patricia Hill Collins notes, the biologically connected family unit is upheld by state-sanctioned marriage, legitimated by science, and sanctioned by law.[424] Moreover, the logic underpinning these laws bestow "rights" in much the same way as citizenship does.[425] Thus, biological connections are given meaning and significance through "racial and ethnic and visual "likeness"" which the state then affirms as "marker[s] of family boundaries and of natural, state-sanctioned family forms."[426]

2.5 Conclusion

[419] Cahn, *The New Kinship*, 32.
[420] Ibid.
[421] Ibid.
[422] Ibid.
[423] Ibid.
[424] Patricia Hill Collins. "It's all in the family: Intersections of gender, race, and nation." *Hypatia* 13, no. 3 (1998): 62-82.
[425] Mamo, *Queering Reproduction*, 210.
[426] Ibid.

This chapter provided the theoretical foundation upon which my dissertation is built. The concepts and theories presented in this chapter guide the methodology, method, and analysis of the case studies I examine. To do this, I addressed three themes: the governance of intimate life; conjugality; and legal parentage and assisted reproductive technologies. To examine the significance of these themes I culled from four sets of literature: critical citizenship studies, critical race theory, and critical intimacy studies. In doing so, I examined spaces of intimacy and kinship to explore the ways in which norms around intimacy, sexuality, conjugality, and parentage are at work in contouring and/or determining the possibilities available for intimate life. The bodies of literature in this chapter allowed me to identify key issues, themes, concepts, and debates in scholarly debates on the governance of intimate life and how they pertain to this dissertation; gain a deeper understanding of the relationships, interrelationships, and intersections between the literatures; and to identify gaps in theory and demonstrate how this project fills these lacunae.[427]

In reviewing these literatures, I argued that kinship has always been a complicated concept – both theoretically and practically. The ways in which kinship is theorized depends largely on how we understand the role, nature, and dimensions of intimacy and what types of intimacies are acceptable, with whom, and for what purpose. The concepts I draw on demonstrate how closely linked kinship and intimacy is to nation building and state interests, particularly with respect to national mythologies and the idealization of family structures and bodies as the natural and proper reproducers of the nation. Much cultural work is done to reinforce the centrality and universality of the nuclear family form. Indeed, the cultural force

[427] Linda Dale Bloomberg and Marie Volpe. "Developing and presenting the literature review." In *Completing your qualitative dissertation: A roadmap from beginning to end*, edited by Linda Dale Bloomberg and Marie Volpe, 46. London: SAGE Publications, 2008.

behind the nuclear family is reflected in a variety of social policy for families and legal decisions around parentage and custody.[428] Critics of changing kinship forms have serious concerns about the expanding legal and social definitions of parents which focus on the risk to society and the risk to children growing up in non-traditional families. For example, in response to Ontario's *All Families are Equal Act*, Joe Boot and Ryan Eras of the Ezra Institute for Contemporary Christianity wrote:

> Through countless generations the nuclear family – consisting of mother, father and their biological offspring – has been the bedrock of Western civilization and indeed the foundation of social order in almost all cultures on earth. Jesus Christ affirms this foundation… The result of this sacred union is children, who are to be raised in the context of the family with a mother and father. God himself has joined husband and wife, parents and children in the ordained structure of the family and we are warned not to attempt to separate what God has joined. But once again Ontario's courts and politicians know better than Christ, the Bible, Western history and almost all cultures in the world. Why? [...] the Legislative Assembly of Ontario voted unanimously to pass [the *All Families are Equal Act*].[429]

Their comment brings together cultural fears about changing family form, debates about religious ethics and morality, the valorized (and overdetermined) figure of the innocent child, the idealized nuclear and heterosexual family form, and a very clear statement about the role of government in intervening (to change) the status quo (although, what Boot and Eras fail to acknowledge, or perhaps recognize, is that the state is also involved in the creation and maintenance of a nuclear family status quo). In response, I find Rambukkana's reflection on changing family configurations useful:

> ... I do not see the nuclear family shrinking from view, wearing away from attrition. If anything, it might be expanding. Recall that the nuclear family is an atomic model of familial dynamics. With the couple at the centre it was always already more than just the couple and could be extended to include grandparents, aunts and uncles, children, and perhaps children's partners and/or own children, all while sitting comfortably within

[428] Fiona Kelly. "Nuclear Norms or Fluid Families-Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law." *Canadian Journal of Family Law* 21 (2004): 133-178.
[429] Joe Boot and Ryan Eras. "MPPs say Farewell to Family." *The Ezra Institute for Contemporary Christianity.* December 12, 2016. https://www.ezrainstitute.ca/resource-library/blog-entries/mpps-say-farewelll-to-family#_edn2.

> normative frameworks of intimacy. It was always an additive model; it was already a flexible model.[430]

Instead of taking seriously – and reinforcing – critics' claims that the nuclear family is in decline, Rambukkana points out (in similar fashion to Stephanie Coontz)[431] that the nuclear family never actually was nuclear. Instead, he suggests that families are actually "a collection of differently shaped structures that fulfil similar functions yet are assembled in various ways…".[432] As such, the task at hand is to recognize and "add in the complexity that has always been there…".[433] The following chapters dive into these complicated waters to examine legislation, judicial decisions, and discourses that are "highly charged with kinship."[434]

To begin charting these waters, Chapter 3 presents a detailed account of the methodology guiding this project and a rationale for the exceptionality of selecting British Columbia and Ontario's new family law acts as well as the *Polygamy Reference*, *C.C. (Re*), and *BCSC 767* for determinations of legal multi-parentage as cases for analysis.

[430] Rambukkana, *Fraught Intimacies,* 160.
[431] Coontz, *The way we never were.*
[432] Rambukkana, *Fraught Intimacies,* 160.
[433] Ibid.
[434] Jennifer Mason. "Tangible affinities and the real life fascination of kinship." *Sociology* 42 no. 1 (2008): 30.

CHAPTER 3: METHODOLOGY

3.1 Introduction

As a qualitative, or "interpretivist" project, this study of the governance of multi-parentage relies on a constructivist framework that understands knowledge to be personally and socially constructed.[435] A qualitative methodology allowed me to first, investigate and analyse select provinces' understandings of, and attempts to support changing and diverse family forms and second, to uncover both material and theoretical sites of support for, and resistance towards, non-normative and non-monogamous intimate arrangements. Emerging from the interdisciplinary nature of my theoretical framework, I selected Critical Discourse Analysis ("CDA") and Critical Policy Studies ("CPS") approaches to guide my analysis. Both CDA and CPS enable research to identify, track, contextualize, and analyze sites of state power as they relate to intimacy and parentage. I employed a Critical Discourse Analysis across all texts (explained further below) and, while the Critical Policy Studies approach is also applied as a broad method of interpretation, evaluation, and analysis, I draw on CPS most heavily in the final stages of analysis. Further, I draw on feminist, queer, and critical race conceptualizations of power – as outlined in Chapter 2 – to interpret and analyze my findings. In the following sections, I outline the research methods and process, discuss case study selection, and conclude with an examination of the study's limitations.

3.2 Research Methods and Processes

Qualitative studies are differentiated from quantitative studies in three primary ways: first, for their pursuit of a "deep understanding about specific instances," second, qualitative research is often open to augmenting a study as new information or dimensions of the study become

[435] Linda Mabry. "Case study in social research." In *The SAGE handbook of social research methods*, edited by Pertti Alasuutari, Leonard Bickman, and Julia Brannen, 216. SAGE Publications, 2008.

apparent during data collection, and third, while quantitative studies often "reduce data to numbers for aggregation," qualitative studies allow researchers using an interpretivist framework to expand their understandings of a "case's context, conditionalities, and meanings."[436] The choices I made surrounding this study's qualitative approach, methods, and data sets emerged through an in depth literature review of primary and secondary sources on the state, the governance of intimate life, sexual citizenship, national reproduction, intimacies, and critical policy studies. The scholarship I reviewed informed the choices I made during the research design phase, including research questions, methodologies, approaches, data collection, interview format and topics, and data analysis. As a result, I chose a triangulated data collection method to include an analysis of legislation, semi-structured interviews, and "political speech" and I examine the interrelationships between data sets to identify and understand multiple forms of meaning-making. This method allows me to explore the articulation of inclusion, diversity, and the parameters of recognition in recent legislative changes and court cases; demonstrate the circularity of definitions of family and what familial arrangements are defined as aberrant; and explore stakeholders experiences with forms of governance of intimate life and/or their reflections on these policy changes.

Embedded in a qualitative framework, I apply CDA and CPS to the texts in my case studies to analyse and synthesize findings. In the following section I outline these approaches, including the rationale for their use and the framework for applying these methods to texts. Overall, these frameworks allow me to investigate complex operations of power through discourse.[437] This study reflects CDA and CPS principles in the types of questions it asks (focusing on complex socio-political inquiries), the diverse empirical focus, and the

[436] Ibid.
[437] Lazar, *Feminist Critical Discourse Analysis as Political Perspective and Praxis*, 13.

interdisciplinary theoretical and methodological tools it uses.[438] Moreover, both CDA and CPS affirm the "semiotic or linguistic" nature of policy development and analysis that resist positivist approaches to policy analysis.[439]

3.2.1 Critical Discourse Analysis

Norman Fairclough, Jane Mulderrig, and Ruth Wodak understand Critical Discourse Analysis as a "problem-oriented interdisciplinary research movement, subsuming a variety of approaches, each with different theoretical models, research methods and agenda."[440] What brings these approaches together is a shared goal to explore the "semiotic dimensions of power, injustice, abuse, and political-economic or cultural change in society."[441] CDA is a distinctive approach because of its unique view of the relationships between language and society and its "critical" approach to methodology.[442] Premised upon the assumption that the "language elements" of discursive events impact, shape, and define the social, CDA aims to identify the "effects of discourse in constituting, reproducing, and changing ideologies."[443]

Although the term "discourse" is used widely and in different ways across disciplines, in the social sciences and even within the field of CDA, broadly speaking, Fairclough, Mulderrig, and Wodak define discourse as "an analytical category describing the vast array of meaning-

[438] Ibid.
[439] Norman Fairclough. "Critical discourse analysis and critical policy studies," *Critical Policy Studies* 7, no. 2 (2013): 177.
[440] Fairclough et. al., *Critical discourse analysis*, 357.
[441] Ibid.
[442] Fairclough notes that the CDA approach is "critical" because it reveals the "non-obvious connections between language and… social life," highlights the ways in which language produces and reproduces relations of power, and focuses on language as a source of "social emancipation" and "social justice." See: Fairclough, Norman. "Critical discourse analysis," in *The SAGE encyclopedia of social science research methods* (Vol. 1), eds. Michael S. Lewis-Beck and Tim Futing Liao. SAGE Publications, 2004: 214.
[443] Ibid.

making resources available to us."[444] Further, discourse as a "form of social practice" that has a "dialectical relationship between a particular discursive event" and all the "situation(s), institutions(s), and social structure(s) which frame it."[445] The dialectical relationship connotes a 'two-way street' between a "discursive event" and the institutions and social structures that contour it.[446] Thus, discursive events and sociopolitical institutions produce and reproduce each other. An integral part of this project's understanding of discourse is that discourse is shaped by "situations, objects of knowledge, and the social identities of and relationships between people and groups of people."[447] For example, CDA enables researchers to understand how different sites of discourse (judicial decisions or legislative debates, for example) are not produced in a linear fashion. Instead, discourses are sometimes overlapping, conflicting, or incongruent. More specifically, because discourse is intimately intertwined with the production and reproduction of the social, it is an important vehicle for understanding the production and manifestations of relationships of power. While the very relations of power that produce our world are often difficult to identify and name, CDA helps to "make more visible these opaque aspects of discourse as social practice."[448]

There are several contemporary approaches[449] to CDA, including critical linguistics and social semiotics; socio-cognitive studies; discourse-historical; and argumentation and rhetoric. This project is inspired by the "Fairclough approach" but engages more closely with feminist and queer critical discourse analysis. Norman Fairclough developed a theory of discourse that examines the discursive nature of "contemporary processes of social transformation."[450] In his

[444] Ibid.
[445] Ibid.
[446] Ibid.
[447] Ibid., 358.
[448] Ibid.
[449] Ibid. See 361-366 for a concise overview of each approach.
[450] Ibid., 362.

work, CDA is employed in part to "explore the socially transformative effects of discursive change [451] by analysing a variety of texts to identify (and ideally work to restructure) relationships

> between different discursive practices within and across institutions, and the shifting of boundaries within and between 'orders of discourse' (structured sets of discursive practices associated with particular social domains).[452]

Research using CDA requires several "levels" of analysis: the researcher must be able to make sense of the links between specific texts and discourses and also between discourses and sociopolitical phenomenon.[453] For Fairclough, CDA is both a theory and a method – CDA is a "theoretical perspective on language... and more generally semiosis which gives rise to ways of analysing language or semiosis within broader analyses of the social process."[454] In turn, CDA is in a "dialogical relationship with other social theories and methods" in a "transdisciplinary" way, such that particular theoretical meeting points between social processes "may give rise to developments of theory and method which shift the boundaries between different theories and methods."[455]

As the analysis of the "dialectical relationships" between discourses and social practices, CDA is oriented towards identifying and understanding changes happening in social life and how discourse operates within these change processes. Fairclough's approach emphasizes that we cannot take the role of discourses' operations in social practices for granted and that researchers

[451] Ibid.
[452] Ibid., 363
[453] Eero Vaara and Janne Tienari. "Critical discourse analysis," in *Encyclopedia of Case Study Research*, eds. Albert J. Mills, Gabrielle Durepos, and Elden Wiebe. SAGE Publications, 2010: 245.
[454] Norman Fairclough. "Critical discourse analysis as a method in social scientific research," in *Methods of Critical Discourse Analysis*, eds. Ruth Wodak and Michael Meyer. SAGE Publications, 2001: 121.
[455] Ibid. See also: Fairclough, Norman. *New Labour, New Language?* Routledge, 2000.

must be attuned to the ways in which discourses may shift over time or be more (or less) salient in one discursive event than another.[456]

To examine these relationships, Fairclough developed a five-step analytical framework for thinking through CDA.[457] Step 1 situates CDA as a "problem-based" approach aimed at shedding light on problems which people are confronted with by particular forms of social life, and to contributing resources which people may be able to draw upon in tackling and overcoming these problems."[458] Step 2 works towards diagnosing the problem(s) by asking questions like "what is it about the way in which social life is structured and organized that makes this a problem which is resistant to easy resolution?"[459] Diagnosing the problem requires the researcher to determine how social practices are co-constitutive and the ways in which discourses relate to networks of social practices.[460] Step 2 incorporates different forms of analyses, for example: interactional (conversations, news media stories, Hansard debates); interdiscursive (how do types of interactions combine to form discourses, genres, and styles); and, linguistic (identifying the ways in which categories of social analysis connect with linguistic analysis). Step 3 examines whether a particular social order "needs" a problem to exist (for example, systems of power and domination). Step 4 moves the analysis from "negative to positive critique" by uncovering contradictions in the dominant social order or by highlighting sites of difference or resistance. Finally, step 5 requires the researcher to engage in a self-reflexive exercise to examine how effective CDA was as a method of critique; whether it aids, in this particular project, as a form of social emancipation; and finally, in what ways the

[456] Ibid.
[457] Ibid., 125. Fairclough notes that this schema is inspired by Roy Bhaskar's concept of "explanatory critique" (see: Bhaskar, Roy. *Scientific realism and human emancipation*. Routledge, 2009 [1986] and Chouliaraki, Lilie and Fairclough, Norman. *Discourse in late modernity*. Edinburgh University Press, 1999.
[458] Ibid., 125.
[459] Ibid.
[460] Ibid., 125-126.

researcher's own position within the academy contours the analyses.

Fairclough also developed a three-dimensional model of discourse which endeavours to integrate different forms and levels of analysis: analysis of text, analysis of discursive practices, and analysis of social practices to demonstrate their interrelationships.[461] In this framework, written or spoken language represent "texts" and are one dimension of a discursive event. The next dimension is the social, political, or ideological practice. The noteworthy piece of this framework is that the analysis of discourse-as-text focuses specifically on linguistic features of the texts, whereas discourse-as-practice moves beyond the linguistic features of a text to attend to how texts are created, shared, and consumed, all which Fairclough argues occurs in "the particular economic, political and institutional settings within which discourse is generated."[462] My approach, while informed by Fairclough's framework, is more narrative in structure and foregrounds feminist and queer critique over a rigid set of steps. As Chapters 4, 5, and 6 will demonstrate, I draw on emergent discourses to identify and attend to gaps between claims and actions, contradictions, limits, power, and resistance.

Feminist critical discourse analysis is chiefly concerned with "critiquing discourses which sustain a patriarchal social order."[463] This critique is designed to create "social transformation" by resisting current, normalized power structures and, in so doing, feminist CDA reveals gendered operations of power in an effort to resist that power and is itself a form of "analytical resistance". [464] Moreover, feminist CDA is more than an "academic de-construction of texts" but is rooted in an analysis of how discursive landscapes have material consequences

[461] Fairclough, Norman. *Discourse and Social Change*. Polity, 1992: 73.
[462] Ibid., 71
[463] Michelle M. Lazar. "Politicizing gender in discourse: Feminist critical discourse analysis as political perspective and praxis," in *Feminist critical discourse analysis*, pp. 1-28. Palgrave Macmillan, 2005: 5.
[464] Ibid., 6.

for marginalized peoples.[465] Thus, feminist CDA has an explicitly "political" stance regarding gendered systems of power and generally has five key principles.

First, feminist CDA is a form of "analytical activism" that works for social justice through critiques of discourse.[466] Second, feminist CDA affirms that gender is an "ideological structure". That is, gender ideology creates hierarchies of acceptable and superior genders, based on sexual difference.[467] Third, this approach understands that relationships of gender and power are multifaceted, complex, and pervasive.[468] For example, the ways in which sexism and gender-based oppression manifests are culturally and temporally specific and oppression is not a zero-sum experience. Women are not wholly oppressed by men, for example, and can participate and reproduce gender-based oppression or can resist that oppression in contexts that might otherwise appear exclusively patriarchal. Fourth, feminist CDA takes discourse as an important component of social practices that produce and reproduce gender ideologies and hierarchies of power. Drawing on Fairclough's work, Lazar asserts that the relationship between discourse and social worlds is "dialectical" wherein both discourse and social practices are constituted by one another.[469] Fifth, and finally, feminist CDA requires researchers' "critical reflexivity". That is, feminists must attend to their own biases so as not to affirm or reproduce gendered hierarchies or the subjugation of diverse ways of knowing. For example, Lazar points out that feminist researchers must pay attention to goals like "social justice" and "emancipation" which necessarily preclude liberal approaches to reform or "tolerance" (since these tactics so easily

[465] Michelle Lazar. "Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis," *Critical Discourse Studies* 4, no. 2 (2007): 142.
[466] Ibid., 145.
[467] Ibid.
[468] Ibid., 148.
[469] Ibid., 149-150.

conform to, and affirm, the status quo). Thus, my work is attentive to discursive frames of "sameness" that reinforce – instead of disrupt – hegemonic forms of intimacy.[470]

Extending the contributions of feminist CDA, I also draw on queer approaches to discourse analysis. Here, William Leap's analysis is instructive. He uses Judith Butler's conceptualization of performativity to think through "the performative nature of discourse". [471] Specifically, Leap is interested in how discourse affirms or resists structures of power and how language mirrors power but also "enacts domination…".[472] For Leap, there are important similarities between CDA and queer linguistics, namely that both approaches are similarly focused on "critical inquiry– and the study of social wrong."[473] This "queer lens" brings into focus the ways in which "messages about sexuality circulate in multiple forms within and beyond the social moment."[474] That is, texts like family law acts and judicial decisions are ripe with meaning about sexuality and intimacy that both mirror contemporary power relations and shape what our intimate futures might look like. Here, a queer linguistics approach is committed to deconstructing how "common sense assumptions" about sexuality are packaged as "obvious...right...[and] true" and how a tacit acceptance of these assumptions reifies sexuality-based hierarchies and exclusions.[475] Thus, queer linguistics works to reveal "common sense" about sexuality while also critiquing and dismantling its "regulatory power".[476]

---

[470] Ibid., 153.
[471] Ibid.
[472] William Leap. "Queer Linguistics and Critical Discourse Analysis," in *The Handbook of Discourse Analysis*, Deborah Tannen, Heidi E. Hamilton, and Deborah Schrifin, eds. John Wiley & Sons, 2015: 661.
[473] Ibid., quoting Judith Butler. 1997: 18.
[474] Leap, *Queer Linguistics*, 661.
[475] Ibid., 662.
[476] Ibid.

Importantly, Leap points out that there is "no single research agenda in queer studies" nor even a unified "queer subject." But, to examine phenomenon through a queer lens is rooted in the belief that

> if sexuality is a pervasive element in human experience, any form of social analysis – including linguistic inquiry – is immediately rendered defective if it overlooks the sexual dimensions of social practice, or fails to address the broader social discourses that surround and inform a specific sexual formation.[477]

This study takes up this call by centering the "sexual dimensions of social practice" as it is produced and reproduced in legislation and judicial decisions. Responding to one of the aims of queer linguistics, I aim to illustrate how intimacy discourses construct how discussions of sexuality take place and what possibilities for sexual intimacy exist as a result.[478] Indeed, Heiko Motschenbacher argues that the goal of queer linguistics is a "reconceptualization of dominant discourses which shape gender and sexual identities."[479] An important focus of this work is narrative analysis. For queer linguistics, narratives are present in a variety of social practices, like media, judicial decisions, and interviews, and they illustrate the constitutive nature of "storytelling and power".[480]

3.2.2 Critical Policy Studies

The *Journal of Critical Policy Studies* describes its purpose as bringing together "contemporary theoretical and methodological discussions, both normative and empirical, to bear on the understanding and analysis of public policy, at local, national and global levels" and to "[move]

---

[477] Ibid., drawing on Eve Sedgwick. *Epistemology of the Closet*. University of California Press, 1990.
[478] Leap, *Queer Linguistics*, 663.
[479] Ibid., 666, citing Heiko Motschenbacher. *Language Gender and Sexual Identity: Poststructuralist Perspectives*. Amsterdam: John Benjamins, 2010.
[480] Anna De Fina and Barbara Johnstone. "Discourse Analysis and Narrative," in *The Handbook of Discourse Analysis*, 159. Edited by Deborah Tannen, Heidi E. Hamilton, and Deborah Schrifin. New York: John Wiley & Sons, 2015.

beyond narrow empirical approaches to pay special attention to interpretive, argumentative, discursive approaches to policy-making."[481] The transmethodological nature of the Journal is widely reflected in the types of policy analysis it publishes, ranging from traditional approaches to the study of policy, like those with a focus on "positivist epistemology, endorsing the view that there is a real world which is accessible to objective description and analysis"[482] to those with a critical or constructivist lens.

Although a variety of approaches exist for studying policy, much of the scholarly writing tends towards five dominant approaches; mathematical optimizing; econometric; quasi-experimental; behavioural process; and, multicriteria decision making.[483] Like these approaches, Critical Policy Studies takes policy to be a critical and fruitful site of inquiry, however, unlike these approaches, CPS is both a theory and method with a constructivist (sometimes poststructuralist) framework that aims to foreground relationships of power. As outlined in Chapter 1, the CPS approach in this project draws heavily on Michael Orsini and Miriam Smith's work in *Critical Policy Studies*. In particular, Orsini and Smith acknowledge that policy studies has increasingly found a foothold in political science and draws on interdisciplinary theoretical and methodological approaches. Critical policy studies is thus informed by broad ideological orientations that focus on identifying, revealing, and examining power. [484] Similarly, David Howarth writes that CPS aims to

> critically explain how and why a particular policy has been formulated and implemented, rather than others. Invariably these processes and practices involve the definition of problems (and thus to some extent solutions), complex practices of deliberation, as well

[481] "Aims and Scope." *Critical Policy Studies*, Taylor and Francis. Online, www.tandfonline.com/aims-and-scope
[482] Carol Bacchi. "Policy studies: traditional approaches," in *Women, policy and politics: The construction of policy problems* (17-31). SAGE Publications, 1999: 17.
[483] Stuart Nagel. "Diverse methods for policy analysis," in *Handbook of public policy evaluation*. SAGE Publications, 2002: 155.
[484] Ibid., 1.

> as the taking of decisions; they also involve complicated logics of inclusion and exclusion, and thus the exercise of political power.[485]

Inspired by these approaches, this project relies on both Orsini and Smith's and Howarth's conceptions of CPS to analyse, evaluate, and critique policy documents, interviews, and political speech to identify themes, patterns, discourses, and relationships of power. Indeed, one of the key components of CPS (and CDA) is its analysis of how power operates in texts. On power, Howarth asserts that

> it is immanent in all kinds of social relations – both public and private – and it is dispersed throughout the social order. Power is productive and constitutive of identities and social relations.[486]

For Howarth, the relationships between power, discourse, and policy are central to a CPS approach. He contends that the challenge for those engaging with CPS is how to think about "power and domination," how the two relate to "discourse, subjectivity, and hegemony," and how to "integrate the ideas of power and domination more explicitly into our critical explanations of policy problems."[487] Since questions of power are understood to be one of political science's central objects of analysis, it is fitting (indeed, necessary) that the methodologies in this study centre analyses of power. He notes:

> power consists of radical acts of inclusion, which involve the elaboration of political frontiers and *the drawing of lines of inclusion and exclusion*. In this conception, the exercise of power constitutes and produces practices and social relations. But it is also involved in the sedimentation and reproduction of social relations via the mobilization of various techniques of political management, and through the elaboration of ideologies and fantasies. The function of the latter is to conceal the radical contingency of social relations and to naturalize relations of domination.[488]

---

[485] David Howarth. "Power, discourse, and policy: articulating a hegemony approach to critical policy studies," *Critical policy studies* 3, no. 3-4 (2010): 324.
[486] Ibid., 323-324.
[487] Ibid., 309.
[488] Ibid., 309-310. Emphasis added.

Equipped with a definition of what CPS is and its central concerns as a theoretical framework, I now turn to *how* CPS is used in this project. For CPS, policy texts "represent the outcome of political struggles over meaning."[489] John Codd expands this point:

> policy documents can be said to constitute the official discourse of the state (Codd, 1985). Thus policies produced by and for the state are obvious instances in which language serves a political purpose, constructing particular meanings and signs that work to mask social conflict and foster commitment to the notion of universal public interest. In this way, policy documents produce real social effects through the production and maintenance of consent.[490]

In this study, I approach policy documents as texts for analysis and as sources of discourses. Here, Codd suggests that policy analysis necessarily produces different readings and so part of the work is to examine the multiplicity of meaning in policy documents. [491] As I explained in chapter 1, Sandra Taylor extends Codd's analysis by thinking of policy documents as texts that *contain* discourses and *are* discourses. For Taylor, this formulation helps researchers theorize competing discourses in the process policy making process.[492] She also notes that discourse analysis has both expanded and deepened critical policy studies, for its attention to how power is produced and reproduced in policy documents.[493]

In addition to the role that critique plays in policy analyses that deploy CPS, Howarth notes that policy analysis ought to have a normative component.[494] To illustrate this, Taylor notes that CPS is linked to critical social research more broadly in that "critical social research is interested not only in what is going on and why, but [is] also concerned with doing something

---

[489] Sandra Taylor. "Critical policy analysis: Exploring contexts, texts and consequences," *Discourse: Studies in the cultural politics of education* 18, no. 1 (1997): 26.
[490] John Codd. "The construction and deconstruction of educational policy documents," *Journal of Education Policy* 3, no. 3 (1988): 237.
[491] Ibid., 239.
[492] Taylor, *Critical policy analysis*, 27.
[493] Ibid., 25.
[494] Howarth, *Power, discourse, and* policy, 324.

about it."[495] Thus, this project engages in both an examination and critique, but also a normative exercise to think through how these policies might better serve the communities they impact. A normative component requires the researcher to ask diagnostic, evaluative, and strategic questions.[496] Diagnostic analysis identifies the reasons and/or causes for why a policy problem exists; evaluative analysis examines the effectiveness of the policy; and strategic analysis works to identify new theories and policy plans that more effectively achieve the policy outcome.

Another dimension of CPS is a commitment to understanding policies within their broader economic, social, and historical context. More specifically, Taylor wishes to move beyond a "macro/micro dichotomy—or even a macro/meso/micro categorisation" to stress the need for "exploring the linkages between the various levels of the policy process with an emphasis on highlighting power relations."[497] For Taylor, a study of policy necessitates an examination of "contexts, texts and consequences."[498] Here, Janine Brodie's important analysis of meso-discourses attends to some of the difficulties of theorizing the state amidst post-modernism's "extremeness".[499] To "reconcile" diverse theorizations of state power, Brodie suggests the term "meso-narrative".[500] For Brodie, meso-narrative allows an analysis of a state's "governing philosophy" *and* historical shifts in state form.[501] Brodie's intervention enables an examination of "meta-narratives" as well as daily exercises of power, or "the micro-technologies

[495] Taylor, *Critical policy analysis*, 23.
[496] Jane Ritchie and Liz Spencer. "Qualitative data analysis for applied policy research," in *The qualitative researcher's* companion. Edited by Michael A. Huberman and Matthew B. Miles. London: SAGE Publications, 2002: 307
[497] Taylor, *Critical policy analysis*, 32-33.
[498] Ibid. See also: Anna Yeatman. *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State*. London: Routledge, 1990.
[499] Janine Brodie. "Meso-discourses, state forms and the gendering of liberal-democratic citizenship," *Citizenship Studies* 1, no. 2 (1997): 227.
[500] Ibid.
[501] Ibid.

of power and the politics of the everyday".[502] In this project, I use CPS to identify meso-narratives that reveal governing philosophies like hetero- and homonormativity as well as the manner in which legislation like the *FLA* and *AFAEA* act as micro-technologies in the reproduction and maintenance of certain forms of intimacy.

In particular, I approach CPS through a feminist lens that is attentive to the operation of power through identities like gender. Lazar argues that "gender ideology" is especially difficult to reveal since its hegemony renders it nearly invisible, or, "largely consensual and acceptable to most..."[503] Drawing on a Gramscian analysis of hegemony, Lazar argues that the supremacy of gender ideology is won on discursive terrains through "ideological assumptions" that are produced and reproduced until they appear normal and natural.[504] For example, the "taken-for-grantedness" of the nuclear family model, with its contingent heterosexuality and monogamy, is an example of the hegemony of gender ideology.[505] As this dissertation points out, this assumption was only recently overturned in Canadian laws with cases like *M v. H*, *Rutherford*, *C.C. (Re)*, and *BCSC 767* as well as legislative change like the *Civil Marriage Act*, BC's *FLA*, and ON's *AFAEA*.

Here, gender ideology is operating at the level of the individual and the institution. Importantly, Lazar points out that while gender ideology is hegemonic it is also possible to resist its power.[506] Put differently, there is a "dialectical tension" between individuals and institutions such that there are fissures in the discursive landscape of gender ideology.[507] A feminist CPS provides the theoretical and methodological tools to examine case studies as sites of

[502] Ibid.
[503] Lazar, *Feminist Critical Discourse Analysis as Political Perspective and Praxis*, 7.
[504] Ibid.
[505] Ibid.
[506] Ibid., 8.
[507] Ibid.

"transgression" while also taking seriously the constraints in which they operate (or the limitations they reproduce).[508] Here, CPS and Brodie's analysis of meso-narratives are closely aligned. Brodie asserts that "a meso-narrative is the periodic rewriting" of contemporary state stories.[509] These stories, produced via texts like legislation, form the basis of a new state form and reflect a "historical consensus" about that which is deemed to be "rational, progress, emancipation, justice…".[510] These narratives produce a "coherence in state activities" but also, as Brodie suggests, allow for an analysis of state contradictions.[511] For example, the *Civil Marriage Act* made it possible for same gender couples to marry but prior to *AFAEA*, provincial legislation in Ontario still required the non-biological parent to adopt her own child, even if she was married to her biological co-parent. On the surface, this may appear contradictory or, as Brodie writes, these decisions may "take on the appearance of incoherence."[512] And yet, a meso-narrative perspective points to the consistency of legislative decisions maintaining a nuclear family form. The disjuncture between federal equal marriage laws and provincial/territorial parentage schemas indicates a clear preference for heterosexual parentage.

3.3 Case Studies and Texts

From the literature review, I identified two pieces of legislation and three judicial decisions that represented the most recent legislative changes in Canada that attempt to 'catch up' to the state of family diversity. While each case could be studied on its own, preliminary research identified interesting themes, patterns, and conversations between the three. Taken together, these cases naturally presented themselves as 'case studies,' defined as the "empirical investigation of a

[508] Ibid., 9.
[509] Brodie, *Meso-discourses*, 227.
[510] Ibid.
[511] Ibid.
[512] Ibid.

specified or bounded phenomenon."[513] Linda Mabry notes that cases may be selected for a variety of reasons, including the researcher's own interest in a particular event or because of the "case's capacity to be informative about a theory, an issue, or a larger constellation of cases".[514] My interest in the governance of intimate life in Canada and the ways in which policies influence and contour people's decisions around intimate arrangements led me to the bodies of literature from which these studies emerged. I hypothesized that these case studies will help to uncover modes of governance and that they are fruitful sites of inquiry for a critical and normative analysis of these legislative changes.

I selected three case studies – British Columbia's *Family Law Act*, Ontario's *All Families Are Equal Act*, and three legal cases, *C.C. (Re)*, *BCSC 767*, and the *Polygamy Reference* – to examine the contemporary state of the governance of intimate life in Canada. These cases emerged through an in-depth literature review of scholarly, grey, and popular research and writing on family diversity in Canada. When I began my research, I was interested in what the expansion of legal parentage to families in British Columbia and Ontario meant for parents in "non-normative" families. That is, if legislative changes to parentage were meaningful to parents, reflected diverse family forms (and their needs), and if the new schemas did, in fact, affirm family diversity. At the time, I was particularly interested in poly-conjugality through the lens of polyamory. My interest was fueled, in part, by the ongoing criminalization of polygamy– another form of "poly" intimacy– in Canada. Over the course of my research and writing, two additional court cases emerged: *C.C. (Re)* and *BCSC 767*.

[513] Taylor, *Critical Policy Analysis*, 214, cited from Smith, Louis. "An evolving logic of participant observation, educational ethnography and other case studies," *Review of Research in Education* 6 (1978): 316-377.
[514] Mabry, *Case study in social research*, 214.

Taken together, these case studies represent some of the most significant "policies" impacting family diversity and intimate life in Canada. Here, I draw on Lisa Stevens and Thomas Bean's definitions of policies as the "artifacts contained in legislative documents, court proceedings, and bylaws" *and* "the crystallization of values and representations of differing stakeholders' views of what is important to a government and what is negligible."[515] This project understands policies in both dimensions – as a set of texts and norms (that operate in a dialectical manner) – that govern, both implicitly and explicitly, the choices people make about their intimate arrangements. As such, this study explores the ways in which British Columbia's *Family Law Act*, Ontario's *All Families Are Equal Act*, and three legal cases, *C.C. (Re)*, *BCSC 767*, and the *Polygamy Reference*, as the most recent legislative changes to account for family diversity in Canada, govern intimate life.

Each case includes three sets of texts: the legislation or case itself, interviews (with families, legal and/or policy experts, and provincial legislators), and political speech (which includes provincial Hansard transcripts, judicial transcripts, provincial and national news media sources, and social media sources of record). I selected texts based on a comprehensive literature review of academic books and journal articles; news media; professional and personal blog-style sources of record; government reports/documents; judicial transcripts; publications by research institutes like the Vanier Institute for the Family and the Canadian Center for Policy Alternatives; and writing by families about their experiences with the policy formulations in question. Overall, these texts enabled me to ground my research within existing scholarly and popular debates; refine my research question, central concepts, and formulate an appropriate

[515] Lisa Patel Stevens and Thomas Bean. "Critical policy analysis in local contexts," in *Critical literacy: Context, research, and practice in the K-12 classroom*. SAGE Publications, 2007: 111.

research design; and helped me to identify what research has already been established regarding family, social policy, and the influence of the state, and what silences exist.

Case study research is designed to gain a deep understanding of particular phenomenon. This goal drives all aspects of the research design and analysis, including case study selection, the writing or refinement of research questions, choosing data collection methods, identifying the underlying research philosophy/approach, and selecting which type of "reporting style" is most effective for communicating the results of the study.[516] Selecting "typical" case studies allow a researcher to identify and examine "ordinary events" and "the social and political structures that sustain them". The use of "typical" case studies reveals the "*status quo* of a phenomenon"[517]. On the other hand, and in this project, "atypical" case studies are cases which "defy expectations, conflict with the ordinary, illustrate contrasting approaches, or suggest alternatives or possibilities for change."[518] Atypical cases are especially useful for identifying, examining, and challenging theories and interpretations of the "status quo" and for improving analyses of social phenomena.[519] As in this study, when more than one atypical case is selected, the "contexts, circumstances, and [the effects of the cases]" assist in providing a broader *and* deeper insight into larger social phenomena.[520]

Case studies are useful for exploring the "complexity of social phenomena," and coupled with an interpretivist methodology, case study researchers are aware that case studies are embedded in, and shaped by, "historical, social, political, ideological, organizational, cultural, linguistic, and philosophical" processes.[521] These processes determine the nature of the case

[516] Ibid.
[517] Ibid., 217.
[518] Ibid.
[519] Ibid.
[520] Ibid.
[521] Frederick Erickson. "Qualitative methods in research on teaching," in *Handbook of research on teaching*, ed. Merlon Wittrock. MacMillan, 1986: 124. Italics in original.

study in question. Further, interpretivist methods do not necessarily seek to "resolve social ambiguities" but instead aim to problematize them. As such, this project engages in both the identification of phenomenon and the problematization thereof.

Mark Olssen, John Codd, and Anne-Marie O'Neill posit that, in the context of policy documents, a discourse analysis is useful because it "enables us to conceptualize and comprehend the relations between the individual policy text and the wider relations of the social structure and political system."[522] Examining legislation is useful for three reasons: first, because policy documents are produced by governments, their very "nature" is political and ought to be understood as "part and parcel of the political structure of society and as a form of political action."[523] Second, given that governments (at all levels) represent "unevenly the influence of different groups and sectors of the society, state policy is inevitably ideological by its very nature and in its effects."[524] Third, policy decisions are constituted by both action *and* inaction, and fundamentally, policy decisions represent the "exercise of political power."[525]

With these parameters in mind, I briefly introduce each piece of legislation and identify the primary policy document that will be analysed in each case. Having introduced the case studies in the introduction, for the purposes of this chapter, I provide a brief background for each case study. A detailed history, context, and discussion of each case study is presented in their respective chapters.

3.3.1 British Columbia's Family Law Act

[522] Mark Olssen, John Codd, and Anne-Marie O'Neill. "Policy as text and policy as discourse: a framework for analysis," in *Education policy: Globalization, citizenship and democracy*. SAGE Publications, 2004: 71.
[523] Ibid.
[524] Ibid.
[525] Ibid.

In Chapter 4, I examine British Columbia's *Family Law Act* (2013). I focus my analysis on the revised schema for determinations of parentage; a change that was prompted by the increased use of assisted reproductive technologies (including insemination by donor and in vitro fertilization) by heterosexual, queer, and sole parents as well as the legal recognition of same-sex relationships. Part of the *FLA* was dedicated to determining legal definitions of parentage to respond to the needs of families for whom legal definitions and documents failed, a situation that was exacerbated by a great deal of uncertainty about who – in the case of a mix of biological and social contributors to a child – became a legal parent. Specifically, I focus on sections 20 and 24 (defining donors and donors' roles), 26 (defining legal parentage), 29 and 30 (preconception agreements), and 31 (declarations of parentage). These sections fall under Part 3 "Parentage" of the *FLA*.

3.3.2 Ontario's All Families Are Equal Act

In Chapter 5 I undertake an examination of Ontario's *All Families Are Equal Act* (2016). Like BC, the *AFAEA* expanded legal definitions of parentage to improve the legal situation for same-sex parents and for parents who used assisted reproductive technologies.[526] Unlike BC, the *AFAEA* was introduced following a series of court cases, the last of which was *Grand v. Ontario*, wherein the presiding judge declared that Ontario's existing parentage provisions were in violation of Canada's *Charter of Rights and Freedoms*. In the *AFAEA*, I examine sections 1 (definitions and interpretations) and 4 (rules of parentage). These sections fall under Part 1 "Parentage" of the *AFAEA*.

[526] Amanda Jerome. "Ottawa lawyers' declaration of parentage illustrates shift in family law," *The Lawyer's Daily* February 28, 2017, www.thelawyersdaily.ca/articles/2610/ottawa-lawyers-declaration-of-parentage-illustrates-shift-in-family-law-.

3.3.3 C.C. (Re), BCSC 767, and the *Polygamy Reference*

This chapter proceeds somewhat differently from Chapters 4 and 5. The primary texts for Chapter 6 are not legislation, but instead, three legal cases: *C.C. (Re)*, *BCSC 767*, and the *Polygamy Reference*. *C.C. (Re)* was decided by the Newfoundland and Labrador Supreme Court and, to my knowledge, is the first legal case in Canada to deal with legal parentage in the context of polyamory. *BCSC 767* and the *Polygamy Reference* are both from British Columbia. *BCSC 767* is a direct response to the *FLA*– a polyamorous throuple could not seek a declaration of legal parentage for the third parent under the revised legislation– whereas the *Polygamy Reference* is not about parentage per se, but the governance of conjugality. All three cases deal with poly-conjugality and multi-parentage, but they are taken up in different ways. Since *C.C. (Re)* and *BCSC 767* are cases seeking declarations of parentage, conjugality is explored through the lens of parentage. The *Polygamy Reference* is more explicitly about conjugality, and the nature of multi-parentage is thus explored through that lens.

3.4 Interviews

Case study research in the social sciences often involves a qualitative mixed methods approach.[527] Norman Denzin and Yvonna Lincoln,[528] Elliot Eisner,[529] Frederick Erickson,[530] and

[527] Mabry, *Case study in social research*, 218. See, also: Chatterji, Madhabi. "Evidence on 'what works': An argument for extended-term mixed-method (ETMM) evaluation designs," *Educational Researcher* 33, no. 9 (2005): 3–13; Datta, Lois-Ellen. "Multimethod evaluations: Using case studies together with other methods," in *Evaluation for the 21st century: A handbook* (344–359), eds. Eleanor Chelimsky and William R. Shadish. SAGE Publications, 1997; Greene, Jennifer C., Valerie J. Caracelli, and Wendy F. Graham. "Toward a conceptual framework for multimethod evaluation designs," *Educational Evaluation and Policy Analysis* 11, no. 3 (1989): 255–274; and Johnson, R. Burke and Anthony Onwuegbuzie. "Mixed methods research: A research paradigm whose time has come," *Educational Researcher* 33, no. 7 (2004): 14–26.
[528] Norman K. Denzin & Yvonna Lincoln. *Handbook of qualitative research*, 3rd ed. Thousand Oaks: SAGE, 2005.
[529] Elliott W. Eisner. *The enlightened eye: Qualitative inquiry and the enhancement of educational practice*. New York: Macmillan, 1991.
[530] Frederick Erickson. "Qualitative methods in research on teaching," in *Handbook of research on teaching*, 119–161. Edited by Merlin C. Wittrock. New York: Macmillan, 1986.

others posit that qualitative methods largely feature three data collection techniques: observation, interview(s), and the review and analysis of "site-generated" or related sources of record. My case study research included 13 semi-structured, confidential interviews with key stakeholders, including senior managers, lawyers, and policy experts from 2020-2021.[531] The interviews formed a central component of my research and analysis. I collected interview data in three ways: I audio recorded the interview, transcribed the audio, and took notes by hand during each interview to highlight themes or points of interest to which I wanted to return later. Transcribing the interviews was critical to the analysis stage because, as Mary Bucholtz argues,

> All transcripts take sides, enabling certain interpretations, advancing particular interests, favoring specific speakers, and so on. The choices made in transcription link the transcript to the context in which it is intended to be read. Embedded in the details of transcription are indications of purpose, audience, and the position of the transcriber toward the text. Transcripts thus testify to the circumstances of their creation and intended use.[532]

Thus, although the transcription itself is not neutral, by transcribing interviews, researchers are able to re-listen to interviews, review the topics discussed, begin the process of interpreting interview data and generating preliminary analyses.[533] There are a variety of ways to transcribe

---

[531] I sent interview requests to 25 people; some did not respond and others replied to say they were either too busy or not able to participate. In the latter case, I understood this to mean that their position precluded them from participating in a project about the development of, in some cases, contentious legislation and/or judicial decisions. As per the University of Alberta's research ethics guidelines, the confidential data gathered during this study has been managed to ensure safety and privacy. As such, all interview data is stored in encrypted files, on a personal computer, that is stored under lock and key while not in use. The University's guidelines require that the study's data is held for 5 years after the project is complete. To fulfil that requirement and to maintain the security of the data, once this project is complete, all encrypted files will be transferred to an external hard drive that is stored under lock and key. When the five-year timeline is complete, the data will be permanently destroyed. Interview participants signed an informed consent form that provided them information about the project, their role in the study, contact information for the University of Alberta's Research Ethics Board and my supervisor should they have any questions, and information about how to withdraw entirely from the study. Additionally, interviewees were advised that at any point during the interview they were entitled, without consequence, to skip a question and return to it later, or not answer a question. Regarding withdrawing from the study, participants had 30 days from the day the interview was completed to indicate their desire to withdraw. Once this intent was communicated, I would delete all information relating to the participant and none of that information would be reproduced in the final dissertation. After the 30-day period, participants were able to request to withdraw their participation, though no one did.
[532] Mary Bucholtz. "The politics of transcription," *Journal of pragmatics* 32, no. 10 (2000): 1440.
[533] Kathryn Roulston. "Doing interview research," in *Reflective interviewing: A guide to theory and practice*. SAGE Publications, 2010: 105.

interviews, the simplest of which is to transcribe words spoken. Other methods include, for example, making note of the gestures or pauses that an in interview participant makes, or the interviewer's utterances (for example, "mhmm").[534] There is a lot to be learned from this level of transcription – features like word stress, pauses, silences, speed of talk, how speakers take turns speaking – are all potential sites of inquiry, however, this level of analysis was not the focus of my study. Instead, my analysis focuses on the level of discourse and not on the "co-construction" of speech.[535] Specifically, the transcription method is "words spoken." Once transcribed, I examined the texts for central themes and concepts within and across texts.

Ideally, I would have conducted the interviews in person, but the Covid-19 pandemic prohibited this. Instead, I conducted the interviews by phone or by Zoom. I recorded each interview and transcribed (using Otter.ai software) the recording before sending each participant a copy of their transcript for review and approval. Most participants did not request any changes to their transcript, and when they did, the requests were minor clarifications. However, in one case, a participant redacted parts of their interview. I assumed that people would be more willing to participate in an interview if I stated, from the beginning, that all participants (unless they consented otherwise) would remain anonymous in my dissertation. Thus, the initials assigned to participants in the subsequent chapters are pseudonyms and, to the best of my ability, I removed all identifying information. To maintain confidentiality, I have not shared the identities of participants with colleagues, other interviewees, or members of the doctoral dissertation committee. Only two participants declined anonymity, so their full names and affiliations are disclosed in the dissertation. Though the use of initials like "AA" or "BB" are inelegant in some sentences, I chose this method (over the use of a pseudonym first name) as an additional measure

[534] Ibid.
[535] Ibid., 107

to ensure anonymity. It seemed less likely that a random assignment of letters would lead to potentially identifying a participant's real name. I did not anticipate that interviewees would reveal highly politically sensitive information, however, the majority were relieved by the cautionary measures I presented. Thus, when I incorporate quotations or paraphrases into Chapters 4, 5, and 6, I am careful to redact or edit descriptions that could be used to identify the interviewee. In a few instances, this meant leaving out exciting details of "behind the scenes" political or legal conversations.

During the primary research phase when I identified British Columbia's *Family Law Act* and Ontario's *All Families Are Equal Act* as case studies, I also identified several news media, social media, or related sources of record surrounding each case. For example, news media stories about legislative changes in British Columbia to the Family Law Act often centred around the family of Della Kangro Wolf. Additionally, in Ontario, family law and reproductive law experts published professional blogs that critiqued and/or provided insights into the *All Families are Equal Act*, including the family of Lynda Collins and Natasha Bhakt. From these sources of record, I purposively sampled potential interview participants. I sent requests to key stakeholders who were "close" to the legislation and/or case or are experts in their fields. As Nicole Carl and Diane Ravitch note, interviews are most often used when the goals of the research questions are to assess how people "understand events and phenomena" so that the research can "develop detailed and contextualized descriptions of individuals' perspectives, integrate the perspectives of different participants, and describe participants' experiences and realities holistically[536]. Sometimes, interview participants would suggest colleagues or friends whom they thought would

[536] Nicole Carl and Sharon Ravitch. "Interviews," in *The SAGE encyclopedia of educational research, measurement, and evaluation*, ed. Bruce B. Fray. SAGE Publications, 2018: 872.

be interested in participating in this project and so I was able to connect with some participants via a "snowball" method.

I developed a set of interview questions based on the research I conducted prior to my interviews. In semi-structured interviews, similar questions are asked of all study participants, however, these questions are not the same, and not necessarily asked in the same order. For example, depending on the participant's distinctive relationship to the legislation or case– for example, a lawyer who assisted in drafting legislation– my interview questions changed. In semi-structured interviews, the researcher often asks follow-up questions during the interview and thus, while the participants are presented with an interview question guide, additional questions and discussion points often arise. Another key feature of semi-structured interviews is that the questions asked are open-ended, meaning that interview participants are not presented with pre-determined answers to select.[537] The types of questions asked during interviews depend largely on the project's research questions and goals. Broadly speaking, semi-structured interview questions often inquire about participants' experiences, opinions and values about a particular event or phenomenon, knowledge about an event or phenomenon, and demographics and/or backgrounds.[538]

3.5 Political Speech

To gain both a comprehensive and in-depth picture of how the BC *FLA*, ON *AFAEA*, and *C.C. (Re)*, *BCSC 767*, and the *Polygamy Reference* are involved in the governance of intimate life, it is prudent to examine not just the policy documents through which the contents of the three Acts are presented, but also surrounding "political speech." By including a variety of texts in this

[537] Ibid., 873-874.
[538] Ibid., 875. See also: Kathryn Roulston and Myungweon Choi. "Qualitative interviews," in *The Sage Handbook of Qualitative Data Collection* (233-249). SAGE Publications, 2018.

study, my aim is to capture the dialectical relationship of discourse, themes, and meaning-making as they appear in multiple texts related to the case studies.

To identify sources of political speech I conducted a thorough examination of available government and news media documents (gathered from Canadian Newsstream and strategic web searches) to identify additional sources of record. As Justin Leifso describes, "strategic web searches" refers to a "set of techniques" to find documents that may be publicly available but difficult to find.[539] The difficulty may arise because data was not stored correctly on websites, links were not updated, or due to poor search engine optimization. On occasion, interview participants were able to provide me with otherwise hard-to-find documents.

My data sources included Hansard transcripts, judicial transcripts, news media, blogs, press releases, research institute publications, and specific provisions relating to polygamy in the *Criminal Code of Canada*. Some of this data was easily accessible by strategic web searches while others (like Hansard transcripts) required more advanced searches in government or legal databases using keyword searches. The variety of texts I examined created a nuanced landscape for discourses surrounding intimacy and parentage.

3.6 Limitations

Inevitably, research designs contain limitations. In this section I outline some of the critiques of qualitative research, Critical Discourse Analysis, and discuss some of the specific challenges of this study. One major concern in qualitative research is "researcher bias," which refers to the researcher's own "assumptions, interests, perceptions, and needs."[540] One of the guiding presuppositions underlaying a critical qualitative study is that there is no "value neutral" or

[539] Justin Leifso. *Shapeshifting: Political rationalities, Lean, and the transforming landscapes of Canadian public bureaucracies*. (PhD diss., University of Alberta, 2020).
[540] Linda Bloomberg and Marie Volpe. "Presenting methodology and research approach," in *Completing your qualitative dissertation: A roadmap from beginning to end*. SAGE Publications, 2008: 87.

"objective" truth and as such any study is informed by bias (qualitative or quantitative). Moreover, as Michelle Lazar points out, "critical praxis-oriented research" does not "pretend to adopt a neutral stance" and centres "biases part of its argument."[541] To this, Lazar suggests that feminist analysis might be *more* "objective" than other forms of analysis since robust feminist critique is attuned to structures of power, ideologies, and systems of oppression that are often ignored or undertheorized in mainstream social science research.[542] Since queer CDA is explicit about its commitment to revealing and analysing the operation of power in gender and sexuality, it is well suited to "studying the linguistic consequences of heteronormativity."[543]

That said, to account for inherent biases in this study I was transparent about the content, assumptions, and objective of this project with my supervisor, doctoral dissertation committee members, and interview participants. Additionally, participants' names were removed from interview transcripts when coding during data analysis so as not to "associate any material or data with any particular individual."[544] My intent in this process was not to remove bias (my own or participants') but to be clear about my biases so that I could engage with them critically in my research, interviews, and writing.

Additionally, interviews as a form of data collection have limitations. First, participants give "real-time answers" to questions they hear for the first time. This might mean that their responses are rushed or not as fully developed as they would have been had participants been presented with the questions in advance of the interview. Second, a poorly orchestrated interview can impact participants' comfort and trust levels and may result in a withdrawal from the study

[541] Lazar, *Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis*, 146, citing Lather, Patti. "Research as praxis." *Harvard Educational Review* 56 (1986): 259.
[542] Lazar, *Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis*, 146.
[543] Heiko Motschenbacher and Martin Stegu. "Queer Linguistic approaches to discourse." *Discourse and Society* 24, no. 5 (2013): 528.
[544] Ibid., 88.

or less transparent answers.[545] With these limitations in mind, I took the following measures: first, I gave participants the opportunity to return to questions throughout the interview if they wished to add more to their response or revise an answer. Additionally, participants were given the opportunity to review their interview transcripts to indicate if they would like something revised or redacted. Second, I prioritized open, honest, and transparent communication with each participant to facilitate a comfortable relationship from initial contact through to the final stages of the transcript review. Though I could not guarantee the level of participant comfort, prioritizing this element was an important step in this process. My previous experience conducting interviews and prior research about conducting interviews were very helpful here. For example, I was much more comfortable practicing flexibility in the interview (with the order of questions or how I asked questions than I might have been otherwise). Third, in preparing for conducting interviews I consulted several academic resources to ensure that, as much as possible, I planned and executed interviews that benefitted both the participant and the researcher. This included providing as much information as possible to the participant about the length, structure, and intent of the interview, contact information for the researcher, researcher's supervisor, and the University of Alberta's Research Ethics Board, and giving participants the opportunity to give feedback about the interview so that suggestions for improvement of the process could be incorporated along the way. I also committed to sending a copy of the final dissertation to each participant as a way of giving back and sharing my findings.

I interviewed fewer participants than I initially hoped for and because participants were purposively sampled based on the data I collected during my preliminary research phase, one critique of this element of the study is that there is a limited possibility for generalizing the

[545] Neil Salkind. *Encyclopedia of research design*. SAGE Publications, 2010: 636.

findings from this to larger populations.[546] Although this study was not intended to develop a "grand theory," I addressed this particular limitation by providing "thick, rich description" with detailed information about the context and background for this research so that the findings of this study can be easily assessed by others for appropriate application in other contexts.[547] I strongly suspect that the Covid-19 pandemic impacted my ability to interview people (family lawyers were increasingly busy) and some senior government officials declined to speak with me.

3.7 Conclusion

The subsequent chapters emerge from the theoretical framework described in Chapter 2 and the research strategy outlined here. In chapters 4, 5, and 6, I use CPS and CDA as methodological tools to trace the legislative and judicial expansion of legal multi-parentage and the ongoing criminalization of multi-parentage. More importantly, I use these tools to demonstrate the significance of legislative change and judicial cases to reveal how the politics of multi-parentage and poly-conjugality are operating in Canada, at present. By focusing on central themes like kinship, sexuality, gender, race, class, and conjugality, I engaged my theoretical framework to locate parentage and conjugality in broader social, political, and legal contexts. I begin this discussion in the next chapter by examining British Columbia's *Family Law Act*, to explore the first jurisdiction in Canada to grant legal parentage to more than three parents (in legislation). From there, I trace the rocky road to Ontario's *All Families Are Equal Act* in chapter 4, and complete the empirical component of my dissertation with thorny problem of poly-conjugality in *C.C. (Re)*, *BCSC* 767, and *the Polygamy Reference* in chapter 6.

[546] Roulston and Choi, *Qualitative interviews*, 244.
[547] Ibid.

CHAPTER 4: CHANGES TO BRITISH COLUMBIA'S FAMILY LAW ACT: A MODEST EXPANSION OF NUCLEARITY

> The feedback that I received from people that I've talked to where I say, "how do you feel about multiple parents?" and everybody that I've talked to is very accepting of it. [They say] "If that's what you want… like, that's great," *but they can't picture it*.[548]

4.1 Introduction

The use of assisted reproductive technologies, multiple-parent families, and same-sex families have changed how family law defines legal parentage. In response, some jurisdictions have amended their laws so that "biology is no longer the sole criterion upon which legal parentage is based." [549] For example, roughly half of Canadian provinces "now give greater weight to preconception intention than biology when determining parentage where conception occurs via assisted reproduction."[550] And yet, while many of these legislative reforms were designed to "reflect and, to some extent, embrace the growing diversity of parenting relationships" in Canada, *none* have actually "challenged the primacy of the two-parent nuclear family."[551]

At first glance, British Columbia's overhaul to their *Family Law Act* ("FLA") seemed to buck the trend. On 18 March 2013, BC became the only Canadian province – and one of the very few jurisdictions in the world – to permit a child to have three legal parents from birth.[552] The *FLA* amended the definitions of legal parents, a change prompted by the increased uses of assisted reproductive technologies and surrogacy arrangements. Prior to the legislative changes, the gaps in BC family law created a great deal of uncertainty about who– in the case of a mix of

[548] BB. Interview with author. Edmonton, Alberta. August 14, 2020. Emphasis added.
[549] Fiona Kelly. "Multiple-Parent Families under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting." *University of British Columbia Law Review* 47 (2014): 567, 565.
[550] Ibid.
[551] Ibid.
[552] Ibid., 566.

biological and social contributors to a child – became a child's legal parent. Part of the 2013 *FLA* was dedicated to determining legal definitions of parentage to respond to the needs of families for whom legal definitions and documents failed. Much of the news coverage highlighted the birth of Della Wolf Kangro Wiley Richards who was the first baby in BC to be born to three legally recognized parents: her two mothers, Danielle Wiley[553] and Anna Richards, and her guardian and biological father, Shawn Kangro. Although three parents had been recognized, through litigation, in Ontario in 2007, [554] this was the first legislative adoption of three parents.

There are three sections of the *FLA* that concern legal parentage, though principally, section 30 is what concerns families in multi-parent arrangements. However, the arrangement anticipated by section 30 is one where a couple conceives a child, with the assistance of either a sperm donor or surrogate, with a "shared preconception intention that the donor or surrogate be the child's third legal parent."[555] In this scenario, each party has the rights and responsibilities of parentage. Although this section applies to both different-sex and same-sex couples and includes the possibility of a single person entering into an arrangement with a surrogate or donor, Fiona Kelly suggests that "the section clearly anticipated it being used in cases of assisted reproductive technologies primarily by lesbian and gay couples and their donors and surrogates."[556] Thus,

[553] I contacted Ms. Wiley to request an interview but unfortunately, I was unable to schedule one, nor was I able to contact Ms. Richards or Mr. Kangro.
[554] In the 2007 case *A.A. v. B.B.,* the Ontario Court of Appeal favoured a three-parent family – two mothers and a father – over the existing two-parent norm. Fiona Kelly explains that "the parties in A.A., a lesbian couple and their gay sperm donor (who was listed on the child's birth certificate), jointly petitioned the court to recognize that their son had three legal parents. To achieve this outcome, the court was asked to extend legal recognition to the non-biological mother without simultaneously severing the parental status of the donor" (2009b, 348). Most legal scholars did not regard *A.A. v. B.B.* as precedential – as Nicole LaViolette writes, "because the case is grounded in the exercise of a court's parens patriae discretionary jurisdiction, the case simply cannot be read as allowing all children to have more than two parents." She goes on to note that "the Court of Appeal's decision in A.A. v. B.B., as sound as the reasoning may be, will likely impact on only a small number of families, despite the fact that many issues raised in that case are at the cusp of changing social and scientific conditions affecting an increasing number of families" (2007, 665). I discuss this case further in Chapter 5.
[555] Kelly, *Multiple Parent Families*, 567.
[556] Ibid.

while it appeared that section 30 held enormous potential for disrupting the "supremacy of the nuclear family" – indeed, Kelly describes the *FLA* as "groundbreaking and potentially quite radical in its possibilities"[557] – the potential is limited. On the one hand, section 30 demonstrates legislative acknowledgment of changing family forms while also providing recognition of some non-normative intimate arrangements. On the other hand, it ultimately reaffirms "biological and opposite-sex parenting."[558] In other words, the drastic overhaul of the *FLA* to "embrace" the province's diversity, reaffirms the private, nuclear family by making a modest expansion to which families are included under its name.

In this chapter, I examine this conundrum – the expansion of legal parentage on the one hand, and the reinforcement of the nuclear family on the other – by providing a comprehensive review and analysis of the *FLA's* parentage provisions. I advance my argument surrounding normative families by laying out a brief history of the *FLA*, then discussing the purpose, implications, and limitations of Section 30. I then examine the significance of multiple parent families in a province that has been the site of intense debate with respect to polygamy– another form of multiple parent families. Next, I present the findings and significance of my critical discourse analysis ("CDA"), drawing on the *FLA*, Hansard debates surrounding the legislation; news media articles; social media sources of record; and interviews with key stakeholders. Finally, I conclude by presenting insights on the possibilities and limitations of the *FLA* as it pertains to multi-parentage and kinship.

4.2 Conceiving the *Family Law Act*

[557] Ibid.
[558] Ibid.

The BC family law reform process began in 2002 and lasted until 2011, with the *FLA* fully implemented in March 2013. The reform process began via the Justice Review Task Force, one of the Civil Justice Reform Projects initiated by the Law Society of British Columbia.[559] The Justice Review Task Force was created to identify areas for law reform, with a focus on ideas to make the "justice system more accessible and cost-effective."[560] From there, the Family Justice Reform Working Group was established in 2003 and consisted of government representatives, members of the judiciary, and mediators, who proposed policy recommendations.[561] These included mandatory mediation policy, improving access to information and advice, and increased sensitivity for cases of domestic violence.[562]

The Office of the Ministry of Attorney General conducted a multi-year review and consultation process prior to implementing changes to the Act. One of the reports produced by this office was the *Family Relations Act Review: Report of Public Consultations* (2009). This report summarizes the major findings from the public consultations process and are categorized under the proposed changes (outlined below) and states that when the former *Family Relations Act* came into force in 1979 it brought forth "a major shift in family law in British Columbia."[563] However, in the decades since its adoption, the landscape of family law (and the families it governed) had changed significantly. In response, the Ministry of the Attorney General decided to perform a "comprehensive review of the act" so that the resultant legislation was "easy to read and to use", "promote[d] the wellbeing of children and families", and supported families' dispute

[559] Rachel Treloar and Susan B. Boyd. "Family law reform in (Neoliberal) context: British Columbia's new family law act." *International journal of law, policy and the family* 28, no. 1 (2014): 81.
[560] Ibid.
[561] Ibid.
[562] Ibid, 81-2.
[563] *Family Relations Act Review: Report of Public Consultations* (2009), 5.

resolutions "quickly, fairly, effectively, and affordably."[564] Overall, the goal was to "modernize the Family Relations Act" to:[565]

- reflect social values and changes in family law research and policy since 1979;
- encourage the use of out-of-court dispute resolution;
- reduce the impacts of conflict on children;
- reply to the Family Justice Reform Working Group's position that the family justice system should reflect the following values: family autonomy, cooperation, best interests of children;
- family restructuring process should be "flexible" to respond to families' unique needs;
- clarify the law so that it is easier to understand; and amalgamate laws governing families into one statute;
- better organize the *Family Relations Act*; and
- ensure that public resources are used correctly.

According to the Report, the Ministry consulted with an advisory group comprised of lawyers and lawyer-mediators and its subsequent papers "summarize current family law here in B.C. and in other parts of Canada and the world, and outline new approaches being tried elsewhere."[566] Each discussion paper presented a series of questions and possible areas for reform under the *Family Relations Act*, but the papers did *not* act as an official Ministry position. Instead, the papers aimed to "promote discussion" during the reform to ensure it reflected "the wisdom of people with a wide range of experience in the family justice system."[567] The consultations occurred in three phases, from February to November 2007 and covered the following topics: dividing family property and dividing pensions; judicial separation; parenting after separation and access responsibilities; family violence; child status (legal parentage); spousal and parental support; cooperative approaches to resolving disputes; and relocating children in the event of changes to families' structures.

---

[564] Ibid.
[565] Ibid., 5-6.
[566] Ibid., 6.
[567] Ibid.

In 2006 the Attorney General of BC announced that the province would modernize its family law statute, the Family Relations Act (RSBC 1996, c. 128), which had been in place since the late 1970s.[568] Between 2007 and 2008, the Ministry's Family Justice Branch invited stakeholders to provide feedback on 14 discussion papers (each addressed a different area of family law). In July 2010, the Ministry of the Attorney General released a White Paper[569] proposing major changes to family law in BC, which included a new definition of parenthood and suggestions to eliminate the language of "custody" and "access".[570] This White Paper was the result of comprehensive research and consultation with stakeholders (for example, legal professionals, legal academics, and members from the non-profit sector) and the public was again invited to respond to the proposals contained in the White Paper.[571] Rachel Treloar and Susan Boyd note that while the final version of the *FLA* does reflect some of the feedback gleaned from community members, concerns remained about the lack of resources available to support families through dispute resolution processes.[572] In addition to the focus on post-separation parenting, the *FLA* made significant changes to how property is divided after separation; includes common-law spouses under the same property rules as married spouses; repeals provisions where adult children might be required to support their parents; and, most importantly for the purposes of this project, defines parentage in situations of assisted reproduction and among same-sex partners.[573] More specifically, the *FLA* made clear that when a child is born through the use of assisted reproductive technologies, the donor (of the reproductive material) is *not* a parent solely because of the donation.[574]

---

[568] Treloar and Boyd, *Family law reform*, 84.
[569] British Columbia Ministry of Attorney General, 2010.
[570] Treloar and Boyd, *Family law reform*, 84.
[571] Ibid.
[572] Ibid.
[573] Ibid.
[574] Section 24(1) and (2).

The changes made to parentage were a minor part of the overall legislation, but they remain significant in that the *FLA* made BC the first province in Canada (and one of the first jurisdictions in the world) to make it possible for a child to have more than two legal parents. Despite this, changes to legal parentage garnered very little debate in legislature. When questioned about the "real" impetus for these changes, interview participants unanimously agreed that it was time for the legislation to change but also that the ease with which parentage was expanded (with little public or political resistance) was striking. A family lawyer, CC, stated that "the legislature decided to codify what was happening in the courts" to simplify the process.[575] In fact, CC was very enthusiastic about reforming determinations of legal parentage given their own experience having to charge clients for determinations of legal parentage.

> […] I'm charging my clients $5000-6000 to do this. Take me out of business! It's stupid. Let's say you and I want to have a baby. We get our surrogate, Jean Smith, we go to the clinic, we spend our money and we're insulted at the end of the day by having to pay $6,000 to a lawyer to get our names on the birth registration. It's cheaper than an adoption but we don't want to adopt because this is your egg in my sperm. So, I think that the changes to that section of the [Family Law Act] came out of [that] issue, and probably some pretty good research and canvassing by the government once they were looking to change it to draw upon the experiences in other jurisdictions. [...] I think in the ordinary course of looking at social legislation, the Family Relations Act was from 1979. So, [34] years later, it's time to see where society is heading.[576]

CC's sentiment reflects broader commentary surrounding the *FLA*– society had changed, families were paying lawyers to legally recognize the roles they understand themselves to have, and what could be determined in legislation was occupying the courts. AA had a similar understanding:

> I think it reflected the social changes that had come about from the time the Family Relations Act was created decades before then. There have been considerable changes in what we consider to be a family unit, and the FLA was intended to better reflect how

[575] CC. Interview with author. Edmonton, Alberta. September 2, 2020.
[576] Ibid.

> families were being formed and how children were being conceived and parented in our more modern social structures.[577]

These responses are substantiated by experts who wrote on the topic. Vancouver lawyers, barbara findlay and Zara Suleman published a paper examining *FLA's* parentage schema. They note that the law "lagged far behind the developments in ART and in family forms" such that "courts were left to fill the gaps in legislative regulation."[578] Thus, the FLA was born, making it the first time that the province had legislation determining parentage for children conceived via ART.[579] Part 3 of the FLA, Parentage, covers the following: determination of parentage for children conceived with/out ART; the legal standing of donors– specifically, if they are donating their reproductive material for conception of a child they will raise, or a child who will be raised by other prospective parents; what happens when if a participant in the creation of an embryo dies before the embryo is used to conceive a child; the requirements for a surrogacy; and mechanisms for amending a determination of parentage.

Importantly, Part 3 addresses *legal* parentage. As such, it does not address parenting rights and responsibilities for non-parents who have important roles with respect to children, as in Part 4 of the *FLA*.[580] The *FLA's* expanded definition does not mean adults under the FRA become legal parents, but rather that under the Act they will be treated in the same way as a parent; wherever the Act refers to a "parent" it also means a "guardian" or a "stepparent."[581] The

---

[577] AA. Interview with author. Edmonton, Alberta. August 6, 2020.
[578] barbara findlay and Zara Suleman. *Baby Steps: Assisted Reproductive Technology and the BC Family Law Act,* 2013, 6.1.7.
[579] Ibid.
[580] The BC Ministry of Justice notes: that parental status and parental roles and responsibilities should not be confused. For example, Part 4 of the *FLA*, Care of and Time with Children, stipulates that people who are not legal parents may have responsibilities related to children and that defining non-parents as "parents" for this purpose of the law does not grant legal parentage, it "simply means that they will be treated in a similar way as a Parent for a particular purpose." See "Family Law Act Explained" http://www.ag.gov.bc.ca/legislation/family-law/pdf/part3.pdf
[581] findlay and Suleman note that these expansions are also in the *FLA*, but are located in the relevant parts of the Act; Part 7 – Child and Spousal support, ss. 146 [Definitions] (§3.146) and 147 [Duty to provide support for Child] (§3.147), 28.

determination of a legal parent for a child conceived by sexual intercourse is clear because that child is a child of "his or her birth mother and biological father" (as per s. 26(1)). Conversely, the parentage of an adopted child is covered under the *Adoption Act [RSBC 1996]*. On the other hand, the determination of children conceived by ART is more complex. findlay and Suleman summarize the factors to assess parentage under the *FLA*:

- "Whether a child was conceived using donated genetic material; and, if so,
    - whether the donor(s) of the genetic material used that material for their own reproductive project;
    - whether the donor provided sperm through the "turkey baster" method or through sexual intercourse;
- Whether a child was gestated by a surrogate mother, and, if so, whether there is a preconception agreement between the surrogate and the "intended parents" which complies with the requirements of the FLA;
- Whether there is a prospective co-parent, and if so,
    - whether the co-parent was in a relationship with the birth parent when the child was conceived;
    - whether the co-parent agreed to be a co-parent when the child was conceived; and
    - whether the co-parent continued to agree to be a co-parent till the child was born.
- Whether there are more than two prospective parents, and if so, whether there is a preconception agreement among the "intended parents" which complies with the requirements of the FLA."

They continue by presenting the "principles of parentage" underpinning these provisions:

- children will be treated equally under the law regardless of how they were conceived;
- a child's legal parents– for the purposes of all BC's laws– are consistent;
- a child may have more than two legal parents; and

- the determination of a child's legal parents is about who gave birth to a child and who intends to raise the child, rather than who is genetically connected to a child.[582]

In what follows, I explore the opportunities and challenges posed by Section 30 – the key section dealing with multi-parentage.

4.3 Expanding Legal Multi-parentage

Prior to the introduction of the *FLA*, legal parentage was managed by different pieces of legislation including the *Law and Equity Act*,[583] the *Adoption Act*,[584] and the *Family Relations Act* ("FRA"),[585] which stated that "a person is the child of his or her natural parents."[586] The FRA governed legal parentage only in the cases of dispute (for example, during child support cases) which effectively left judges with no "general authority" under the FRA to "make declarations of legal parentage."[587] Thus, in the "absence of legislative guidance to the contrary" the law assumed that the presumptive biological parents of the child were *also* the legal parents (except in the case of adoption).[588] That framework also limited the number of legally recognized parents to two.[589] But, due to "changes in social values and medical technology"[590] and because BC was one of the few provinces in Canada that did not have a "comprehensive legal parentage regime,"[591] the Attorney General decided this was an area of provincial law that needed

[582] barbara findlay and Zara Suleman. *Baby Steps: Assisted Reproductive Technology and the BC Family Law Act,* 2013.
[583] *RSBC* 1996, c. 253.
[584] Ibid., c. 5.
[585] Ibid., c. 128.
[586] Kelly, *Multiple-Parent Families*, 577.
[587] Ibid.
[588] Ibid.
[589] Ibid.
[590] British Columbia, Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (British Columbia: Civil and Family Law Policy Office, 2010), 31.
[591] Kelly, *Multiple-Parent Families*, 577.

updating.[592] The purpose of reforming parentage law was "to provide a scheme for determining legal parentage" especially where children are conceived via ARTs to "[protect] the child's interests and [promote] stable family relationships."[593] The reforms were intended to apply equally to single parents, same-sex, and different-sex couples, however, the "multiple-parent provision" (section 30) is *only* available in cases where assisted reproduction is used.[594]

Section 30 is connected to a series of other provisions that address cases of assisted reproduction, such as section 24 which confirms that "a donor of genetic material is not, by virtue only of the donation, the child's parent and cannot be declared by a court, by reason only of the donation, to be the child's parent."[595] This section also confirms, for the first time in BC, the legal status of sperm and egg donors. Section 27 defines parentage in cases where a child is conceived through assisted reproduction, but *not* via a surrogacy arrangement.[596] Subsection 27(2) states that "where a child is born as a result of assisted reproduction, the child's birth mother is the child's parent." Additionally, "a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent, unless there is preconception evidence that the person did not consent to be the child's parent."[597] Section 27 "ensures that the birth mother's partner, whether male or female, is a presumptive legal parent, provided he or she consented to being a parent."[598] Finally, section 29, dealing with parentage in cases of surrogacy agreements, also comes to bear on section 30. This section only applies if there is a written *preconception agreement* between the potential surrogate and

[592] Ibid.
[593] Ibid.
[594] Ibid.
[595] *FLA* ss. 20(1), 30.
[596] Ibid., s 27.
[597] Ibid., s 27(3).
[598] Kelly, *Multiple-Parent Families*, 578.

"intended parent or parents"[599] that confirms that a surrogate is not parent, will surrender the child to the intended parent(s), and the intended parent(s) will be the legal parent(s).[600] That said, when the child is born, the "intended parent" (under the aforementioned agreement) is only the child's parent *if* the surrogate provides additional written consent to "surrender the child to the intended parent(s) and the intended parent(s) take the child into their care."[601] What sections 24, 27, and 29 demonstrate is that in cases of "assisted conception", a preconception agreement from all parties is key for determining parentage. In fact, Kelly suggests that preconception intention will most often "trump biological or genetic ties."[602]

Section 30 envisages a scenario where the gamete donor or surrogate[603] is "actively involved" in the child's life and a legal parent."[604] If conception occurs through assisted reproduction, section 30 allows the relevant parties to create a pre-conception agreement that confirms the gamete provider or surrogate is a legal parent.[605] There are two distinct scenarios under which preconception agreements can be entered: first, the intended parent(s) enter into an agreement with a potential birth mother who agrees to parent with the intended parent(s).[606] This arrangement may include, for example, a gay male or lesbian couple and a surrogate, a single man or woman and a surrogate, and a different-sex couple and a surrogate. Second, a potential birth mother and someone who is married to (or in a marriage-like relationship) with her, *and* a donor who agrees to parent together with the birth mother and her partner, all of whom come

[599] The Act defines "intended parent" or "intended parents" as "a person who intends, or two persons who are married or in a marriage-like relationship who intend, to be a parent of a child and, for that purpose, the person makes or the 2 persons make" a pre-conception surrogacy agreement. *FLA*, s 20(1).
[600] Kelly, *Multiple-Parent Families*, 578 citing *FLA* s 29(2).
[601] Ibid., s 29(3).
[602] Kelly, *Multiple-Parent Families*, 579.
[603] This may be both a genetic *and* biological parent.
[604] Kelly, *Multiple-Parent Families*, 579.
[605] Ibid.
[606] *FLA* s 30(1)(b)(i).

together to make a preconception agreement stipulating that all three adults will be the child's legal parents. This scenario applies equally to lesbian and different-sex couples who use egg and/or sperm donors. Curiously, when this provision was discussed in consultation reports, like the *White Paper*, the descriptions referred to lesbian couples and their known sperm donors.[607] An important element of both these scenarios is that upon the birth of the child, the child's parents are all parties to the preconception agreement.[608]

Provided that the requirements of Section 30 are met, the parties may be registered as a child's legal parents without needing a declaration of parentage. That said, if there are more than two legal parents, there must be a preconception agreement among all prospective parents that is signed *prior to conception*. Interview participants confirmed that there is no set form and that prospective parents can craft agreements so long as they contain the information above.[609] While findlay and Suleman suggest that "it is an open question what the maximum number of parents may be," others, like Kelly and interview participants, suggest the number is up to a maximum of five and the legislative intent is three.

The *FLA* made other important advances with respect to parentage, like clarifying the status of a donor. For example, unless a donor of sperm is using the sperm for their own reproductive project (including a multi-parent project), the sperm donor is never a "parent." The same logic applies for an egg donor.[610] Additionally, findlay and Suleman suggest that the ability to have a surrogacy agreement and register a child as the "child of his or her "intended parents" without a court order" is a positive and helpful change. However, they also suggest that while the

[607] Kelly, *Multiple-Parent Families*, 579. See also: British Columbia, Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act British Columbia: Civil and Family Law Policy Office* (2010), 32.
[608] *FLA* s 30(2).
[609] BB. Interview with author. Edmonton, Alberta. August 14, 2020.
[610] findlay and Suleman, *Baby Steps*, 36.

number of families who will opt for more than two legal parents is a "minority of potential parents" it is precisely these parents who are "among the most vulnerable to a challenge of their parental status."[611] Finally, the legal status of a co-parent whose partner has conceived via ART is clarified in the *FLA*. The non-gestational partner who consents to parent will continue to be registered as a parent of the child when the child is born, and unlike the regime in the FRA, will not require a "declaration of birth or an adoption in addition to registration of the birth."[612] In sum, section 30 presents possibilities for the recognition of diverse family forms by:

> [serving] as legislative acknowledgment of the changing nature of Canadian families in general, while providing specific recognition of some of the less normative family relationships created by lesbians and gay men.[613]

However, section 30 is heavily constrained by other parameters that limit its ability for inclusivity: first, it can only be used in instances of assisted reproduction; second, it requires the couple to be married or in a marriage-like relationship; third, it is only available to additional parents who share a biological or genetic link to the child; and fourth, it appears that section 30 is intended to limit the number of parents to three.[614] Together, these limitations mean that the only families that can be created through section 30 are those in which "a child being raised by same-sex parents will acquire a third legal parent who is both the child's other biological progenitor as well as an individual of the opposite sex."[615] As such, instead of "transforming traditional family structures", section 30 has maintained biological-ties and different-sex parenting. My findings demonstrate that the *FLA* creatively reproduces the primacy of the biological family – by

[611] Ibid.
[612] Ibid.
[613] Kelly, *Multiple-Parent Families*, 567.
[614] Ibid., 567-568.
[615] Ibid., 568.

extending nuclearity to lesbian and gay families and those using and assisted reproductive technologies – while also highlighting the possibilities and limitations of legal recognition. According to Kelly, this outcome is consistent with trends in family law that place greater value on biological relationships, especially relationships to fathers, and that limit women's autonomy.[616] Section 30 then becomes a "statutory vehicle" through which non-normative families are "encouraged to fulfil this ideological goal", which is particularly challenging for those who do not fit the "heteronormative script."[617]

I identified 4 discourse themes, examined below. To protect the anonymity of interview participants, I coded their names as alphabetical initials (for example, "AA" and "BB" and these initials are *not* the actual initials of the participants); I am intentionally vague about each participant's professional designation or affiliation; and I use gender-neutral terms to refer to participants. This practice is consistent throughout the remaining chapters, unless a participant indicated that they were comfortable with their name and identifying information appearing in the dissertation. I interviewed 4 people, including lawyers and members of the public service in British Columbia. I also sent interview requests to the family of Della Wolf and Members of the Legislative Assembly in BC who debated relevant sections of the Family Law Act. Unfortunately, I did not hear back from Della's parents or the MLAs I contacted. In my methodology chapter, I reviewed some of the limitations of my methods but for the purpose of providing context here, I hypothesize that there were two primary barriers to interviewing MLAs for this chapter. First, the global Covid-19 pandemic created unprecedented circumstances for elected officials, and I suspect their time was occupied responding to emergency matters for their constituents and ministries. Second, when I began this project, the Family Law Act was nearly

[616] Ibid.
[617] Ibid.

four years old. When I began the interview process in summer 2020, the *FLA* was 7 years old. I anticipate that the age of the Act and the extenuating circumstances of Covid-19 significantly reduced the response rate to interview requests.

4.3.1 The primacy of biology and property, or "Who's your daddy?"

For a child to have three legal parents under Section 30, all intended parents must agree to be parents via a preconception agreement. That is, all parties wishing to be recognized as parents must agree to do so *prior* to the conception of their child. The preconception agreements provide legal clarity for the intended parents, clarity for the state should disputes about legal parentage arise, and clarity for the children born of the arrangement. BC is not unique for having this requirement; as I note in Chapter 5, Ontario's *All Families Are Equal Act* also requires that intended parents sign a preconception agreement. The preconception agreement requirement provides an important degree of legal and social clarity to family members. For example, parents and courts benefit from documented evidence of intent when making determinations of parenting time during family transition. In fact, John Robertson suggests that "preconception rearing intentions should count as much as or more than biologic connection" (in the context of determining legal parenting in ART scenarios).[618] Robertson argues that there are "compelling reasons for recognizing the pre-conception intentions of the parties as the presumptive arbiter of rearing rights and duties, as long as the welfare of the offspring will not be severely damaged by honoring these intentions." Marjorie Shultz agrees: "[when procreative agreements are] deliberate, explicit and bargained for… as they are in technologically assisted reproductive

[618] John A. Robertson. "Collaborative Reproduction: Donors and Surrogates." In *Children of Choice: Freedom and the New Reproductive Technologies*, 104-5. Princeton: Princeton University Press, 1994, cited in Shanley, Mary Lyndon. "Surrogacy: Reconceptualizing Family Relationships in an Age of Reproductive Technologies." In *Philosophical Foundations of Children's and Family Law*, 299. Edited by Elizabeth Brake and Lucinda Ferguson. London: Oxford University Press, 2018.

arrangements, they should be honored."[619] For scholars like Robertson and Shultz, contracts are a method of enhancing "individual freedom and responsibility" for involved parties.[620] Proponents of contractual thinking rely on the language of choice and reproductive freedom to make the case that intended parents, gamete donors, or surrogates should have the bodily autonomy to "decide what to do with their bodies free of government prohibition or regulation."[621]

Conversely, only Section 30 families are required to have preconception agreements while other, heterosexual, monogamous, and reproductive families do not. As I illustrate below, preconception agreements demonstrate how ideologies of the family operate to romanticize family formation and attempt to regulate or assimilate non-nuclear families into structures that approximate the nuclear family. When I began this research, I anticipated that the requirement for, or parameters surrounding, preconception agreements would garner considerable attention in legislative debate, media, or legal commentary. I assumed that bringing together contracts and conception would disrupt social norms surrounding reproduction. To my surprise, there was near silence. In fact, most interview participants found value in pre-conception agreements; some even noted that all families should be subject to this requirement. When mentioned, the agreements are discussed as providing legal clarity in roles for the donor and intended parents:

> What [the FLA] does is clarify that the intended parents are the parents once and for all. So there can be an agreement made [...] For example, if there is an agreement between the donor and the intended parents that the donor wants to be part of a parenting arrangement, wants to have a role, that agreement has to be signed in advance of conception. What this does is clarify that the intended parents are the parents, and the intended parents are the legal parents of the child.[622]

[619] Marjorie Maguire Shultz. "Reproductive technology and intent-based parenthood: an opportunity for gender neutrality." *Wisconsin Law Review* (1990): 297.
[620] Shanley, *Surrogacy*, 300.
[621] Ibid.
[622] British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 21, 2011 (8940).

Another MLA clarified by asking, "so in theory, then, could you have more than two parents?" and "as we're in this section and dealing with these new and involved concepts, are potentially all three of those parents liable for support of the child?" The response, from Shirley Bond, asserted that the preconception agreement was about clarifying parental roles (for example, a donor is not necessarily a parent) and about finding legal responsibility. She noted:

> … What it means is that a child will have two legal parents unless there is an agreement made to involve an additional person, who may be the donor or the surrogate, by agreement in advance of conception. So it clarifies that the intended parents are the legal parents and only by agreement in advance would there be additional legal parents… This is about responsibility — parenting responsibility and legal responsibility. Should there be a decision to be involved in the legal parenting of a child, along with that goes legal responsibility.[623]

Another MLA, Ralph Sultan, tried to summarize the *FLA* to his constituents by creating his own slogans:

> So I was thinking the other night: "Well, how would I explain this new act? It's kind of complicated." [...] So I reduced it down to a few slogans, just to maybe paraphrase what it meant to me. Slogan 1: "Kids first." Okay. We understand that. Number 2: *"Who's your daddy?"* And the related phrase: it's a wise man who knows his own father [...] That wasn't completely successful, but you get the idea.[624]

This brief exchange highlights three key elements surrounding preconception agreements. First, the imagined family for these agreements is a couple and their donor. This requires a parenting structure that reflects, however creatively, a heterosexual and biologically related dyad. Second, the requirement that all intended parents must agree prior to conception does not allow for adults, who play a significant role later in a child's life, to be considered a legal parent. As such, the kinship possibilities under Section 30 are limited. Third, the agreements are largely about being able to trace and locate legal and financial responsibility for children and not, as I explore further below, to codify or support a fundamentally new definition of legal parentage.

---

[623] Ibid.
[624] British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 17, 2011 (8891).

At the core of these reflections are an assumption about the primacy and desirability of biologically connected families. In North America, this has long underpinned both social and common-law approaches to defining legal parentage and family. For example, Mary Lyndon Shanley notes that "'family' meant biological parents and their children'" and, quoting David Schneider, "[t]he relationship which is "real" or "true" or "blood" or "by birth" can never be severed…."[625] Because blood relationships are culturally (and legally) understood as "objective fact[s] of nature," their significance is defined through its perceived indestructability. Moreover, this biological relationship is a legal fiction that is maintained by the fact that the law turns husbands into fathers.[626] In other words, blood relationships hold immense socio-cultural, political, and legal weight such that, until quite recently, the "social and legal constructions of parenthood" were understood to stem from the "natural occurrences of coitus, pregnancy, and childbirth, simply ratifying or codifying existing natural relationships."[627] However, once it became possible for fertilization to happen outside the body, new possibilities for expanding families emerged and with this came efforts to "declare contractual agreement rather than biological ties" to be the ground upon which legal parental status was declared when using ARTs.[628] This shift from biological to contractual determinations of parentage does not de-stabilize the biological foundation of determination parentage. The contractual determination legalizes parentage in the context of a biological connection outside of a procreative, heterosexual, nuclear family. As a result, the contractual requirement stands in for a "natural"

[625] Mary Lyndon Shanley. "Surrogacy: Reconceptualizing Family Relationships in an Age of Reproductive Technologies." In *Philosophical Foundations of Children's and Family Law*, edited by Elizabeth Brake and Lucinda Ferguson, 295. Oxford: Oxford University Press, 2018.
[626] David Schneider. "Relatives." In *American Kinship: A Cultural Account*, 24. Chicago: University of Chicago Press, 1968, cited in Shanley, *Surrogacy*, 295.
[627] Ibid.
[628] Ibid., 296-7.

biological connection and places strong limitations on the types of kinship arrangements possible.

As Roxanne Mykitiuk demonstrates, the real or perceived "closeness of biogenetic identity" has come to "symboliz[e] degrees of closeness between kin."[629] For Mykitiuk, kinship and family represent different types of relationships determined by conjugality and procreation. For example, the presence of a child creates a kinship relationship between the parents.[630] Recently though, the increased use of reproductive technologies as well as changing family forms has created a "new field of relationships" that does not easily map onto the traditional family template.[631] In other words, the presence of a child does not necessarily mean that its genitors are also parents, and therefore kin.[632] As a result of these changes (in particular, through reproductive technologies), procreation can be separated from the body and ""unrelated" others" become part of procreation such that women and men can have children without heterosexual sex or relationships.[633] By expanding the possibilities for parenthood, one might assume that the law follows suit, however, Mykitiuk (and others) show that this is often not the case. Legislation and social policy are created within existing gendered and "cultural asymmetries" to construct new categories of legal parentage that reflect old assumptions.[634] As a result, Mykitiuk argues that family law reforms are still "characterized by the visible reification of the normative, two-parent family structure."[635] The requirement for pre-conception agreements demonstrates that "diverse" families, created via ART, receive legal recognition when the "categories of filiation" affirm the

[629] Roxanne Mykitiuk. "Beyond conception: Legal determinations of filiation in the context of assisted reproductive technologies." *Osgoode Hall Law Journal* 39 (2001): 814.
[630] Ibid.
[631] Ibid.
[632] Ibid., 815.
[633] Ibid.
[634] Ibid.
[635] Ibid.

ideological status quo. Conversely, as Mykitiuk argues, families who do *not* conform to the status quo will only achieve legal recognition if the schemas for determining relatedness are reformed.[636] Complicating matters further, the contractual nature of preconception agreements is intimately connected with the marketization of egg (and sperm) donation. As Shanley explains:

> ... influencing the reception of contracts for collaborative procreation was the fact that when egg extraction and IVF became possible after 1978, eggs and embryos were viewed as analogous to sperm, as separable from the body, and as capable of being exchanged and commodified. When gametes are separable from the provider they can appear to have certain characteristics of commodities, objects 'produced' by the body that become part of a common store, as the term 'sperm bank' suggests, a generalized 'resource' that can be traded in the market.[637]

Marilyn Strathern suggests that the transactional nature of gametes reflects the highly commercialized world we live in with respect to other goods and services.[638] Shanley suggests that the mix of contractual thinking, commercialization, and emphasis on "market choice" produced an environment well suited to contracting about future children. She argues that mainstream pro-choice movements' focus on individual autonomy also contributed to an environment where a "contractual agreement was the proper grounding of legal parental status in cases of procreation using ARTs."[639]

The contractual nature of preconception agreements is particularly interesting in an era of neoliberal individualism wherein people are encouraged (indeed, forced into) becoming hyper-responsible for their health, wellness, financial prosperity, and it appears, the way conception takes place. Moreover, neoliberal individualism and compulsory reproduction intertwine so that pre-conception agreements – a form of contract – are both material and theoretical illustrations of

---

[636] Ibid.
[637] Mykitiuk, *Beyond Conception*, 815.
[638] Marilyn Strathern. "Enterprising Kinship: consumer choice and the new reproductive technologies." In *Reproducing the future: Essays on anthropology, kinship and the new reproductive technologies*, 37. Manchester: Manchester University Press, 1992.
[639] Shanley, *Surrogacy*, 300.

families' private rights and responsibilities. Here, Jennifer Nedelsky's reminder is important: if we understand that our "private rights" always have "social consequences" then we will experience our kinship relationships differently.[640] For Nedelsky, the recognition of the political dimensions of intimate life will impact the ways in which we understand our fundamental interdependencies. Similarly, Shanley suggests that contracts are "undeniably important tools" for family formation but that understanding parenthood solely based on contracts "obscures" other forms of relationships,[641] and I argue, systems of power like gender, race, class, and sexuality. By obfuscating the complexity of these relationships, pre-conception agreements act as a form of contract that "[does] not make relationship central to [its] understanding of the human subject".[642] As Nedelsky points out, conventional liberal rights theories understand that individuals need to be protected by rights but not that we are "creatures whose interests, needs and capacities routinely intertwine."[643] Further, the preconception agreement is really about creating parent-child relationships that requires, as Pamela Laufer-Ukeles, "reciprocity, gratitude, responsibility, and compulsory solidarity."[644] ARTs, adoption, and other forms of kinship creation are clearly pushing family law to consider parentage differently, but the allegedly new definitions of what constitutes family are not significant deviations from the status quo.

For Shanley, this outcome is unsurprising. When surrogacy practices emerged, doctors and lawyers were not focused on the "web of relations" that this possibility produced but instead

[640] Jennifer Nedelsky. "Reconceiving rights as relationship." *Review of Constitutional Studies* 1 (1993): 17.
[641] Shanley, *Surrogacy*, 303.
[642] Nedelsky, *Reconceiving Rights as Relationship*, 12.
[643] Ibid.
[644] Pamela Laufer-Ukeles. "Mothering for money: Regulating commercial intimacy." *Indiana Law Journal* 88 (2013): 1223.

on ensuring that couples could reproduce. ARTs were initially a "cure" for infertile heterosexuals and, as Shanley argues,

> emerged from advances in medical technology and was regarded as a *'last step'* in infertility treatment, and therefore as a *private matter*, and one in which the primary responsibility of the physician was protecting the health of the patient.[645]

Lawyers who were party to the "transfer or assignment of parental rights" focused on "the rights of the negotiating parties as traditional– liberal theory and law suggested."[646] However, this approach to conceiving of people as individual actors clearly does not reflect the profound complexity of relationships among adults party to the agreement or the children brought into the world as a result of the agreement.[647] Like other forms of non-normative kinship (adoption, step-parenting, parenting in blended families, co-parenting in same-sex families, foster parenting, lone parenting), families created through ARTs have the potential to "[stretch] our understanding of what constitutes a 'family'".[648] Shanley's analysis is reflected in MLA Mary Polak's comment discussing the *FLA* and ARTs:

> No one would have imagined in 1978 that there would be an issue around who the parents of a child are. In 1978 I think I was in about grade 4, and the most that you really learned about families in school was through your textbook, your grade reader, that told you that families were made up of Dick and Jane and Spot. It really was never contemplated that we would be in a world as complex as we are today when it comes to families, but we are.[649]

Polak continued with an assertion that the increase in children born via ART placed an increased responsibility on the government to amend outdated laws. She said:

> [the government has] a responsibility to consider what impact that has with respect to a law from 1978 that doesn't recognize the existence of the use of those kinds of

[645] Shanley, *Surrogacy*, 312. Emphasis added.
[646] Ibid.
[647] Ibid.
[648] Ibid.
[649] British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 17, 2011 (8854).

> technologies and, therefore, the varied structures of families that that can potentially create.[650]

Determining parentage becomes much more complicated when ARTs make possible a variety of 'parents.' As such, courts were left to make determinations in an ad-hoc manner. Or, in Polak's words "We see that the courts, in the absence of guidance from the legislators, is [sic] really stuck with trying to be as wise as Solomon in the old story and determine who on earth is going to be the parent of this child."[651] Instead, the revised *FLA* created parameters for identifying parentage that made possible opportunities to define legal parentage even in the context of more than two parents. Or as Polak said,

> the [FLA] allows for the opportunity for those who are in relationships where more than the usual biological two parents could be identified, recognizing that in many cases now in our society there are more than two individuals who would claim parentage for various reasons.[652]

Further, she noted that the revised *FLA*

> sets out limitations that allow for families to agree as to a model of parenting that they wish to see. Perhaps, as happens in some cases today, there would be two people, two individuals, who for many reasons could not or did not wish to have their own biological child and have taken the opportunity that is afforded by modern technology and utilized the genetic material from one or more other individuals.[653]

In addition to Polak, MLA Joan McIntyre also noted that the province was in need of a "framework for determining legal parentage, including where assisted conception is used" and further emphasized that these determinations help "[protect] the child's best interests and promotes a stable family relationship."[654] This was supported by MLA Mary McNeil, who asserted the value of a revised parentage schema because "children will benefit from the clarity

---

[650] Ibid.
[651] Ibid.
[652] Ibid.
[653] Ibid.
[654] British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 17, 2011 (8874).

of knowing who their legal parents are, including in situations where reproductive technology has been used..."[655] This latter point – knowing who one's "real" parents are to promote "stable" relationships – is of particularly salient for studies of kinship. McIntyre and McNeil's comments indicate that legal certainty surrounding biological kinship determines a child's best interests and family stability (recall also, Ralph Sultan's slogan "who's your daddy?").

While there was little pushback in the legislature, there are long-standing social and scholarly resistances to familial change. Writing against this "new ideology of the family," David Velleman argues that families who have children via assisted reproductive technologies are participating in an "experiment… supported by a new ideology of the family, developed for people who want to have children but lack the biological means to 'have' them in the usual sense."[656] He asserts that children ought to be raised by their biological parents and that:

> what is most troubling about gamete donation is that it purposely severs a connection of the sort that normally informs a person's sense of identity, which is composed of elements that must bear clear emotional meaning, as only stories and symbols can. To downplay the symbolic and mythical significance of severing a child's connections to its biological parents is therefore to misrepresent what is really going on.[657]

Further,

> People who create children by donor conception already know– or should already know– that their children will be disadvantaged by the lack of a basic good on which most people rely in their pursuit of themselves, most people rely on their acquaintance with people who are like them by virtue of being their biological relatives.[658]

On the surface, Velleman's points might seem persuasive. This is largely due to how well his arguments mirror and reinforce traditional Western values that idealize the nuclear (biological)

[655] Ibid., 8881.
[656] David J. Velleman. "Family history." *Philosophical Papers* 34, no. 3 (2005): 361.
[657] Ibid., 362-363.
[658] Ibid., 364-5.

family form. Indeed, Velleman is making the case for the nuclear family. At the close of his article "Family history" he contends that

> How do I know that I inherited [character traits] from [my grandparents]? I don't: it's all *imaginative speculation*. But such speculations are how we define and redefine ourselves, weighing different possible meanings for our characters by playing them out in different imagined stories. In these speculations, family history gives us inexhaustible food for thought. Why would we create children whose provision of possible self-understandings was poorer than our own?[659]

I agree with Velleman that we do not know whether one trait came from a grandparent, great grandparent, aunt, or uncle. At best, we imagine it to be so and either find comfort (or another feeling) in this association. I also agree that "imaginative speculations about" these associations play a part in how we (re)define and (re)make ourselves. However, I disagree with Velleman's assertion that the biological family is the most important site for self-understanding. Families are important sites of learning about one's self, not because it is normatively correct, but because young people are required to spend significant time with family members under the social expectation that these relationships are the most important in a person's life. Family becomes important because family relationships are usually a child's primary connections *and* there is significant social and legal value ascribed to families, relationships with family members, and the role that families play in the formation of the self. However, while the biological component *may* be significant is not *necessarily* significant.

On this point, I find Sally Haslanger's work especially useful. She reminds us that the formation of self and identity is culturally and contextually specific.[660] Haslanger agrees with Vellman that it is morally wrong to create children only to deprive them of becoming a "fully

[659] Ibid., 377. Emphasis added.
[660] Sally Haslanger. "Family, Ancestry, and Self: What is the moral significance of biological ties?" *Resisting Reality: Social Construction and Social Critique*, 167. New York: Oxford University Press, 2012.

functioning agent."[661] However, "what counts as a healthy identity and what resources are needed for forming such an identity are culturally specific."[662] Haslanger writes,

> Identities locate us within social structures and cultural narratives; they situate individuals in relation to others. Because there are indefinitely many ways of organizing ourselves, there will be variations in what is owed to individuals who are engaged in identity formation.[663]

The primacy of biological connections is advanced by those in non-normative families too. I was struck, although not surprised, by references to biological primacy by the parents of Della Wolf in news media reporting. In a 2014 *National Post* article, Anna Richards (one of Della's mothers) is quoted as saying "We wanted our kids to know *where they came from biologically* and actually liked the idea of having extended family."[664] In a CBC article, father Shawn Kangro said "it feels really just *natural* and easy, *like any other family*" and Danielle Wiley said "I know a lot of other lesbians don't want that. They want an anonymous donor. But both of us [Wiley and Richards] liked the idea of somebody who could be involved, and *who could be a father figure to our children*."[665]

Richards' and Kangro's statements reflect Fiona Kelly's findings in her (2009) study of planned lesbian families in BC and Alberta. She found that "despite the mothers' clear belief that biological connection did not make one a parent without an intention to parent… the symbolism of biological relatedness was always present even as it was displaced."[666] Kelly suggests that the

---

[661] Ibid.
[662] Ibid.
[663] Ibid.
[664] "Vancouver baby becomes first person to have three parents named on birth certificate in B.C." *National Post*. February 10, 2014. https://nationalpost.com/news/canada/vancouver-baby-becomes-first-person-to-have-three-parents-named-on-birth-certificate-in-b-c. Emphasis added.
[665] "Della Wolf is B.C.'s 1st child with 3 parents on birth certificate." *CBC News*. February 6, 2014. https://www.cbc.ca/news/canada/british-columbia/della-wolf-is-b-c-s-1st-child-with-3-parents-on-birth-certificate-1.2526584. Emphasis added.
[666] Fiona Kelly. "(Re)forming parenthood: The assignment of legal parentage within planned lesbian families." *Ottawa Law Review* 40 (2008): 198.

"meaning attributed to the donor relationship in the context of the lesbian family is perhaps the most difficult issue"[667] facing lesbian mothers. The reason for this is two-fold: first, the absence of legal and social guidance on how to do this and second, social pressures to provide children with a "father" or "father figure."[668] When lesbian women decide to become parents, they first must decide whether they will use an anonymous donor, an anonymous donor with an identity release, a known donor, or become parents through adoption.[669] In the case of a known donor, as with the Wiley-Richards-Kangro family, the parents must also decide what relationship the donor will have to the child(ren) and what the meaning of that relationship is. Clearly, the mothers play a significant role in constructing their families and "determining the meaning attributed to the donor relationship within their family", however, Kelly points out that "the donor's role must also be understood in the context of the current and widespread moral panic about the prospect of "fatherless families"". [670] In recent years, debates about lesbian families' use of donor insemination are part of a broader "debate about the meaning of fatherhood in contemporary society."[671] This debate has largely been constructed by fathers' rights activists who assert that fathers play a unique and irreplaceable role in children's lives.[672] In fact, fathers' rights activists have "linked the lack of a father figure with lax discipline, criminal behaviour, teenage pregnancy, delinquency, youth suicide, poverty and unemployment."[673] For the fathers'

[667] Ibid., 201.
[668] Ibid.
[669] Ibid.
[670] Ibid.
[671] Ibid.
[672] Ibid., 201-202.
[673] Ibid., 202. Kelly also cites a submission from the National Shared Parenting Association to Canada's Special Joint Committee on Child Custody and Access that states "[s]tatistical information backs up the high cost of fatherlessness or father absence. For girls, never feeling worthy of love from a man, it's teenage pregnancies… For boys, it's not knowing how to be a man or how to interact with women. Often violence masks their anger in their father's absence" (Canada, Special Joint committee on child Custody and Access, *Proceedings of the Special Joint Committee on Child Custody and Access* (Ottawa, Public Works and Government Services, 1998).

rights movement, the solution to this assembly of social ills is to "re-instate the father in his rightful place as head of the (preferably married) family."[674] As Kelly observes, "fathers have come to occupy an almost mythical status in society, capable of alleviating even the most complex social problems."[675]

Whether Wiley and Richards would describe themselves as being impacted by the fatherless family moral panic, their comments (noted above) certainly reflect, or at least signal, dominant cultural understandings about the importance of a father, the necessity of knowing one's biological ties, and about the naturalness of the nuclear family form. It is perhaps for this reason that there are relatively few Canadian news articles on this story (compared to news media reporting on other elements of changes to the *FLA*). The reference to biological ties demonstrates Nordqvist's findings that "genes and genetic connectedness… have not lost their social and cultural significance in defining family relationships."[676] As discussed in Chapter 2, Nordqvist found that the "cultural trope of "the gene"" plays a key role in how people approach family life.[677] However, as Strathern argues, genetic relationships ought not to the 'real' basis of kinship. Instead, genetic relationships should be considered as a set of discourses that gives meaning to genetic and biological connections.[678] She defines kinship as the "the manner in which social arrangements are based in and provide the cultural context for the natural processes [of birth and procreation]."[679] "Genetic thinking" comes to have cultural resonance because of its

[674] Ibid. See also Susan B. Boyd. "Demonizing mothers: Fathers' rights discourses in child custody law reform processes." *Journal of the Motherhood Initiative for Research and Community Involvement* 6, no. 1 (2004): 52-74.
[675] Ibid.
[676] Petra Nordqvist. "Genetic thinking and everyday living: On family practices and family imaginaries." *The Sociological Review* 65, no. 4 (2017): 866. See also: Dermott, Esther. *Intimate fatherhood*. London: Routledge, 2008.
[677] Ibid.
[678] Ibid.
[679] Ibid.

connection with concepts like familial belonging, ownership, and connectedness.[680] On this point, Strathern and Jeanette Edwards analyse the connections between genetic thinking and belonging to find that one is both "born" and "bred" into kinship networks.[681] Genetic ties are "conjured up as part of that system of associations; they are socially perceived to enable people to class elements together so that they seem linked" and are thus "socially understood to be 'facts' rather than discourse."[682] Part of what renders these connections so profound is their cultural resonance and their emotional dimension: "connections appear intrinsically desirable. People take pleasure in making links of logic or narrative, as people take pleasure in claiming personal links."[683] Additionally, Nordqvist's empirical work demonstrates that "the practice of claiming links, genetic or otherwise, is perceived as a pleasurable part of family life."[684] Jennifer Mason's work confirms Strathern and Edwards' and Nordqvist's findings. She contends that the fixed-ness of relationships is "alluring, desirable and fascinating" and writes that people work to understand "created relationships" as if they are "fixed", which reinforces the desirability of fixed relationships in the first place.[685] This feedback loop demonstrates how genetic thinking – a product of both biology and culture –cannot be reduced only to science.[686]

At first glance, the Wiley-Richards-Kangro family appeared to form a strong resistance to the status-quo; indeed, there are three parents, two of whom are in a lesbian relationship with each other, and another who is not in a romantic relationship with the others at all, but still has parental rights and responsibilities. Recall, in Chapter 2, the ways in which multi-parent family

---

[680] Nordqvist, *Genetic thinking*, 868.
[681] Jeanette Edwards & Marilyn Strathern. "Including our own." In *Cultures of relatedness: New approaches to the study of kinship*, edited by Janet Carsten, 149–166. Cambridge: Cambridge University Press, 2000.
[682] Nordqvist, *Genetic thinking*, 868.
[683] Edwards and Strathern, *Including our own*, 152.
[684] Nordqvist, *Genetic thinking*, 868-869. See also: Nordqvist, Petra. "'Out of sight, out of mind' Family resemblances in lesbian donor conception." *Sociology* 44 (2010): 1128–1144.
[685] Jennifer Mason. "Tangible affinities and the real life fascination of kinship." *Sociology* 42, no. 1 (2008): 29-45.
[686] Ibid.

arrangements can resist the status-quo of intimate life in Canada; there is a potential for multi-parent families to challenge ideas about conjugality, intimacy, divisions of labour, caregiving roles and responsibilities, and the role of the state in intimate life. One of the challenges of performing discourse analyses on articles surrounding this story is that there were relatively few Canadian news pieces, and of those pieces, many used the same comments from the family and/or did not add new details. However, despite the lack of domestic (or even provincial) reporting, this story received international coverage, including reporting in the United States, the United Kingdom, Slovakia, and in *El Pais* – a Spanish language news website. I suggest that the story received comparably more international news attention because this family's arrangement might be more distinctive in other cultural contexts. Canada is experiencing a change in the visibility of non-nuclear family forms and increasingly, provinces are also expanding the recognition of intimate arrangements. Thus, while the Kangro-Wiley-Wolf family shifts the conversation somewhat, the news coverage and the content of the coverage suggest that this family's arrangement is not entirely unusual in a Canadian context. I will return to this paradox in the conclusion of the chapter.

Despite the primacy of biological thinking in the *FLA* and legislative debate, interview participants unanimously agreed that biology did *not* determine family and that it should not be the way in which the law understands family relationships. I asked each participant to describe how they define "family", either personally or in the context of the work. Though the boundary between a "professional" and "personal" definition is rather arbitrary, participants mostly chose to respond by exploring definitions of family in the context of their work life with more personal accounts of their understanding of "family" expressed later in the interview. For example, CC– a

family lawyer in British Columbia– describes the ways in which families have long defined themselves outside of legal definitions:

> I think that individuals have always recognized what they define as family outside of what the law provides [...] And so I think the reality is the law was just behind what human nature is all about, you know, that's how that's how I see it. And I accept the fact that changing the norm takes time; it takes a generation, maybe it takes more than generations for people to understand. How long did it take the Canadian government to pass the Morgentaler laws? [...].[687]

Similarly, DD– a family law scholar– describes the difficulties defining family, but most importantly, they note that that the law tries *not* to define family. Instead, the law defines "parent"– since presumably the biology of that is much clearer:

> It's very hard to pin down how one might define a family but I think that there are kind of characteristics that suggest family relationships. And so those things would be mutual care, and a degree of interdependence. I don't think that needs to be financial, but a kind of an emotional and caregiving interdependency. And I don't think that families are tied to a certain number of people. I think family can certainly extend beyond, obviously, the nuclear model. And I think that there's a lot of self-definition in family so what's interesting is that if you look at the law, while the law has attempted to define things like "parent", it's very rare for legislation to ever attempt to define family. It just has much wider parameters and I think we're much more comfortable with it being open to a degree of self-definition.[688]

The 'biology of parent' is as imprecise as the definition of family. Thus, if the law is more inclined to define parent than family, that is because of the specific legal rights and responsibilities that attend to that status. Both CC and DD, who are longstanding experts in their fields, both assert that a single definition of family does not exist, nor can it be captured by the law. Families have been defining themselves outside of the law for some time and when the law does try to define familial relationships, the definitions are limited to "parent" or "guardian" and not family. Other participants identified similar complexities with defining family, for example, CC spoke about how families form:

---

[687] CC. Interview with author. Edmonton, Alberta. September 2, 2020.
[688] DD. Interview with author. Edmonton, Alberta. December 3, 2020.

> [...] At the end of the day [people] adopt because the affiliation is psychological. How do we fall in love [...] We don't fall in love because "gee, we're programmed to." We develop a social relationship, then we develop a closer relationship, and then we might develop an intimate relationship. And I think the same is true with family. I've never looked upon families having a view biologically. You begin with the dumb questions: what's your name, your date of birth, what you do? And then you tell me about your partner, I find out you're married, you find out that I'm raising a kid from another relationship. You know, all sorts of stuff. I've always been of the view that biology and status don't define a family.[689]

When probed about whether legal recognition of said family was valuable and important, all participants confirmed that legal recognition is important– though not necessarily desirable for all families (I describe this tension later). AA, a BC public servant who worked closely with the *FLA*, said:

> I think recognition as a family – as a family unit – is quite important to people. It's important both in terms of, I suppose how families themselves understand their legal rights and responsibilities. So that has very practical importance, then in your own personal opinion it matters for the social recognition piece…[690]

With respect to social recognition, AA elaborated:

> [...] There's an important emotional and social element to recognition as a family. Our family identity is an intrinsic part of overall identity. And having people recognize that is kind of near and dear to the hearts of people. And then on a more practical level, being recognized as a founding member is important for things like registering a child at school. So that's where the legal recognition in particular becomes an important part of a family, even though you may no longer be together or the relationship has, otherwise somehow changed."[691]

These comments reflect the continued emotional and legal importance of recognizing familial relationships, however imperfectly. Living in a world that both recognizes and affirms one's family status carries enormous normative force and creates a sense of belonging. As Nancy Polikoff argued decades ago, "the law's unwillingness to recognize and preserve parent – child relationships in non-traditional families *sacrifices the best interests of children* in those

[689] CC. Interview with author. Edmonton, Alberta. September 2, 2020.
[690] AA. Interview with author. Edmonton, Alberta. August 6, 2020.
[691] Ibid.

families."[692] Section 30 was also symbolically important in so far as it was a "statement of the province's desire to recognize the growing diversity of BC families, specifically acknowledging a type of family arrangement found primarily within the lesbian and gay community."[693] The *FLA's* expansion of legal parenthood extended legitimacy to a three parent family, "treating it as a functional and valuable family form, fully capable of meeting the interests of children"[694] Reflecting on their own experience, Linda Collins and Natasha Bahkt argue that the "emergence of new family forms involving same-sex couples and those who use reproductive technologies" is "[disrupting] centuries-old definitions of what it means to be a family."[695]

That said, not all families live in jurisdictions where the creation of a legal regime recognizing three parents goes relatively unnoticed. To this end, participant BB suggested that the socio-political landscape in BC is more progressive than in other parts of the country, or the world. Though, as this dissertation demonstrates, BC may have instigated (or influenced) similar legislative changes in Ontario and Saskatchewan. While reviewing Hansard debates and news media coverage, I was struck by the relative lack of engagement with the parentage regimes and the possibility for a child to have more than two legal parents. BB agreed and commented on their own surprise:

> We did think it was going to be a way bigger deal and a way bigger announcement and that we would hear a lot of feedback. It was so quiet. People know now that you can have multiple parents. Nobody seems to be bothered by it. I think we're living in a culture where we're very accepting. And I think that that's a good thing because we are very tolerant. And if you want to have three parents or four parents. Fine. That's your family. I think that our culture [has] shifted from being discriminatory to being accepting that

[692] Nancy Polikoff. "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families." *Georgetown Law Journal* 78, no. 3 (1990): 573. Emphasis added.
[693] Ibid.
[694] Kelly, *Transforming Laws Family*, 581.
[695] Natasha Bakht and Lynda M. Collins. "Are You My Mother: Parentage in a Nonconjugal Family." *Canadian Journal of Family Law* 31 (2018): 110-111.

> anything goes now and nobody really, it doesn't matter if your neighbors want to have three parents. [...] nobody batted an eye. It was like, "Oh yeah, whatever."[696]

This confirms Petra Nordqvist's finding that "the social meaning of reproductive relationships is to some degree highly negotiable."[697] However, when BB inquired about the parentage changes in the *FLA* with friends and colleagues, the responses they received were less confident. For example,

> The feedback that I received from people that I've talked to where I sort of say, "how do you feel about multiple parents?" and they just, I mean everybody that I've talked to is very accepting of it. [They say] "If that's what you want… like, that's great," *but they can't picture it*.

BB's comments affirm Megan Carroll's[698] findings that despite the increased diversity in kinship arrangements (or, how people 'do' family), it would appear that less has changed in terms of everyday normative understandings of what a family "looks like."[699] This suggests that "social scripts"[700] – "the ways in which people think and work out how to behave in particular situations is socially scripted; that is, it follows codes of conduct" – about sexuality and kinship still lag behind contemporary demographic diversity. The discrepancy is powerful because social scripts act as "a metaphor for conceptualising the production of behaviour in social life"[701] and reproduce the intelligibility of certain families over others.

The above analysis is bolstered by the requirements for biological or genetic links in section 30 families. In other words, a third parent *must* share a biological (though not necessarily

---

[696] BB. Interview with author. Edmonton, Alberta. August 14, 2020. Emphasis added.
[697] Deborah Dempsey. "Conceiving and negotiating reproductive relationships: Lesbians and gay men forming families with children." Sociology 44, no. 6 (2010): 1157.
[698] Megan Carroll. "Managing without moms: Gay fathers, incidental activism and the politics of parental gender." *Journal of Family Issues* 39, no. 13 (2018): 3410–3435. See also: Morgan, David. *Family Connections: An Introduction to Family Studies*. Cambridge: Polity Press, 1996.
[699] Joshua Gamson. *Modern Families: Stories of Extraordinary Journeys to Kinship*. New York: New York University Press, 2015.
[700] John H. Gagnon and William Simon. *Sexual Conduct*. London: Hutchinson, 1973.
[701] William Simon and John H. Gagnon. "Sexual scripts: Permanence and change." *Archives of Sexual Behaviour* 15, no. 2 (1986): 97–120 cited in Nordqvist, *Telling Reproductive Stories*, 4.

genetic) link to the child.[702] According to paragraph 30(1)(b), the third parent must be the birth mother (a surrogate) or a donor, and families are not permitted to choose a third parent beyond these two options.[703] The result is that section 30 actually reinforces, and elevates, the value (and possibility) of "biological ties over other kinds of relationships."[704] On the surface, this outcome seems quite appalling for a piece of legislation that was designed to expand legal parentage. Further, for those who co-parent with a donor or surrogate, the third parent will almost always, in the case of a same-sex family, be someone of a different sex.[705] For example, lesbian couples may parent with their child's biological father and gay couples may parent with their child's biological (though perhaps not genetic) mother, but in both cases, a different-sex parent is "guaranteed."[706] This reflects a judicial tendency (in a lesbian context) to "find fathers" for children who are raised by two mothers.[707] The consequence of this is that people are actually not permitted to expand "the boundaries of parenthood beyond the heteronormative framework" to reflect important social relationships or "chosen families."[708] The result is that section 30 works to reconstruct the heteronormative biological family, wherein children have a biological parent of each sex.[709]

When I began this research, I had strong reservations about the requirement for a pre-conception agreement. Largely, my critique was that it demanded something of "nontraditional" families that it did not of families who conceived in "traditional" ways. In so doing, I felt the *FLA* had a different set of rules for non-nuclear families than nuclear families and that this

[702] Kelly, *Transforming Laws Family*, 582.
[703] Ibid.
[704] Ibid.
[705] Ibid., 584.
[706] Ibid.
[707] Ibid.
[708] Ibid.
[709] Ibid.

requirement represented a rather archaic prescription that required non-nuclear families to somehow codify the birth of a child in ways that non-nuclear families do not need to. Further, the requirement of a preconception agreement rules out the possibility of later recognizing important adults as legal parents. I asked each participant how they felt about the requirement for a preconception agreement and whether they had any critiques or concerns about the stipulations. BB offered a background history to what was in place prior to this addition in the *FLA*. They described the process as such:

> We did allow what we call the "co-op" parents, the mother with [a person who was not the biological father]. Now, the only qualifier for that one was that you had to be in a relationship and married [or in a] married-like relationship when the child was born. So, we had a lot of uptake in that lots of young girls are getting pregnant and then meeting another fella, you know, midway through pregnancy and falling in love, and he was going to raise that child. So, we still to this day have hundreds of birth registrations out there, where they put their boyfriend on and of course, that relationship has dissolved. And now he's on [the birth registration] but he's out of the picture. He's gone. And the child has never known him or never will probably. You know, once he figured out "Oh my, this is a big responsibility…"

BB's sentiment continues to reflect the social and legal value accorded to fatherhood and the assumption that single motherhood is somehow a tragedy. They continued to describe the difficulties that these abandoned young mothers faced:

> [There used to be a service counter] across the street. And I remember these moms coming in and going, "he's long gone and how do I get them off" and I'm going "sorry," you know. That's why the Family Law Act has been a godsend because now we know that there was an intent. Whereas before it was no intention; the boyfriend just thought "wow this is cool. I love this person." But baby comes along and they're up all night and on the birth registration, so the problem is this child is going to grow up with a person on the birth certificate that he has to, he or she or they, have to know the name and the birthplace of that particular person in order to get their birth certificate if they want to order one later in life. You have to know the parents' names and birthplaces. And there they will never have met this person or have any recollection of meaning. The only way to get that person off would be to go to court. And I've only seen one successful case.

BB continued to say that because of this, the preconception agreement provides clarity for both children and parents about who intends to be a parent and therefore has parental rights and

responsibilities. They described the permanency of legal parenthood and how the previous schema may have accorded legal fatherhood to those who wished to avoid it. They describe the ways in which preconception agreements operate to ensure that those who become legal parents want to be parents. They note:

> You do have to have a preconception agreement, and the reason being is when they drafted the legislation, I was working with [a] lawyer and he said that it was all about intent. So, when you have sexual intercourse with someone and you go on for father, you're on for the rest of your life. There's no way out, unless the child's given up for adoption or something like that. But you're a father and you can't come off. So, what they wanted to do is have that same sort of responsibility as a parent, when you're in a relationship with a mother, it's your intent to create this child. And that's why you have to say that this was assisted reproduction, so we know that there was an intentional act to have this child and the parent that's going on there is on for all purposes of the law. So, we're talking as you go further into the Family Law Act, you've got inheritance and responsibilities financially as well for that child and then all the rest of the parental responsibilities to go with it. And that was the intent, to make sure that if you go on as a parent, and not as a father, the responsibilities, either way, are the same.[710]

Similarly, AA explained that the nature of the preconception agreement ensures that adults cannot lay claim to legal parenthood after the birth of a child *or* cannot rescind legal parenthood. They describe this process as "mitigating risk":

> … nobody's brought in, after the fact and they can't raise their hand and say "Yeah, but that wasn't what I wanted to be, you know, I never signed on for that." In fact, they did, they signed an agreement that said they wanted to be a parent. [They] intended to be a parent. That's the kind of risk it's intended to mitigate. It creates some certainty, so you don't end up with a situation where a person can be told they are parents, and they say "no but I never intended to be a parent…[711]

AA and BB highlight a significant point: in addition to clarifying the responsibilities of legal parents the preconception agreement then makes possible the ability to identify and trace who is eligible and/or responsible for property, inheritance, estates, and other areas of "family" responsibility. In this way, I argue that the preconception agreement is a tool to codify who the

[710] BB. Interview with author. Edmonton, Alberta. August 14, 2020.
[711] AA. Interview with author. Edmonton, Alberta. August 6, 2020.

state can hold responsible for the child or children but also all subsequent financial matters. The preconception ensures that there will never be a "filius nullius" and while this may be of some benefit to the child and their parent(s), I suggest this is mostly of benefit to the state.

AA agreed with BB and noted that the requirement for a preconception agreement acts as a "balancer" because (as BB also stated) it provides clarity for children and adults but does not prescribe what a familial arrangement ought to look like. AA said:

> There is no prescribed form or format that has to be followed. There needs to be a written agreement that has some very sort of basic information included in it. I think the intention was not to make that requirement onerous but to achieve that sort of minimum threshold of certainty that the Act was aiming to achieve. That being said, of course there are cases where people didn't realize. So, when you have a friend donor… They didn't realize that there was supposed to be an agreement in place before conception occurred. Or some of the technical requirements about how conception was supposed to occur. It wasn't supposed to be through sexual intercourse; those details, but it's not perfect. Everybody doesn't always have the information they need but most of the people who look into it a little bit should have most of the information.[712]

These responses clarified the legislative intent behind the preconception agreement. That is, I could see the importance of the agreement for things like Vital Statistics or negotiating family law cases. However, AA and BB's responses did not attend to my underlying concern about the inequality that the preconception requirement may produce between couples who do not use ART and those who do. Or the limitations it might place on families who conceive and then later want to add important adults in a formalized way. However, DD clarified this conundrum beautifully:

> Well, I love the preconception agreement because the reality is people who engage in assisted reproduction with known donors enter preconception agreements every single time. It is a fallacy to think that people in this situation are not contracting about prospective children. And if they didn't, they'd be stupid. Because they would be risking entering a situation where the terms of their arrangement are unclear and there is nothing that you could do; that would be worse in terms of starting a child's life. They're clear about who's doing what, who are the parents. That's the stability that children need from day one. And so, that relationship might evolve, your donor may become more involved,

[712] Ibid.

> you might find extended family become involved. I have no problem with post birth relationships evolving. I don't think you're going to capture everything in that preconception agreement, but initial intention about what we are doing and who is doing what... I think that quite frankly society would probably benefit from doing that more broadly. So, yes, I recognize it's unusual in family law and it makes people uncomfortable because it suggests that we are contracting about children and in this case, children that don't even exist yet. But it is naive to think that that's not what's happening already. And it is good practice to do that before you go and conceive a child with someone, particularly where you're not in a committed, or necessarily committed, relationship with that person. In some cases, increasingly, because donors have been met online and you literally don't know the person at all. So, I'm a fan. I quite like it.[713]

When pressed about the possible inequities between queer families and traditional, heterosexual families DD said that there are "default legal settings" for heterosexual couples. The pre-conception agreement requirement creates these settings for families who are otherwise not intelligible to the law. They said:

> The difference is that with those other scenarios where children are brought into the world without planning, there are default legal settings. If you have sex with someone and you produce a child you are a legal parent and a whole bunch of rights and responsibilities flow from that because we have default legal settings. If someone conceived with someone at home using fresh sperm and you're not in a relationship, there are no default settings. That's why I think it's different. So, we don't necessarily police people but we do police by instance of law.[714]

Only one participant strongly opposed the preconception agreement, and they did so on the grounds of resisting unnecessary forms of government intrusion and regulation of intimacy. CC said:

> I could be convinced otherwise but it is not something that sits well with me in terms of the government telling me that there should be these considerations. I know the arguments for, you know, having parenting courses before you have kids... I just don't think that's human nature, so I think maybe my bias is otherwise… I sure as hell can't relate to how that would have worked for my [partner] and myself. I like to think we were a little more spontaneous.

[713] DD. Interview with author. Edmonton, Alberta. December 3, 2020.
[714] Ibid.

The diversity of responses with respect to the necessity or value of preconception agreements is worthy of note. BB suggests that preconception agreements are important and necessary for clarifying roles, rights, and responsibilities with respect to children. DD finds that they are worthwhile to ensure that the law responds equitably by providing "default settings" for families who use ART to conceive. CC was less enthusiastic about this requirement, citing both the intrusiveness of the law and spontaneity. On the former point, the many manifestations of the governance of intimate life are precisely the topic of this dissertation. CC and I discussed Pierre Elliot Trudeau's famous quote "the state has no business in the bedrooms of the nation" and with a chuckle, CC agreed this may be the root of their resistance; a generational and intellectual distaste for government regulation in "the bedroom". On CC's latter point, most families who are pursuing ART are not behaving "spontaneously" anyway, since ART requires a significant amount of time, planning, money, and emotional and physical fortitude.

Like Deborah Dempsey, I argue that this type of agreement "draws on some normative notions of Western kinship and family relationships" while reinforcing the boundary that some family forms are undesirable and, in fact, beyond the recognition of the law. Given the requirement for a biological connection, Section 30 and preconception agreements also reflect practices surrounding donor insemination where "identity-release" considerations exit.[715] Importantly, preconception agreements are more likely to produce "patterned or structured" family arrangements that reflect "conventional categories" of gender, biological, and genetic relatedness than individual family diversity.[716] For example, Dempsey's research highlights that relationships between biological fathers and children are generally regarded more flexibly than children's relationships to their biological mothers and lesbian couples and single women wanted

[715] Dempsey, *Conceiving and negotiating*, 1154.
[716] Ibid., 1158.

primary "resident parental rights and caregiving responsibilities" with biological fathers "assuming more distant non-resident social contact."[717] That said, as I demonstrate in the section below, families do find ways to resist the "gendered nature of the assumptions informing these negotiations." However, precisely because they resist legal recognition, it is difficult to capture the contours of their resistance.

4.3.2 Limits of legal recognition

Deborah Dempsey notes that the early 2000s saw the birth of sociological literature on "cultures of intimacy and care" outside the nuclear family.[718] This literature was trying to understand "configurations of significant personal relationships" that departed from "western nuclear family models" in heterosexual and non-heterosexual contexts.[719] For example, Jeffrey Weeks et. al. (2001) examine the practices of gay and lesbian couples who engage in "open and explicit processes of negotiating the meaning of relationships" given the lack of legal recognition and support they face.[720] Further, Sasha Roseneil and Shelley Budgeon's (2004) research examines the strong and lasting caring relationships that exist between cohabiting friends who are not in romantic relationships with one another[721] while anthropologists have demonstrated "the creative and dynamic nature of kinship made possible by developments in ART" like the possibility of having different gestational, biological, social, and legal parents.[722] These scholarly interventions

---

[717] Ibid.
[718] Ibid., 1146.
[719] See also: Sasha Roseneil and Shelley Budgeon. "Cultures of Intimacy and Care Beyond "the Family": Personal Life and Social Change in the Early 21st Century." *Current Sociology* 52, no. 2 (2004): 135–59 and Weeks, Jeffrey, Brian Heaphy, and Catherine Donovan. *Same Sex Intimacies; Families of Choice and Other Life Experiments.* London: Routledge, 2001.
[720] Weeks, Heaphy, and Donovan, *Same Sex Intimacies.*
[721] Roseneil and Budgeon, *Cultures of Intimacy*.
[722] Ibid. See also: Janet Carsten. *After Kinship.* Cambridge: Cambridge University Press, 2004; Edwards, Jeanette. *Born and Bred: Idioms of Kinship and New Reproductive Technologies in England*. Oxford: Oxford University

mirror the increasing visibility of many non-nuclear family forms, like three-parent families. However, one of the conundrums I identified in BC was the discrepancy between the expansion of legal parentage and the actual number of registered multiple parent families. I asked BB about a possible explanation for this, and they said:

> [...] you know, a lot of it had to do with trends. You know the different trends; trans women and this with that and then that didn't come to be up until early this year. In the last seven years, there have only been three families that have come forward [who have more than three legal parents]. And now we have five. Okay, and we register 46,000 births, every year. So, seven years if you do the math. Do roughly 45,000 times seven, and then five families in the seven years. So that's all we have.[723]

Out of approximately 315,000 births registered in the last seven years, only five have more than three legal parents. BB notes that this number is significantly small since "people were saying, you know, "the world needs this, we want to have many, many parents.""[724] And yet, despite the "different trends" there was less uptake than many anticipated. BB elaborated by saying they anticipated that many more families would register and the low numbers seemed incommensurate with the amount of work required for amending legislation, statues, and forms:

> we were actually expecting there to be [more families] just because of… drafting this was a lot of work. Even the forms for the multiple parents. [There was a lot] involved in drafting all the birth registrations and making sure that the wording was right and making sure that the, you know, preconception agreement, it was… it was just a lot of work. I think we thought that this was just going to be, you know, a huge uptake. And I guess, all I can think of is just a traditional two parent family is still what people are mostly doing.[725]

I queried other participants about the low registration of multiple parents is and each participant had a slightly different hypothesis. CC thought that very few people were aware of the legislative changes that permitted more than two legal parents– despite extensive public consultations

---

Press, 2000; and Thompson, Charis. *Making Parents: The Ontological Choreography of Reproductive Technologies*. Cambridge: MIT Press, 2005.

[723] BB. Interview with author. Edmonton, Alberta. August 14, 2020.

[724] Ibid.

[725] Ibid.

before it passed. AA was unsure but suspected that the arrangement may just be uncommon. BB described a general feeling that parenting is already a complicated affair and so people are not interested in further complications by adding additional parents. They note:

> People who like are married or [in a] married-like relationship, and then have children, recognize the issues that come along with that. And I think they think adding one more parent or two more parents would [create] that many more issues. I think that has a lot to do with that, I think that people just think "oh my gosh how is this ever going to play out and how is this going to work." And personally, I would think that as well. I would have a hard time having another parent involved in raising my children. It's difficult and so I think that's probably one of the reasons that people just aren't organizing families in that manner."[726]

BB continues their discussion:

> My first thought would be that I don't know of any family organizing themselves in that way. Because of the intent of multiple parents [in the FLA], you have to have a preconception agreement, so you have to get together before the child is conceived. You have to have assisted reproduction. And I don't think there's a lot of people interested in going through all that. I just don't know a lot of people and I don't know of anyone that has a desire, I think, from the people like in my circle and extended circle and from the people I shared with it. They find it very challenging as parents [...]; there are stresses, and even in those cases, 50% of those don't survive in their marriage or marriage-like relationships. Not only just the couple itself, but you add a child into that, or two or three, that just leads to a lot more problems. Now you're adding another parent to the picture, or two. I think for most people that thought is just daunting to think how in the world is that really going to ever work when two people have a hard enough time trying to make a go of it.[727]

I suspect that BB's sentiments are shared by many, reflecting a narrow and distinctly colonial (or maybe western) and white interpretation about the possibilities that multiple parents might afford a family. For example, multiple adults to share in caregiving, financial responsibilities, and household tasks could ease the stress of familial life. There are several examples kinship practices in Indigenous, South Asian, and Black communities in Canada, and around the world, where multiple caregiving adults is common and affirmed (though not legally recognized). bell

[726] Ibid.
[727] Ibid.

hooks and Patricia Hill Collins both explore the practice of biological mothers having a network of friends and family to support them in child care.[728] For example, extended family like grandmothers or aunts, as well has close friends form "networks of care." This form of childcare was critical for Black women who, historically, had to leave their own families to work outside the home or necessary when childcare is unavailable (either it is too expensive or there are no spaces).[729] For many families, community care is still required, given the continued inaccessibility of child care. bell hooks described the tradition of multiple parents and people who do not have biological children sharing child rearing as "revolutionary parenting."[730] She noted that it is revolutionary in that it opposes the Western ideology that maintains that two biological heterosexual parents, and in particular mothers, should be raising children."[731] In fact, anthropologists refer to the practice of communal child care as "alloparenting" (wherein adults, who are not genetically related to a child, provide parent-like care). Sarah Blaffer Hrdy argues that humans could never have evolved without communal care, since infants require so much support from their mothers and, in turn, mothers required support from others to help raise their children.[732] Hrdy suggests that alloparenting was critical for early hunter-gatherer societies and contributed positively to human evolution.[733]

---

[728] bell hooks. *Feminist Theory: From Margin to Center*, 2nd ed., 144. Cambridge: South End, 2000: and Collins, Patricia Hill. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 45, 173. New York: Routledge, 2002.
[729] Ibid.
[730] hooks, *Feminist Theory*, 133. See also Kupenda, Angela Mae. "Two Parents are Better Than None: Whether Two Single African American Adults-Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other-Should Be Allowed to Jointly Adopt and Co-Parent African American Children." *Louisville Journal of Family Law* 35, no. 4 (1997): 707 and van de Sande, Adje and Peter Menzies. "Native and Mainstream Parenting: A Comparative Study." *Native Journal of Social Work* 4, no. 1 (2003): 129.
[731] Ibid.
[732] Sarah Blaffer Hrdy. *Mothers and Others: The Evolutionary Origins of Mutual Understanding*, 270. Cambridge: Belknap Press of Harvard University Press, 2009.
[733] Ibid., 271.

While I suspect that BB and CC's hesitation was well-meaning, their interpretation reflects broader and more insidious ideas about the ideal family form; that is, the simplest family form is a two-parent nuclear household. Though BB earlier says that their circle of colleagues and friends were not bothered by the thought of four or more parents, they also shared that the idea of four or more parents is too complicated to be viable. I found another participant's account, of why so few four or more parent families are registered, more plausible and engaging. DD suggested:

> So, I think of the families that I interviewed, that really embraced quite a complex form of family– usually involving more than two adults– some of them were not interested in being captured by the law. They felt that that would either put them in boxes or define roles in ways that didn't really suit what they were trying to achieve. And there was a reluctance for them to engage with law. And so I think that when we move outside so when you look at say a common law heterosexual or same sex common law couples or same sex parenting in a nuclear model, those families and, I hate making this comparison, but they look like the "traditional norms", it's very easy to legislate in relation to them and I think by and large, most of those family types want to be treated in the same way under law so they know the same kind of legal equality essentially right formula equality. But I'm not so sure about some of those, those families who kind of operate outside of that model.[734]

DD's analysis suggests that the low numbers of four parent families who are captured by BC's Vital Statistics Department is not, as BB or CC suggest, the result of a lack of awareness or a lack of interest (though, these may be variables as well) but chiefly because families who are invested in non-normative arrangements are also committed to designing their families and living with their families in ways that are outside the purview of the law. That is, outside the governance and regulation of the law. This likely reflects Cris Mayo's argument that there is a "tension" between lesbian, gay, bisexual, and trans rights and recognition and that of "queer" people:

> There is a tension between discussing how people, such as lesbian, gay, bisexual, and transgender (lgbt) people, might be recognized by law and given (or denied) certain legal

[734] DD. Interview with author. Edmonton, Alberta. December 3, 2020.

> rights on the basis of their identity and how queer people, not always fully recognizable as inhabiting particular identity categories, might also live their potentials. Laws and rights regulate particular kinds of people, and while lgbt people have pursued civil rights energetically for the last sixty years or so, their queerness has continued to complicate any attempt to gain legitimacy.[735]

Whereas mainstream LGBT organizing is largely concerned with civil rights, like equal marriage, queer liberationists work to deconstruct the very categories of sexual and gender identities and practices.[736] Queer liberation encourages us to think "not just about abstract possibilities and freedoms but about the freedoms and possibilities of people who are barely recognizable. These queer claims are often hard to frame in terms of liberal theory and actual law."[737] DD's comment suggests that the low number of registered families reflects a queer liberation politics designed to eschew claims to legitimacy and live beyond the bounds of recognition. This is, perhaps, a result of the limitations of liberal theory. Mayo argues that given its "[dedication] to interrogating traditions", liberalism is "unwilling" (or unable) "to extend its analysis of freedom to sexual freedom, its embrace of autonomy to queer critique, its sense of progression toward new possibilities to queer futurities."[738]

CC made a similar observation, though it was not framed with respect to resisting legal recognition. They stated:

> Now what I will tell you though is the following. It is my understanding that some of the birth registrations in the gay and lesbian community may not be in accord with the provisions of the *Family Law Act* because the requirements for a reproductive technology contract or procedure have not been followed and, thus, the birth registrations are made as if it was a birth as a result of sexual intercourse.[739]

---

[735] Cris Mayo. "Pushing the Limits of Liberalism: Queerness, Children, and the Future." *Educational Theory* 56, no. 4 (2006): 469.
[736] Ibid.
[737] Ibid.
[738] Ibid., 471.
[739] CC. Interview with author. Edmonton, Alberta. September 2, 2020.

In other words, it was CC's understanding that some queer families may not be registering their multi-parent arrangement because they did not meet the requirements in the *FLA* of a preconception agreement. That is, the adults who wanted to be parents did not formally agree to do so prior to conception. On the surface, this seems contrary to DD's assertion that the low numbers of registered multi parent families reflected their desire to actively live outside the regulation and governance of the law. However, CC's assertion arrives at the same conclusion– though with a differently formulated perspective. Perhaps the families identified by CC are also choosing to live outside the governance of the law and so they are choosing to construct their families in ways that may not meet the requirements of the *FLA*. In fact, DD found:

> [...] the families that I have spoken to, who have adopted that type of model, are not interested in legal engagement at all. And some are concerned about what legal regulation might mean for them, actually. And in terms of the concern around what legal recognition might mean because it might be limiting.[740]

When asked to elaborate on these concerns, DD stated that families they spoke with were concerned about how the *FLA* would impact their familial roles. For example:

> Yeah, well that there was a presumption that the roles that they played within their family could be equated with existing normative roles, so that you know you could be a mother or a father, or a co parent. But sometimes they really just didn't fit with those roles. There's one family I spoke to where the two women involved were non-conjugal partners; they had a child together but not a sexual relationship and then they had the donor and the donor's partner. And they didn't want to be kept... what would you do with those roles? They were concerned that it would actually legally transform a family that works really well for them.[741]

According to DD, the low numbers of registered multi-parent families is not an indication that they do not exist but rather, "they're not conformists." Further, they note that not many families are engaging in "co parenting relationships" that are across households where the work is equally divided. In DD's observations, there is almost always a primary home with a parent or parents

[740] DD. Interview with author. Edmonton, Alberta. December 3, 2020.
[741] Ibid.

and then "more diluted roles for the other participants" who are "absolutely significant, but not necessarily parental."[742] In turn, DD extended the analysis put forward by BB and suggested that:

> I think there's all sorts of reasons why it might not have had a great uptake, but the numbers are small, like it's clear that we're not talking about large numbers of people in the first place. So, it doesn't surprise me then that the number of people who used it– particularly with four or more parents– would be even fewer. And as I said they're going to be the least normative members of this class of people. So, they really want to have four or five legal parents for a child, as opposed to four or five people heavily involved in the child's life or, quite frankly, peripherally involved in the child's life.

The significance of this observation is not the statistically low numbers of families who opt for recognition, but *why* some families do not. Moreover, I am interested in what the "opting-out" means about the limits of this legislation and more broadly about the limits of governance of intimate life and the ways in which families are choosing to live outside the law. Some families' decisions to live outside the law's recognition may reflect the limitations of liberalism, or as Mayo suggests, "liberalism falls short of an ability to deal with queer issues." The reason for this is that liberalism "cannot fully understand… the disruptions arising out of queerness that challenge liberalism's simultaneous assumption of heterosexual subjects and inability to see its subjects as inhabiting particular identities." [743] Thus, liberalism's "own subtle omission" is that the ideal citizen is heterosexual which affects its approach to recognizing or including "proto-citizens" – children."[744] In other words, queer children are "denied representations of themselves" in public life and a "sense of futurity." [745] The visibility of queer families gives queer children a sense of belonging and "the idea that one might plan for future relationships" so

[742] Ibid.
[743] Mayo, *Pushing the Limits*, 471.
[744] Ibid.
[745] Ibid., 473.

that children – as proto-citizens – have ways to "imagine themselves as part of the social fabric, as people whose choices and attachments will matter to others."[746]

Despite the low numbers of registered multi-parent families, government documents, Hansard debates, and interview participants agreed that the legislation was "catching up" to BC's changing social landscape. For many, the *FLA* was finally mirroring the pre-existing (and longstanding) diversity of BC families. This is noteworthy since it simultaneously acknowledges the limitations of legal recognition (non-normative families existed outside the recognition of the law) and while also affirming its necessity for families. This tension highlights the implications of the legal recognition of intimate life, especially for those whose intimate arrangements are considered unusual or unique. One article, titled "Changes to family law the first in 30+ years…", reads "The changes… aim to make the court process less adversarial and deal with *modern-day realities such as common-law and same-sex couples*."[747] While a blog from "Connect Family Law" writes "The law often has difficulty keeping pace with changes in our social landscape"[748] followed by another citing that "This is the most significant change to family law since the Family Relations Act came into force in the 1970s."[749]

In the Legislative Assembly, Polak asserted the family's centrality to society even as its structure has changed. Her comment reflects both a reaffirmation of dominant ideologies of the family and a modest expansion of nuclearity. She said:

> [the family] has changed the way it looks over the years, but nevertheless, all of us have something that we would hold on to and call our family. Some look very traditional and represent the way in which we have seen families for hundreds of years. Some look very different from what they would have looked in 1978 [...].[750]

---

[746] Ibid.
[747] "Changes to family law the first in 30+ years; Children's best interest, property rights change." *North Shore News*. November 30, 2011. Emphasis added.
[748] Leisha Murphy. "Are you my mother?" *Connect Family Law Blog*. June 8, 2017.
[749] Angela Thiele. Blog interview. Lindsay Kenney Law. No date.
[750] British Columbia. Legislature. 39th Parl., 3rd Sess., November 17, 2011 (8852).

She continues by noting that while non-nuclear families existed in 1978, "the traditional marriage relationship was the one of primary consideration," in the *Family Relations Act*.[751] Here, we see Polak articulating the view that while the family is a perennial structure in society, the shape and needs of such families change over time, and the legislation by which they were being governed (the Family Relations Act) was out-of-step with the character of modern families in British Columbia. This is particularly clear when Polak notes that the "traditional marriage relationship" was the status-quo when the FRA was enacted. We can assume then, that the *FLA* was designed, in part, to respond to the needs of non-traditional families, those for whom parentage determinations may be less clear. Extending Polak's case, Shirley Bond noted that the *FLA* was a "very significant piece of legislation" that "has been 30 years in the making, and [replaces] the Family Relations Act, which has not been substantially reviewed since 1978"[752] and Barry Penner noted that legislators had been "actively engaged in working to modernize the Family Relations Act in British Columbia."[753] To emphasize the points her colleagues made, Mary McNeil lamented "It is obviously time to replace the current act, which was introduced well over 30 years ago, with a new act that focuses more clearly on meeting what is the best interest of the child."[754]

MLAs, journalists, and lawyers were quite clear on how monumental the *FLA* was for family law in BC, however, even amidst such sweeping changes, some families will continue to be located beyond the BC legal imaginary. For example, an article in the *Times Colonist* (Victoria, British Columbia) notes:

---

[751] Ibid., 8854.
[752] Ibid., 8845.
[753] British Columbia. Legislature. 39th Parl., 3rd Sess., May 12, 2011 (6933).
[754] British Columbia. Legislature. 39th Parl., 3rd Sess., November 17, 2011 (8881).

> A case can be made that the new Family Law Act, tabled Monday in the legislature, is the most far reaching social reform of our era. The massive bill completely redefines the civil structures that underpin marriage and family life.[755]

This argument reflects Velleman's critique of "new ideologies of the family" and the homophobic sentiment that is entrenched in liberalism, according to Mayo. For example, he notes "by whatever name sexual diversity is called" it still causes "consternation and even panic."[756] Moreover, while liberal states are expanding sexual citizenship regimes, the categories of inclusion will always be limited if, as Mayo argues, "liberals address sexuality as if their own embrace of heteronormativity was not itself part of the problem."[757] Responding to claims like the one made in the Times-Colonist, Boyd states that the *FLA* is "an exercise in social policy" but "it doesn't "completely redefine" the civil structures that underpin marriage and family life…"[758] For example, the *FLA* did not change how unmarried spousal relationships are recognized or laws surrounding child and spousal support.[759] On the topic of polyamory, Boyd notes that:

> I was struck by how very well the *Family Law Act* fit with the circumstances and legal interests of people involved in polyamorous or polyfidelitous relationships. Far from the moralizing finger wag of the federal *Civil Marriage Act*, the new provincial law practically throws the door open to non-binary spousal relationships! To be fair, I expect that this result was unanticipated, but it is nonetheless welcome and astonishingly progressive.[760]

He further illustrates this by suggesting that the *FLA* makes it possible for "someone [to] qualify as an unmarried spouse while still being a married spouse." He does note that "most of the time, this happened when a married person had separated, started a new relationship, and lived with

[755] "Don't rush with Family Law Act." *Times Colonist*. November 11, 2019.
[756] Mayo, *Pushing the Limits*, 470.
[757] Ibid., 471.
[758] John-Paul Boyd. "A Reply to the Times Colonist." *JP Boyd on Family Law: the Blog by Collaborative Divorce Vancouver*. November 19, 2011.
[759] Ibid.
[760] Ibid., 1.

the new person for long enough to qualify as an unmarried spouse without being divorced from the first spouse."[761] Nonetheless, he argues, the *FLA* defines "an unmarried spouse has lived with another person in a marriage-like relationship", suggesting that nothing in the *FLA* says one can only be in one spousal relationship at a time.[762] He describes the following scenarios to illustrate his point:

> Assuming that A, B and C have all lived together for at least two years in marriage-like relationships, A is in an unmarried spousal relationship with B and in a separate unmarried spousal relationship with C. B is in a spousal relationship with A and in another spousal relationship C. C is likewise in a spousal relationship with A and in a spousal relationship with B.
>
> In fact, things could be yet more complicated, as long as each relationship meets the criteria of (a) living together (b) for at least two years in a (c) marriage-like relationship. In this case, A is in three simultaneous relationships, one with B, another with C and yet another with D.[763]

Despite my deeply skeptical reading of the *FLA*, lawyer John-Paul Boyd thinks that the possibilities for polyamorous kinship relations is quite open under this legislative change and that the legislative reform is not as radical as many propose. From Boyd's perspective, the *FLA* was neither a grand 'catch up' nor limited in scope since the changes made to the *FLA* were, in some respects, not as dramatic as many indicate, but that in others, the *FLA* may be quite inclusive (as noted above, with respect to the possibilities for polyamorous families to exist). Much of John-Paul Boyd's excitement about the *FLA* rests on two premises: first, that the *FLA* opens possibilities for multiple spouses (as explored above) and second, that those in polyamorous relationships are probably better prepared for relationship breakdown since they likely pursued cohabitation agreements prior to their union. I find both these propositions weak, since one still cannot have more than one *married* spouse (and while that may work for many, it

[761] Ibid., 2.
[762] Ibid., 3.
[763] Ibid.

circumvents the possibilities for redefining kinship because it privileges certain types of relationship over others). Second, I am not confident that one's participation in a polyamorous relationship is any sort of guarantee that one is better prepared for relationship breakdown. Perhaps the *FLA* makes polyamory possible in some scenarios, but not in ones that are disruptive to the traditional ideology of the family. Boyd's optimism and my skepticism might best be described via Mayo's description of liberal and queer theory. As noted above, for Mayo, liberals eschew the reality that heternormativity is part of the problem. As such, simply expanding the categories of parent, for example, cannot address the limitations of the category itself. [764] Queer theory is "considerably less optimistic" about the extent to which legal and/or political changes will end discrimination based on gender and sexuality.[765]

4.3.3 When things fall apart

There were very few legislative debates about multi-parentage (Section 30). Instead, it appears that the "problem" the *FLA* seeks to remedy is how to *make* families, not keep them together. In so doing, Rachel Treloar and Susan Boyd suggest that the *FLA* "constructs the 'new' face of contemporary motherhood and fatherhood after divorce" where each parent maintains the same "authority" they had during the marriage-like relationship.[766] In other words, the *FLA* distanced itself from "presumptions regarding the preferred form of parenting arrangements" but maintained a position that "on separation, each parent is the child's guardian with all parental

[764] Mayo, *Pushing the Limits*, 471-472.
[765] Ibid.
[766] Rachel Treloar and Susan B. Boyd. "Family law reform in (Neoliberal) context: British Columbia's new family law act." *International journal of law, policy and the family* 28, no. 1 (2014): 77. See also: Neale, Bren and Carol Smart. "Experiments with parenthood?" *Journal of Sociology* 38, no. 2 (1997): 201–19 and Smart, Carol. "The "new" parenthood: fathers and mothers after divorce." In *The 'New' Family?*, 100-115. Edited by Elizabeth B. Silva and Carol Smart. London: SAGE, 1999.

responsibilities."[767] Additionally, the *FLA* presented new guidelines for family disputes, emphasizing out-of-court resolution.[768] According to past Minister of Justice, Shirley Bond:

> A fundamental shift was needed to encourage and assist parents and spouses to resolve their disputes co-operatively, with courts being a last resort. Under the Family Law Act, approaches like mediation and parenting coordination are encouraged. These family dispute resolution processes are generally quicker, less expensive and have fewer emotional consequences for families than going to court.[769]

The *FLA* also made available new tools "to assist when court intervention is necessary, such as where there is a risk of violence or agreements are not kept."[770] However, as Treloar and Boyd note, when the FLA came into force, there was no additional financial support for programs and services to support families undergoing restructuring.[771] In sum, while the *FLA* implemented new guidelines and approaches, there were concerns about whether or not there would be adequate resources to support access to these guidelines.[772] Or, as Denise Riley eloquently summarizes in a different context, "… any increased liberalization of speech, of law, and of culture—without an increased liberalization in the distribution of economic resources—will generate new inequalities of its own."[773] This conundrum is revealing, there is a clear effort on behalf of the provincial government to re-design the ways in which families dissolve, however, there are material limitations on the extent to which families will be supported in doing so. Absent, too, is any consideration about how multi-parent families may have unique experiences with respect to restructuring. This begs the question: what is at stake, for the state, when families fall apart?

---

[767] Ibid.
[768] Ibid., 78 and *FLA* s.4.
[769] Shirley Bond. "B.C.'s new family law reflects modern society." *Vancouver Sun*. March 27, 2013. http://www.vancouversun.com/life/family+reflects+modern+society/8161327/story.html.
[770] Ibid.
[771] Treloar and Boyd, *Family law reform*, 78.
[772] Ibid.
[773] Denise Riley. "The Right to be Lonely," *A Journal of Feminist Cultural Studies* 13, no. 1 (2002): 8.

Under section 30, a parent who does not live with the child is still a "guardian", with "all of the rights and responsibilities of a parent".[774] However, "no further legislative guidance is provided for multiple-parent families."[775] While Kelly notes that guardians are subject to the same legislative rules as legal parents, it is clear that the remaining parenting provisions pay little attention to the breakdown of multiple-parent families.[776] Since section 30 requires parties to create a written agreement, it is reasonable to expect that the agreement include "clauses addressing key parenting issues such as time with the child, support, and how matters such as relocation might be dealt with."[777] Though section 30 does not require this, Kelly notes that lesbians and gay families who engage in co-parenting arrangements frequently sign their own "co-parenting" or "donor agreements" to figure out when the child will spend time with each parent (since most section 30 families will not live together in the same home).[778] Curiously, while such arrangements can be included in a section 30 agreement, they will not be enforceable; in fact, the only binding component of a section 30 agreement is who is a legal parent.[779]

The unenforceability of pre-conception parenting agreements is in accordance with traditional family law principles; since, the thinking goes, decisions about children ought to be made in the child's best interests which cannot exclusively be decided prior to conception.[780] That said, the fact that section 30 families cannot make binding agreements about these issues

---

[774] *FLA* s.30, para. 39(3)(a).
[775] Kelly, *Multiple-Parent Families*, 589.
[776] Ibid.
[777] Ibid.
[778] Ibid., 590.
[779] Ibid.
[780] For Kelly, it is important to respond to the criticism that the 'best interests of the child' cannot be determined prior to conception. Drawing on Boyd, what this critique fails to account for is the fact that "children benefit from clearly defined familial ties, and to the extent that conflict is diminished, this too is beneficial" ("Gendering legal parenthood: Bio-genetic ties, internationality and responsibility." *Windsor Year Book of Access to Justice* 25, no. 1 (2007): 63-94). Children raised within non-normative families are much more vulnerable to "unwanted intervention" than their counterparts (*Multiple Parent-Families*, 591). Further, she notes "allowing parents to clarify the nature of their family arrangements, particularly given that the types of families they are creating have no norms upon which to rely, necessarily enhances the well being of children" (ibid.).

presents a real, practical conundrum. Co-parenting across multiple households requires an incredible amount of planning and support from all parties and so it makes sense that many families may wish to create firm plans surrounding these details. This need for planning may be especially necessary when "the parties are not engaged in an intimate relationship and therefore have quite a different investment in each other than a married or de facto couple who decide to have a child together."[781] Section 30 families are wading into largely uncharted territory and so it makes sense that families desire some sort of certainty regarding post-birth arrangements.[782] Kelly aptly notes that "permitting parties to contract about children is controversial [however] section 30 families are, by their very nature, contractual."[783] Indeed, in the case of section 30 families, the family would not exist without the contract.[784] One way to recognize a pre-conception agreement, while also attending to the child's best interest, is to "treat the agreement as creating a series of rebuttable presumptions."[785] The agreement would then serve as the departure point for resolving any conflict *and* could be rebutted if the original propositions were no longer in the best interests of the child.

While section 30 does provide a way to legally recognize multiple-parent families, much more needs to be done to address the challenges that arise when multiple-parent families decide to restructure. News media coverage focused much of its attention on the efforts that the new *FLA* made to address family conflict but did not address the complexities of family conflict in the case of multiple-parent families. For example,

> Firstly, pejorative terminology is removed: The language of "custody" and "access" left many parents feeling marginalized and overlooked as fully contributing parents who provided value to their children's lives. These terms also connoted an "I win, you lose"

[781] Ibid.
[782] Ibid.
[783] Ibid.
[784] Ibid.
[785] Ibid.

> philosophy. The language of the new Family Law Act is "parenting time" and "contact," words that do not imply ownership of children by one parent to the exclusion of the other.[786]

The *FLA* was designed to prioritize children's safety and "best interests" during separation or divorce, clarify parental responsibilities, and encourage families to "resolve their disputes out of court" via mediation, for example.[787] Additionally, Saskatoon's *Star Phoenix* quotes then Attorney General Mike de Jong, "Family law is built around a very adversarial model, and we think there is a better way, when a family changes or a relationship comes apart… to resolve some of those issues than rushing off to court immediately."[788] The British Columbia Association of Clinical Counsellors prepared a special document for "clinical counsellors" who provide guidance to families experiencing separation or divorce. In the thirty-page document there is no mention of guidance for multiple parent families. The author of the document, legal counselor George K. Bryce, notes that:

> The terms "husband" and "wife" used in the old FRA have been replaced with the gender neutral term "spouse," and similar changes have been made to a number of other BC statutes. "Spouse" includes certain kinds of unmarried *couples* as well as married *couples*. Further, the words "father" and "mother" have been changed to "parent" and "guardian."[789]

Recall, as per the changes to how parentage is defined in the *FLA*, "parent" is a more expansive term that allows for more than two people to be recognized as parents. However, it is curious that despite that change, a legal commentary document that was designed to address how dispute resolution impacts families refers exclusively to "couples" or uses the language of "both parents" indicating that only two parent families are envisioned. Further, there are no clear references to

---

[786] Edwin Knight. "Are child laws archaic in British Columbia?" *Port Alberni Times*. February 19, 2015.
[787] Ibid.
[788] Rob Shaw. "B.C. proposes new approach to divorce." *Phoenix Star*. July 20, 2010.
[789] George K. Bryce. "The New Family Law Act: What clinical counsellors need to know about BC's new legislation before they provide counselling services to families undergoing separation or divorce." *British Columbia Association of Clinical Counsellors*. July 26, 2013, 4. Emphasis added.

multiple parent families, or the possibility of multiple parents, in the thirty-page document. There is one exception to this: where sections of the *FLA* are reproduced. More specifically, the section on parenting arrangements makes references to "guardians" and the possibility that parenting responsibilities are shared among "all guardians" (however, these references are still excerpts from the *FLA* itself, not in the document's analysis of the *FLA*).[790]

This silence is not unique either. In a bulletin released by Tyleen Underwood Law Office, regarding the implications of the new *FLA* for families experiencing separation or divorce, the guide makes statements like "my child's *other parent*" or "the *other parent*".[791] Indeed, even the reference document on "Family Law in BC" prepared by the Legal Aid Society of BC only refers to couples. For example, "I live apart from the *other parent* of my children", "You and your *partner* likely need to reach decisions about some important issues" and "Under the law, *both parents* must support their children — it's every child's right.[792] In a *Canadian Press* article, James Keller writes, "It marks the latest effort to change how the province deals with legal disputes involving separating *couples* and domestic violence... The proposed legislation, which would be called the Family Law Act, aims to discourage *couples* from seeing the courts as the first stop in resolving a dispute, instead calling for more options to resolve conflicts through co-operation and mediation."[793]

A review of Hansard debates surrounding the *Family Law Act* reveals an intense, almost singular, focus on family dispute. For example, Suzanne Anton (Vancouver-Fraserview) said: "The goal in family law is to help families achieve resolution of their issues. That was the goal of

---

[790] Ibid., 9.
[791] "Frequently asked questions about the new BC Family Law Act." *Tyleen Underwood Law Office*. https://tyleenunderwood.ca/frequently-asked-questions-about-the-new-bc-family-law-act/. Emphasis added.
[792] "Family Law in BC: Quick Reference Tool." *Legal Aid Society of British Columbia*, 1-2, 9. https://api.lss.bc.ca/resources/pdfs/pubs/Family-Law-in-BC-Quick-Reference-Tool-eng.pdf. Emphasis added.
[793] James Keller. "B.C. reforms would make court the last resort for family disputes." *The Canadian Press*. July 19, 2010. Emphasis added.

the new Family Law Act. That's the goal of the family mediation centres, the justice access centres… Our goal is to help families achieve resolution outside of courtrooms."[794] Later, she emphasizes that point by noting that "In the new Family Law Act, the emphasis is on mediation and, as I said, keeping things out of court, finding resolution to issues which help families, help children, without going through having a third party — namely, the court — to adjudicate the issues."[795] Barry Penner's comments are also illustrative of the *FLA*'s emphasis on family dissolution, and in particular, the dissolution of *couples*. He notes "But as indicated in the White Paper last year, the government is interested in additional efforts to provide opportunities for mediation of disputes, because we know that the earlier you can defuse a dispute, the better it is in the long term for the relationship between the various *couples* and, in particular, the interrelationship between the *couples* and the children, if there are any from the relationship."[796]

To be clear, my point is not that the law applies differently to multiple parent families; the application of the law is the same across all family structures. My argument is that the discussions surrounding the *FLA* do not appear to consider how multiple parent families might navigate family dissolution differently, considering the added complexity of having multiple parents negotiate what that change ought to look like. I hypothesize that there are four interrelated reasons for this. First, and the most obvious reason in this case, is that the *FLA* simply was not designed to radically rethink kinship considering multiple parents who might be in relationships with one another (as opposed to two co-parents and an involved known donor). As a result, surrounding media and legal commentary do not address the implications of these changes for multiple-parent families because this family form was not 'imagined' or sanctified

[794] British Columbia. Legislature. Debates. 40th Parl., 2nd Sess., May 26, 2014 (4189).
[795] Ibid.
[796] British Columbia. Legislature. Debates. 40th Parl., 2nd Sess., May 12, 2011 (6934). Emphasis added.

by the *FLA* in the first place. Second, because the *FLA* was not designed for polyamorous multiple-parent families, surrounding commentary was unlikely to pick up that line of inquiry and investigate the *FLA's* limitations with that family formation in mind. Third, the number of polyamorous multiple-parent families is likely statistically small and those who might rely on the *FLA* to navigate family dissolution may be even smaller. So those commenting may not think it prudent to include an analysis of how the *FLA* would impact a statistically irrelevant family form. However, fourth, and finally, what weaves all of these reasons together is that the BC government had an opportunity to do something quite creative with its *FLA* in expanding the definition of parenting and rethinking what family means today. What it came up with was a piece of legislation that works more retroactively than proactively. That is, the new *FLA* allowed for (some) families using assisted reproductive technologies to recognize the donor as a parent – a practice that has existed for some time and certainly was due for legal recognition and inclusion. What it failed to do though, was account for another family form that has also existed for some time and is also becoming increasingly visible and viable as a kinship formation– ethically non-monogamous families. This discourse theme reveals that there are still idealized family forms and that the dissolution of some families (and even their recognition) matters more than others. As Keller notes "[the *FLA*] marks the latest effort to change how the province deals with legal disputes involving separating *couples*…"[797]

It is troubling that the *FLA* fails to consider the ways in which family dissolution may occur differently across different family forms but also that non-normative family forms may require different kinds of supports to navigate the dissolution of their relationships. As Charlotte Bendall and Rosie Harding found in their study of civil partnership dissolution in the UK (2018),

[797] Ibid.

queer couples often approach relationship dissolution differently than heterosexual couples (that is, according to their research, the participants identified wanting a dissolution process that was more collegial and collective). However, Bendall and Harding argue that "same-sex relationships are being assimilated into the marriage model in the realm of legal recognition" and in so doing, the possibilities for creating new ways of addressing relationship breakdown in the context of queer relationships is lost.[798] In fact, their study found that there were key differences between the ways that heterosexual and queer relationships navigated dissolution: first, 'same-sex' couples were generally "resistant to the negative interpersonal effects of legalized familial dispute resolution"; second, many same- sex couples do not trust the legal system to "sort out their disputes"; third, "there is significant resistance to the redistributive models of financial division that have developed through different-sex divorce cases"; fourth, many couples indicated wanting to preserve friendly relationships with their ex-partners; and fifth, couples' desires to settle, rather than litigate, their family law disputes.[799] Bendall and Harding's findings show that relationship dissolution for non-heterosexual relationships "pose novel challenges for family law."[800] While their study examines lesbian and gay *couples* and their experiences of relationship dissolution, by extension, one may anticipate that those in polyamorous or multiple-parent relationships may too decide to approach dissolution in ways for which the legal system, and its adjudicators, are unprepared.

As Ira Ellman notes, "the interaction between legal and social norms is heightened in family law because of the intimate and personal nature of much of its content, and the problem of

[798] Charlotte Bendall and Rosie Harding. "Heteronormativity in Dissolution Proceedings Exploring the Impact of Recourse to Legal Advice in Same- Sex Relationship Breakdown." In *Philosophical Foundations of Children's and Family Law*, 144. Edited by Elizabeth Brake and Lucinda Ferguson. London: Oxford University Press, 2018.
[799] Ibid., 148.
[800] Ibid., 151.

power is particularly challenging because its exercise may be subtle and hidden."[801] Further, power operates through the intersections of people's identities, heightening for example, the ways in which gendered norms influence relationships.[802] John Eekelaar suggests that one needs to deeply examine the relationship between legal and social norms in the realm of "family matters" because of the law's ability to "protect and reinforce existing social structures" or "attempt to perpetuate [these structures] into the future."[803]

As one family law firm writes,

> The FLA in BC has tried to address the changing nature of families; however, potential parents who are unaware of the law and the need to enter into agreements where appropriate and required may end up in our courts. The potential result? Tremendous uncertainty about one of the most important questions a child can ask: Are you my parent?[804]

Curiously, John-Paul Boyd has a different perspective on this entirely. He goes so far as to suggest that those entering polyamorous relationships do so in a "fully conscious manner" and as such, are more likely to plan for "the breakdown of their relationship."[805] As such, he suggests that those in polyamorous relationships are more likely to make cohabitation plans that consider elements like:

- having children, and the parentage of children if assisted reproduction is used;
- child care responsibilities during the relationship;
- contribution to household expenses and household chores;
- management of household finances, including joint accounts;
- purchasing new assets, and how those assets will be owned; and,
- new partners entering the relationship and existing partners exiting.[806]

---

[801] Ira Ellman. "Why Making Family Law is Hard." *Arizona State Law Journal* 35 (2003): 699, quoted in Eekelaar, John. "Family Law and Legal Theory". In *Philosophical Foundations of Children's and Family Law*, edited by Elizabeth Brake and Lucinda Ferguson, 42-43. London: Oxford University Press, 2018.
[802] Ibid.
[803] John Eekelaar. "Family Law and Legal Theory". *Philosophical Foundations of Children's and Family Law*, 46. Edited by Elizabeth Brake and Lucinda Ferguson. London: Oxford University Press, 2018.
[804] Leisha Murphy. "Are you my mother?". *Connect Family Law Blog*. June 8, 2017.
[805] John-Paul Boyd. "Polyamory and the Family Law Act: Surprisingly Happy Bedfellows." *JP Boyd on Family Law: the Blog by Collaborative Divorce Vancouver*. October 11, 2014, 4.
[806] Ibid.

My reading of the *FLA* is more skeptical. First, while it is possible that some practitioners of polyamory may pursue cohabitation agreements that address the above parameters, I do not think that enough people would pursue preparing a cohabitation agreement with legal guidance to make the supposed inclusivity of the *FLA* meaningful for most. Boyd's position assumes that parties would have to know such an option was available, think it was a good idea, find legal representation to assist in the preparation of such a document, and have the funds to pay for that representation. Further, to his point about children – prospective multi-parent families are obligated to pursue a preconception agreement but there is no template for what other kinds of information these agreements contain. As such, agreements may vary widely from family to family, other than the required stipulation regarding parentage.

Shirley Bond (Prince George-Valemount) was a strong advocate for the *FLA*. She emphasizes that "the new Family Law Act has been 30 years in the making, and it will replace the *Family Relations Act*, which has not been substantially reviewed since 1978." And,

> This legislation is a chance to make a difference in the lives of British Columbians across our beautiful province. This is a chance to put children first and keep families safe. I'm very proud of the work that has gone into the legislation and truly feel that this is a signature piece of how this government is committed to putting families first.[807]

This theme is inflected by another, closely related discourse, of the "best interests of the child" and "the family". I chose to focus my emphasis on "when it begins to fall apart" because both "best interests of the child" and "the family" are contained within that theme. I, too, hope that legislation can "keep families safe" and "make a difference" in the lives of those it governs. My critique here though, is that the families imagined by this legislation are narrowly defined. As a result, the legislation cannot be fully realized. Though quite lengthy to reproduce, Mary Polak's (Langley) remarks capture these tensions:

[807] British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 17, 2011 (8852). Emphasis added.

> [...] The family, of course, is the foundational structure of our entire society. It has changed the way it looks over the years, but nevertheless, all of us have something that we would hold on to and call our family. Some look very traditional and represent the way in which we have seen families for hundreds of years. Some look very different from what they would have looked in 1978, the point being that for all of us, a family is a wonderful thing when it's working together.
>
> It is not necessarily such a wonderful thing *when it begins to fall apart*. The strong feelings that arise at that moment, unfortunately, can also mean there are casualties in a marriage breakdown that go far beyond the individual parties who were the origin of that relationship. Many occasions show us the need for thinking about children in the best way that we possibly can.
>
> It is for that reason that I am so very pleased to see that one of the most significant changes this new Family Law Act makes is to turn the tables on how we look at children when a relationship is breaking down. Rather than looking at children as some kind of property to be divided, rather than looking at children as something to be owned and something to fight over, instead we now come to a place, in this act, where children are looked upon in the way in which we truly should as a society — as those who are vulnerable, as those who are deserving of our protection and our caring [...]."[808]

Often, when familial arrangements change there are numerous legal and practical considerations. This is the case when a loved one dies or moves, provinces or partners decide to end their romantic relationship. When children are involved and there are multiple legal or social parents then matters become more complicated. findlay and Suleman highlight that when Section 30 families – parents of children conceived via ART – decide to end or change their relationship, questions of custody and access are even more pressing.[809] For example, they note that a birth parent may assert that they have more rights than their non-birth co-parent; in the context of two lesbian co-mothers, they found that some birth mothers assert they have stronger claims to custody than their non-biological co-mothers; and a donor who was present in the life of a child after birth may pursue access rights.[810] For example,

> If a donor has been actively involved in the child's life after birth, then unless the parties have an adoption or a declaration of parentage, the donor may later assert parental rights

[808] Ibid., 8853.
[809] findlay and Suleman, *Baby Steps*, 22-23.
[810] Ibid.

> in order to continue to have access to the child if the child's co-parents break up. Sometimes, the parties have an explicit three-parent arrangement, with or without a written agreement, in which the donor plays an ongoing role in the child's life. If unhappy differences arise between the donor and the co-parents, the donor might make an application for access relying on his parental status. A donor may also make a claim if the co-mothers break up and his continuing access to the child is threatened. In both of those situations, the fact that the donor has been involved with the child on an ongoing basis carries much more weight than the simple fact of donation of sperm or egg in the court's determination of the best interests of the child and award of access.[811]

Despite Bond and Polak's concerns for the wellbeing of families during breakdown, the needs of Section 30 families have not been considered carefully enough. This stands in contrast to the claim that Mary Polak makes:

> The fact that families have changed dramatically in the way that they look in 2011 doesn't mean that their importance, their significance and their influence on society at large has changed. In fact, supporting parents in attempting to make amicable arrangements around the time they will spend with their children I believe has a spillover benefit to all of society as we again strengthen that unit of parent and child.[812]

This predicament confirms Petra Nordqvist's assertion that because these kinship arrangements do not conform to strict nuclear family models (and instead incorporate biological and non-biological relationships), they "often exceed legal frameworks that construct the idea of family", in other words, the law does not imagine their existence.[813] This also demonstrates the limitations of legislative change that reflects "individual freedom" and reinforces the necessity of a legally recognized, private family. The *FLA* affords some legal protections to Section 30 families, however, as Mayo argues: "liberal theory might give sexual orientation some protections, queer theory might respond that only certain queers are allowed those protections." [814] These

[811] Ibid.
[812] British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 17, 2011 (8853).
[813] Petra Nordqvist. "Telling Reproductive Stories: Social Scripts, Relationality and Donor Conception." *Sociology* 55, no. 4 (2017): 43.
[814] Mayo, *Pushing the Limits*, 472.

protections are limited to those whose "relationships, activities, and communities" reflect the heteronormal status quo.[815]

4.4 Conclusion

Section 30 – and its related sections 29, 27, and 24 – of the BC *Family Law Act* was a unique piece of the legislation in 2013. At its introduction, BC was the only jurisdiction in the world that made it possible for a child to have more than two legal parents without a court's declaration of parentage. The changes to legal parentage did not receive much attention in provincial news media (it did get some mention, and in particular the story of Della Wolf was broadcast nationally and internationally) and received even less attention in legislative debate. At the beginning of my research the lack of public discussion puzzled me since the changes seemed so dramatic, even if they were long overdue. I posit that the extensive community consultation conducted by the provincial government played a role, but did little to eschew the biological and heterosexual underpinnings of normative familial arrangements. In other words, there was little for the public to debate. Further, my research identified several limitations inherent in the legal parentage provisions, like the requirement for biological or genetic links between parents and child(ren). I argue that the *FLA's* focus on biological/genetic connection and the requirement for a preconception agreement re-draw the boundaries of kinship inclusion and exclusion and highlight the law's continued interest in both reproducing desirable family forms *and* expanding the boundaries of that desirability (with limits). Under the *FLA*, the expansion of legal parentage is a tool to locate legal responsibility and ownership for children who could not be claimed under the *FRA*. When concerns about "knowing" and "belonging" to families are advanced using the "best interest of the child" argument, these claims do not consider the ways in which knowing

[815] Ibid.

and belonging cannot be constrained by biology or genetics and cannot be tracked meaningfully by the law. As such, the question is: who was the change in legal parentage designed to assist? DD suggests that the *FLA* sought to incorporate "same sex common law couples or same sex parenting in a nuclear model" because "it's very easy to legislate in relation to them and I think, by and large, most of those family types want to be treated in the same way under law so they know the same kind of legal equality - essentially right formula equality.[816] Section 30 families do not "destabilize traditional relationships between (hetero)sexuality and membership within the polity." [817]

One of the themes that emerged in my analysis of news media, blog, and Hansard debates was that the changes to the *FLA* were "playing catch-up". Indeed, the provincial government's own publicity around the *FLA* also included this messaging. One of the questions I asked of participants was whether the *FLA* was responding to contemporary demographic changes or whether it was trying to anticipate what new family formations the future might bring. All participants agreed that the *FLA* made significant and necessary strides to catch-up to the diversity of family arrangements that have existed for some time. I agree with their hypothesis, though I suggest that Ken Plummer's argument is also salient; Plummer argues that expansions in legal recognition of kinship are "driven and shaped by a growing culture of individualization" and the West's fixation on liberal individualism creates an environment in which there are a "range of "choices" concerning who one marries; with whom one cohabitates; if, when, and under what conditions one procreates; and with whom one has sex and in what form." [818] One

[816] DD. Interview with author. Edmonton, Alberta. December 3, 2020.
[817] Mamo, *Imagining Futures of Belonging*, 246-247.
[818] Ken Plummer. "The sexual spectacle: Making a public culture of sexual problems." In *Handbook of Social Problems: A Comparative International Perspective,* 521-541. Edited by George Ritzer. London: SAGE Publications, 2003.

must examine the expansion of legal parentage within the context of individual choice, a "regime of normalization", and the state's investment in the reproduction of family.[819]

However, most lawyers and advocates also noted that even with the strides forward, there are ways in which the legislation has more work to do. For example, AA said of the changes:

> I think that the FLA made broad strides forward at the time it was implemented, and I think it continues to capture most family structures… [the government] took the position that [they] would be conducting an evaluation to see whether [they're] achieving the intended policy objectives. And [they're] starting now to look at whether there are any gaps or areas for improvement. Now that they have been in place for seven years or so. And if you've kind of been watching the news media coverage over the last year so I mean there are, there are a few family structures that may not be reflected as well as perhaps they could be in the FLA. I think [the government] is at a position now where even in just the last seven years, many [family structures] have continued to evolve at quite a rapid pace. I think it's easy to say that there's perhaps some room for reflection and, perhaps, considering whether there's room for better capturing our families. [The government] did make considerable strides, at the time it was implemented.[820]

AA did not indicate when a governmental review might take place, only that it was their understanding that the province was open to reviewing the legislation to see if the changes in areas like Section 30 were accomplishing their aims. BB suggested that terminology was one of the *FLA's* largest leaps forward with respect to parenting regimes; more specifically, using language that is less gendered to reflect changing social realities in British Columbia. For example,

> I think we move away from the word mother and father because mother is a role, that doesn't necessarily mean that she gave birth. We have adoptive mothers; we have adoptive fathers. So, that term "mother" is your role in society, but fathers are playing that role now, right? Like, it's a term that historically, because that's all that you could have was a mother and a father, you know, it made sense but today, that's not the case. We've got many birth registrations with two males. In fact, [with] a lot of our surrogacies that's what they are. The lion's share are two males.[821]

DD provided some nuance:

---

[819] Mamo, *Imagining Futures of Belonging*, 247.
[820] AA. Interview with author. Edmonton, Alberta. August 6, 2020.
[821] BB. Interview with author. Edmonton, Alberta. August 14, 2020.

> I was about to say "no" and I second-guessed myself. I think that the multiple parent aspect was kind of forward thinking, I mean BC [was the only jurisdiction at the time where more than two legal parents was possible] so you could argue that was forward thinking. Or you could say actually gay and lesbian couples have been co parenting like this for 50 years. But not maybe in great numbers. I think I'm going to stick to the assertion that it's a catch up. I mean it's a difficult one. It's not clear cut, but I think the biggest shift for me– even though I personally see no relationship between marriage and having children– to be in a country where same sex marriage was legalized but when those two people had a baby and within the context of their marriage it wasn't clear that they were both parents. I mean that's a catch up. And no one else has to deal with that. So, things like that had created a disconnect I guess between different pieces of law, different pieces of legislation that just didn't make sense... I feel like it was a catch up. However, I do think the law sets BC up very well for the future.[822]

As DD notes, it is quite remarkable that the legalization of same sex marriage did not also address parentage, although Canada's constitutional division of powers, in which the federal government regulates marriage while the provinces regulate domestic relationships including parentage, provides the structural explanation for this inconsistency. Here, the law was playing a significant catch-up to "allow" parents to become legal parents nearly 10 years after same-sex marriage became legal in Canada (and BC made same-sex marriage possible in 2003). DD described the relationship between the law and social realities more carefully. They note:

> [...] I think that governments should attempt to make sure that the laws reflect societal realities. So when it comes to common law couples, or same sex couples with children, then they're fairly easy family forms to accommodate or to articulate… I think where it becomes more complex is for example where you've got three or four parent families or a variety of different types of co-parenting arrangements across multiple households where system connection has been used, where I think there was maybe a time when I felt that it was important to the law to try to capture these families as well. But I think it's important that where that attempt is made that there is an opportunity to opt in or opt out. [...] And obviously British Columbia introduced its law that included three parents and I was involved in that process and very much supported it. But I think the key is that it was an *opt in* law. You weren't obligated to create a family; you could ignore it. And so, I don't think there's a lot of value in trying to capture every single type of family form that exists…[823]

[822] DD. Interview with author. Edmonton, Alberta. December 3, 2020.
[823] Ibid. Emphasis added.

The opt in nature of the parentage provisions leaves room for families who wish to organize themselves outside the purview of the law. It also does not limit the possibility of diverse family forms, but it limits the possibility of those families having the same legal rights and responsibilities. This works well for families who may feel constrained by the roles and responsibilities the law ascribes to legal parents, but it also destabilizes parents who desire legal recognition and do not have it. This is done in part by focusing not on creating families but on creating babies.

As one participant noted, "[the government] really focused on creating a baby."[824] AA explained that "as advanced as it is, you know, the [BC *FLA*] ... really focused on, you said creating a family. They really focused on creating a *baby*." Indeed, this distinction had not occurred to me until AA pointed it out. AA elaborates on this point by highlighting another example of this:

> [...] I don't see the legislation right now really thinking about [other ways to form families]. I mean, aside from adoption. You can of course adopt older children. I don't see the legislation sort of thinking about how families might be formed with older family members. Outside of that adoption process which is so onerous. So, like I said, it's just something that has struck me recently but if this moves forward in this area… It would be nice if we could, as a country, start thinking about more how we can better… because there are so many families who form differently later on, it'd be nice to capture that better."[825]

Another participant was less sure about the proposition that the *FLA* was concerned with creating a baby and not a family. When prompted to consider this and the possibility of expanding legal parentage so that important adults who are brought into the family later can be recognized as legal parents, BB said:

> No, the Adoption Act has not caught up with that. That might be something that the Adoption Act will change one day. If, you know, two people are in a relationship and they want a third one later... Again, like I said, when we were drafting up the legislation,

[824] AA. Interview with author. Edmonton, Alberta. August 6, 2020. Emphasis added.
[825] Ibid.

> it was all about the intent of who's going to raise that child. Later in life, now suddenly that raising of that child– if they're older, you know, is no longer sort of part of the picture. You know at age 14, you now invite another person into your relationship [...] and they want to be a parent, they've missed out on 14 years of parenting. I don't know if they would ever do that…"[826]

What both AA and BB's comments point out is that the focus of Section 30 (and its sister sections) was that the legislation was designed to make it possible for babies to be born to more than two legal parents. While I agree this is a step in the right direction with respect to expanding definitions of legal parentage and broadening social scripts of how many parents a child can legally have (since we know that society can and does recognize multiple social parents) it stops short of broadening the definition of family. Though, as DD notes earlier in section 4.8.3 – "Living outside the law" – family law has worked hard to stay away from defining family by focusing on defining parents instead.

To be sure, legislation cannot do all things for all people but there are sustained critiques that point to some of the tensions around the number of parents permitted and who the legislation had in mind as the family opting for recognition. Additionally, the requirements for genetic connection among parents and child and the requirement of a preconception agreement pose very significant limitations on the types of families that can form. Interview participants shared some of these concerns and identified additional critiques, like the gendered language in the *FLA*, the scope and prescriptive nature of the *FLA*, the availability of information to potential Section 30 families, and the requirement for preconception agreements. My analysis demonstrates that the broadening of legal parentage under British Columbia's *Family Law Act* only applies to families who continue to rely on biological kinship, different-sex parenting regimes, and parents who are in conjugal relationships. Additionally, the province's expansion of multi-parentage in one

[826] BB. Interview with author. Edmonton, Alberta. August 14, 2020.

context (ARTs) is complicated by its investment in criminalizing forms of multi-parentage in another (polygamy) (I investigate this conundrum in Chapter 6).

In the next chapter, "Challenging the *Charter* to make all families equal", I examine Ontario's *All Families Are Equal Act* (2017). The *All Families Are Equal Act* received a tremendous amount of provincial news coverage, much of which positioned Kathleen Wynne's Liberal government as the driver for advancing equity among the province's queer communities. However, unlike BC's *FLA*, the *All Families Are Equal Act* was not precipitated by the province's own interest in revising family law but instead by a charter challenge, *Grand v. (Ontario) Attorney General, 2016 ONSC 3434*. In *Grand*, Justice Chiapetta found that Ontario's parentage provisions discriminated against lesbian couples and forced the provincial government to amend their legislation accordingly. The *All Families Are Equal Act* was a response to Chiapetta's judgement, and seemingly more radical than British Columbia's *FLA*.

CHAPTER 5: CHALLENGING THE *CHARTER* TO MAKE ALL FAMILIES EQUAL

> … When Ruby, our first child, was born we had Joanna Radbord do the declaration of parentage– we knew Joanna as a litigator, we knew she was looking for a fight on this issue and so I think we were interested in exploring whether we would litigate the inequality that we were experiencing. But we were first time parents and it's overwhelming. The thought of also commencing litigation against the government [of Ontario] seemed like an overreach. We decided not to do that. And when we worked with Joanna and understood the choice between adoption, which seemed gross and completely wrong, and getting the declaration of parentage, we opted for the declaration. The experience of getting the declaration was terrible, the judge treated it like an adoption and a celebration [whereas] we felt like "here we are being oppressed by the law."[827]

5.1 Introduction

On January 1, 2017 the *All Families Are Equal Act* ("AFAEA") came into force in Ontario. Under the Liberal leadership of Kathleen Wynne, the Government of Ontario positioned itself as the standard bearer for queer parenting rights. To celebrate the Act, Attorney General Yasir Naqvi said:

> All parents and their kids need to be treated equally under the law. The best thing for a child is to have parents who can make important decisions about their care from the minute they are born, without any legal uncertainty. There is no one way to have a family. The changes we are proposing reflect this reality.[828]

This legislation marked an important shift for the province, whose former statutory regime, much like British Columbia's, had not been updated since the late 1970s. Formerly, two pieces of legislation governed parentage in Ontario: the *Vital Statistics Act* ("VSA") and the *Children's Law Reform Act* ("CLRA"), neither of which explicitly addressed parentage regimes for families who conceived via assisted reproductive technologies or surrogacy arrangements. The *AFAEA* sought to remedy this discrimination so that all parents – regardless of their sexual orientation,

[827] Kirsti Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[828] Ontario. Office of Attorney General. "Ontario to Introduce Legislation Ensuring Equal Treatment for All Families: Legislation Would Address Legal Uncertainty for Parents and Children." *News Release*. September 29, 2016. https://perma.cc/PT2Q-VW57

reproductive capacity, or kinship arrangement – were treated equally under the law. Unlike BC's *Family Law Act* ("FLA"), this statute faced considerably more public debate from those who thought the legislation did not go far enough and those who thought it was an assault on the family as a result of the province's "ideological obsession with denying the significance of sexual difference in family life…".[829]

This chapter explores the legal decisions that lead to the *AFAEA* and the competing discourses surrounding its birth. In the first section, I present the legal landscape leading up to the *AFAEA*, beginning with the road to *Grand v Ontario.* Second, I present the discourse themes surrounding the *AFAEA*, culled from interviews, Hansard and Standing Committee transcripts, news media, and professional blogs. Third, I conclude by arguing that the queer potential of the *AFAEA* is undermined by its advocates' use of normalizing discourses and the centering of the biologically connected family. The way the *AFAEA* achieves this is subtle but significant: the legislation is the legacy of the two-parent, heterosexual limit that *A.A. v. B.B.* sets up. For clarity, I provide a timeline of the cases I reference, below.

Case	**Date**
M v H [1999] 2 S.C.R. 3 [*M v. H*]	May 19, 1999
Forrester v. Saliba, 2000 CanLII 28722 ONCJ [*Forrester v. Saliba*]	July 24, 2000
Halpern v Canada (AG), [2003] O.J. No. 2268 [*Halpern*]	June 10, 2003

[829] John Sikkema, then Legal Counsel for the Association for Reformed Political Action (ARPA) Canada wrote for LifeSite (a right-leaning Christian news site): "Ironically, it is the government's ideological obsession with denying the significance of sexual difference in family life, and its politicizing of the English language in the name of "equality", that seems to have enabled this, the most glaringly unequal provision of Bill 28, to pass scrutiny. But far worse, in my view, is that the Committee and the government have ignored children's interest in knowing their origin, which is important for children's physical and mental health and identity. Bill 28 does not provide for this, even while it facilitates the separation of children from their natural parents, by design." https://www.lifesitenews.com/opinion/freudian-slips-can-be-found-in-ontarios-all-families-are-equal-act.

M.D.R. et al. v. Deputy Registrar General (Ont.), [2006] O.T.C. 489 (SC) [*Rutherford*]	June 6, 2006
A.A. v. B.B. (2007), 368 N.R. 384 (SCC) [*A.A. v. B.B.*]	September 13, 2007
Grand v. Ontario (Attorney General) 2016 CarswellOnt 8390 (Ont.S.C.) [*Grand*]	May 24, 2016

5.2 Chartering new legal territory: *Grand v. Ontario*

The *All Families Are Equal Act* proposed an entirely new scheme for determining parentage when a child is conceived through surrogacy[830]– whether the child is genetically related to both intended parents, as in gestational surrogacy, where an embryo is implanted into a surrogate mother's uterus through in-vitro fertilization, or traditional surrogacy where the surrogate's own ovum is inseminated. Under the previous legislative regime, same-gender intended parents had to make a declaration of parentage in court to override the legal presumptions that the surrogate mother and her own partner (if applicable) were the parents of the child. To add insult to injury, same-gender partners could only establish parentage through adoption, that is, parents had to adopt their own child to be legally recognized as parents. One of the remedies provided by the *AFAEA* was an out-of-court process for intended parents: instead of a declaration of parentage granted by the court, intended parents could mail-in an application to register themselves as the legal parents of their child. The Attorney General's office noted three goals of the legislation: first, to "provide greater clarity and certainty for parents who use assisted reproduction"; second, to "provide a streamlined process for the legal recognition of parents who use a surrogate"; and

[830] There are up to seven types of surrogacy arrangements possible: gestational surrogacy ("GS"), traditional surrogacy ("TS"), traditional surrogacy and donor sperm ("TS/DS"), gestational surrogacy and egg donation ("GS/ED"), gestational surrogacy and donor sperm ("GS/DS"), gestational surrogacy and egg/sperm donation ("GS/ED/DS"), and gestational surrogacy and donor embryo ("GS/DE"). Surrogacy arrangements are governed by the *Assisted Human Reproduction Act (S.C. 2004, c. 2)*: https://perma.cc/4EY3-322G.

third, to "reduce the need for parents who use assisted reproduction to have to go to court to have their parental status recognized in law."[831]

On the surface, the story of the *AFAEA* seemed quite remarkable. Not long after BC introduced its own history-making *FLA*, Ontario went a step further by explicitly highlighting equality for queer and multi-parent families. However, like many tales involving the family, the genesis of the *AFAEA* is much more complicated than press releases depicted. In fact, a predecessor to the *AFAEA* was introduced in 2015 as "Cy and Ruby's Act."[832] The bill was named after the children of Jennifer and Kirsti Mathers McHenry. The Mathers McHenrys worked with Cheri DiNovo, a New Democratic Party Member of Provincial Parliament, to create a bill that would ensure their own terrifying experience did not happen to others: if Jennifer (the genetic mother and carrier of Ruby) had died during labour, Kirsti's legal status as a parent was so precarious that she may not have been able to take their daughter Ruby home or make necessary medical decisions for the newborn.[833] Describing this turmoil, Jennifer writes:

> When I was giving birth to our daughter, Ruby, there was a moment when my heart rate plummeted. My wife, Kirsti, was afraid I'd die. In that moment, six years ago, she also faced another terrifying prospect: that, if the worst happened, she might not be able to care for Ruby. Though we are legally married, Kirsti would be, in the eyes of the law, a stranger to our newborn.
>
> I lived, and Ruby was born healthy. Soon after her birth, we moved to make Kirsti a legal parent. We could do this in one of three ways: Kirsti could adopt Ruby, we could obtain a declaration from a court that Kirsti was her parent, or we could change the law.[834]

[831] Ontario, *News Release*.
[832] An Act to amend the Children's Law Reform Act, the Vital Statistics Act and other Acts with respect to parental recognition, 2015 (Bill 137, Cy and Ruby's Act (Parental Recognition)).
[833] Jennifer Mathers McHenry. "Opinion: Ontario's laws make no sense for same-sex couples who have kids." *Precedent*. September 6, 2016. https://lawandstyle.ca/tag/teplitsky/
[834] Ibid.

At the time, the Mathers McHenrys decided to pursue a declaration of parentage for Kirsti.[835] A few years later, upon the birth of their son Cy, Kirsti took parental leave but had not yet secured a declaration of parentage for Cy. Even though she waited in line at the Service Canada office with infant Cy strapped to her front, she was denied benefits because she was not considered Cy's legal parent.[836] That prompted Jennifer and Kirsti to attempt to change the law and "2015 marked the beginning of our year-long odyssey through the province's bottlenecked, often unempathetic, legislative process."[837] Kirsti reflected on this experience with her wife, Jennifer:

> … we said [to each other] "let's try to get the logic, like we know what the law should be let's write it, why are we going to litigate this and then leave it up to a bunch of government lawyers who don't know what's what?" They know stuff. But they've been given the opportunity to rewrite this a couple of times and they haven't done it properly, so let's just do it properly. So [Peter Tabuns] says "great you guys write it, and we'll see what we can do with it." We put a draft together, and Peter said "great I'm going to pass you off to Cheri DiNovo, who's the NDP LGBTQ critic." [Cheri] is a powerhouse of extraordinary proportions, that woman just gets things done. So that was great. The second we were in Cheri's office I [thought] "okay, we're doing this. It really is going to happen."[838]

In the end, *Cy and Ruby's Act* was unsuccessful and government officials told the Mathers McHenrys that they intended to enact legislation but wanted to draft it in-house. Kirsti says of the news "we weren't thrilled that it didn't pass but we didn't think it was the end of the road, either" and they continued to advocate for legislative change and work with MPPs to draft new legislation.[839] At the same time the Mathers McHenrys were mobilizing, a group of families launched a court case, *Grand v. (Ontario) Attorney General, 2016ONSC 3434*, challenging the constitutionality of the laws governing parentage in Ontario. The applicants were represented by Martha McCarthy and Joanna Radbord (both of whom are leaders in the field of family and

[835] Ibid.
[836] Kristi Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[837] McHenry, *Ontario's laws make no sense*.
[838] Kristi Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[839] Ibid.

constitutional law)[840] and their efforts eventually lead to the *All Families Are Equal Act*.

As Chapter 4 made clear, families are increasingly using assisted reproductive technologies – including egg and sperm donation as well as surrogacy – to conceive. This change, as well as shifting social norms around parenting and kinship, gender identity, and sexuality are forcing legislators to confront the evolution of families. As Dave Snow explains, two-parent, monogamous, and/or conjugal households "does not reflect the lived experience of many LGBTQ families"[841] and advocacy groups and families began to "challenge provincial parentage policy rooted in the heteronormative two-parent family."[842] Like many changes to family law practices before it (notably, *M v. H*; *Forrester v. Saliba*; *Halpern*; *Rutherford*; *A.A. v B.B.)*, the *AFAEA* was preceded by a successful Charter challenge in *Grand v. Ontario*.

On April 8, 2016, Joanna Radbord commenced an Application that represented twenty-one families – called *Grand v. Ontario* –[843] which called for a "declaration of constitutional

---

[840] McCarthy was instrumental in *Halpern v Canada (Attorney General)* and on the *Reference re Same-Sex Marriage* that came before the Supreme Court of Canada in 2004. Additionally. Ms. McCarthy and Ms. Radbord led the path-breaking spousal support case, *M. v. H (1996)*, which produced widespread amendments to federal and provincial legislation for same-sex couples. Ms. Rabord's record in family and constitutional law extends to other monumental cases like *Forrester v. Saliba (2000)* where the court affirmed that children and youth have the right to the guidance and a relationship with a LGBTQ parent to the extent it is in their best interests. A parent's gender identity or expression does not constitute a material change in circumstances to vary custody or access arrangements; *M.D.R. v. Ontario (Deputy Registrar General)* (commonly referred to as "Rutherford") for birth registration; in *A.A. v. B.B.* for three parent recognition; and most recently, defining legal parentage in *Grand v. Ontario*.

[841] David Snow. "Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act." *Canadian Journal of Law & Society* 32, no. 3 (2017): 330.

[842] Ibid.

[843] In "The Birth of the All Families are Equal Act: Reconceptualising Parentage in Ontario," Radbord notes that the only publicly available decision in the litigation is *Grand v. Ontario (Attorney General), [2016]* O.J. No. 2764, 2016 ONSC 3434, but some of the background and interim consent order appear in *M.R.R. v. J.M., [2017]* O.J. No. 2121 (S.C.J.). In this case, M.R.R. wanted to conceive a child. After unsuccessful attempts through a fertility clinic, she was conceived with donor sperm via sexual intercourse with a friend and former partner, J.M. The case arose because M.R.R. was claiming child support from J.M. while J.M. was seeking a declaration that he was not a legal parent to the child. The Ontario *Children's Law Reform Act* allows applications to the court for declarations that one is *not* the parent of a particular child. J.M. was seeking this declaration to clarify the nature of the relationship to M.R.R.'s child and confirm legal responsibilities. If J.M. was found to be a parent, he would have been responsible for providing child support and could claim custodial access to the child. Ontario legislation requires that these arrangements be documented and signed prior to conception (as a "preconception" agreement). M.R.R. and J.M. verbally agreed that J.M. would not be a parent to the child, but the parties did not sign a written contract confirming this until the child was almost one. According to Johnston, the court reviewed the parties' communications outlining

invalidity in relation to the discriminatory provisions" of the *Children's Law Reform Act* and *Vital Statistics Act*. On June 22, 2016 Justice Chiappetta found that the CLRA was unconstitutional because "it failed to grant equal status to children based on their parents' sexual orientation, gender identity, family composition or use of assisted reproduction."[844] The Application included several affidavits from parents, experts, and children outlining the impacts that discriminatory legislation had on their families, including the case's namesake Raquel Grand.

Grand begins her affidavit by describing her family of origin; she was born in 1974 to her parents Theresa and John and there was no question about who her legal parents were. She describes that "the same privilege was enjoyed at the births of each of my five younger siblings until we were all a legal family of eight with no one doubting that we all belonged to each other."[845] In 2008, Grand married Deanna Djos and they "always knew [they] wanted to start a family." They conducted extensive research about how to achieve this goal including "[taking] prenatal courses on the legal implications of starting a family as a same-sex couple" and speaking with friends about their desire. In conversation with their friend, Michael Soulard (who also wanted children), the three adults decided that Michael would be their donor and that Michael would *not* be a legal parent.[846] With Soulard's assistance, Grand and Djos completed an

---

their intentions with respect to parentage and while there was no question that J.M. was the biological parent of the child the court found sufficient evidence that there was an agreement between the parties to treat J.M. as a sperm donor via sexual intercourse and not as an intended 'social parent.' Justice Fryer notes that "the amendments to the *CLRA* with respect to parentage move the focus away from biology toward the pre-conception intentions of the parties..." (at 162). He further states "this case should not stand for the proposition that parties are not required to reduce their agreements to writing. Rather the facts in this case highlight how crucial it is for parties to have a written agreement clearly defining their intentions before a child is conceived" (at 164). This case is significant because it is the first case that draws on *Grand v. Ontario* in its decision, specifically referencing preconception intention.

[844] Joanna Radbord. "The Birth of the All Families are Equal Act: Reconceptualising Parentage in Ontario." *Ontario Family Law Reporter* 31, no. 8 (2018): 94.

[845] Raquel Bernadette Grand. Affidavit. April 4, 2016, at 1 (from Submission to Standing Committee on Social Policy. Exhibit No. SP 41-2/01/63. October 18, 2016).

[846] Ibid., at 3-4.

at-home insemination and Djos became pregnant and delivered their daughter, Thora Raquel Grand-Djos. Grand writes that "Thora was beautiful and perfectly healthy and we were thrilled parents."[847] However, their joy was tempered by the fact that Djos's birth experience was physically and emotionally traumatic. After giving birth, Grand and Djos discovered that Djos was "hemorrhaging badly and her body was not responding to the care the midwives were giving her" and so the midwives transferred Djos to St. Michael's Hospital (Toronto, Ontario). The scene that unfolded is every new parent's nightmare:

> I [Grand] stood at the side of the room and held onto our new daughter and watched in horror as my wife passed in and out of consciousness, trying not to notice the alarming amount of blood that was accumulating on the floor around her bed in the form of soaked rags. There was a panicked scramble of midwives, nurses and doctors as they tried to gain control of this unpredictable medical situation.
>
> I stood on the side of that room for six hours holding the sturdy little body of our newborn daughter who was full of life as I hoped that my wife would not lose hers. More than once I realized that I might have to raise this little girl on my own. More than once it dawned on me that I was not even Thora's legal parent, as I had yet to adopt her. Would I be able to adopt my own child if my wife died? Would I lose custody of her because I was not her biological mother? These were questions I had to consider while holding out hope that Deanna would not leave us. In the end we were very lucky. The doctor was able to stop Deanna's bleeding and after a short hospital stay, we went home as a family.[848]

The exhaustion did not end; the family still needed to acquire legal recognition of parentage that reflected their intended structure with Grand and Djos as parents, *not* Soulard. Since Grand was not recognized as a legal parent, she had to adopt her daughter Thora to be granted legal parentage. Soulard was required to sign over his rights and the three adults met with lawyers and "spent thousands of dollars" to achieve their legal family structure.[849] Shortly after, Grand, Djos, and Soulard decided to welcome another child and this time, Grand would be the "biological parent." The three used the same process – at-home insemination – and their second daughter,

[847] Ibid., at 3-4.
[848] Ibid., at 8. Emphasis added.
[849] Ibid., at 9-12.

Aloe Deanna Grand-Djos, was born in 2015.[850] During labour, Aloe's shoulder became stuck and:

> Even though Aloe's head was out, she could not take her first breath because her chest was being constricted. When she finally was born a couple of minutes later, she plopped out lifeless and blue right in front of me…[851]

Aloe spent the first five days of her life in intensive care and Grand was "once again… confronted with the knowledge that [her] family wasn't legally whole."[852] Instead of focusing on her daughter's health, Grand reports thinking about the fact that "Deanna wasn't Aloe's mother. What if Aloe had died? Would Deanna be able to adopt a dead child or would it prevent Deanna from being recognized as Aloe's mother?"[853] Just like the birth of their first daughter, Thora, the family had to obtain legal recognition and ask the courts for a declaration of parentage to recognize Grand and Djos as Aloe's legal parents, in accordance with their pre-conception intentions. In her affidavit in *Grand*, she writes:

> While we should be concentrating on integrating Aloe into our lives and enjoying our new family of four, we do have to think about obtaining parental recognition through legal processes once again. We ask for a declaration of parentage recognizing me and Deanna as mothers of Aloe Deanna Grand-Djos, born August 17th, 2015, and declaring that there is no other parent. This declaration accords with our intentions and Aloe's reality of her family.
>
> The donor consents to the declaration, though there is no male person presumed to be a parent under s. 8(1) of the *Children's Law Reform Act*.
>
> Rather than other families being forced to secure adoption orders or declarations of parentage, we hope this Honourable Court will recognize that substantive equality requires that all families, including LGBTQ families, require prompt and accurate birth registration, as well as legal recognition of their parentage, without court hearings, delays, uncertainty and stress.

[850] Ibid., at 13.
[851] Ibid., at 13.
[852] Ibid., at 15.
[853] Ibid., at 16.

> A non-discriminatory scheme of birth registration and parental recognition would be in all children's best interests, and respect the equality and dignity of LGBTQ families.[854]

Other Applicants described similarly harrowing circumstances, marred by uncertainty, financial loss, and the knowledge that under provincial law, their families were not legally recognized in the same way that heterosexual families were. As a result, the Application asked the court to make the following orders:[855] declarations of parentage should reflect intended parents' desires; discriminatory sections of the CLRA and VSA be declared unconstitutional; and that the Court assert its jurisdiction until the CLRA and VSA provisions are consistent with the *Canadian Charter of Rights and Freedoms*.

The Application also provided a background summary outlining the impacts of current legislation on the Applicants and Ontarians generally.[856] First, parents or intended parents would not have accurate recognition of their parentage which is contrary to children's best interests. Second, Ontario had not taken appropriate steps to address legislative gaps identified in *Rutherford* and *A.A. v. B.B.* Third, post-*Rutherford*, the province did not change the necessary *Vital Statistics Act* regulations and as a result the *Children's Law Reform Act* continued to "deny equal respect and recognition to children, undermines family security, imperils safety, causes psychological stress and confusion, enforces marginalization and stigmatization, and demeans dignity."[857] As a result of these legal inequalities – which had been well documented for over a decade – the Applicants sought a declaration that the *CLRA* and *VSA* violates s. 7 and 15 of the *Charter of Canadian Rights and Freedoms* ("Charter") "in a manner not justified in a free and democratic society." Further, the Application argued that the provisions discriminated against

[854] Ibid., at 18-21.
[855] Submission to Standing Committee on Social Policy. Exhibit No. SP 41-2/01/63. October 18, 2016. 4.
[856] Ibid., 5.
[857] Ibid.

LGBT parents and their children, based on sex, sexual orientation, gender identity, and family status.[858]

The Applicants in *Grand* had a variety of family configurations, but all were LGBTQ parents or intended parents who sought "an end to discrimination in relation to birth registration and parental recognition."[859] *Grand* families were different from those in *Rutherford*; the latter was comprised of lesbian co-mothers who conceived using unknown donor sperm. However, despite winning that case, families continued to find themselves in similar circumstances because Ontario's "amendment to VSA regulations did not provide co-mothers with secure, equally-recognized and equally-protected parental status."[860] Thus, *Grand* was conceived.

Importantly, *Grand* Applicants also prioritized legal change that would recognize more than two legal parents. The Application notes that in 2007, the Court of Appeal for Ontario – in *A.A. v. B.B.* – acknowledged that a child could have more than two legal parents but the CLRA had not yet been updated to "contemplate the needs and experiences of multi-parent LGBTQ families, almost a decade later."[861] Two of the families in *Grand* were intended to be multi-parent families: first, J, I, B, and A planned to be a multiple-parent family and, at the time of submission, had just welcomed their first baby "O" and all four parents wanted to be recognized as O's legal parents. J, I, B, and A assert that "O should have had the security, and respect, of having immediate parental recognition, rather than the parents being required to prepare an affidavit within a week of O's birth."[862] The second multiple-parent family was led by four parents – E, M, A, and D – who were already raising four children together and were considering

[858] Ibid.
[859] Ibid., 6.
[860] Ibid.
[861] Ibid., 9.
[862] Ibid., 9.

having another child.[863] The Application argues that "It would be in that child's best interests, and consonant with the demands of substantive equality, that all four mothers be legally recognized as parents from birth."[864] An adult child of the family, N, reflected on the "strain of parental non-recognition," saying that children "shouldn't have to live with insecurity and challenges to the reality of their family as they know it."[865]

In response to Justice Chiappetta's decision, then Attorney General, Mr. Yasir Naqvi, agreed to introduce a bill to the Legislative Assembly that would remedy this discrimination and adhere to a set of principles (outlined below), by September 30, 2016. At the eleventh hour, the Ontario government introduced the *All Families Are Equal Act* (Parentage and Related Registrations Statute Law Amendment) – as required by court order – on September 29, 2016. According to the government, Bill 28 would "ensure that the legal status of parents is recognized clearly and equitably, whether they are LGBTQ2+ or straight, and whether their children were conceived with or without assistance."[866]

At the time it was launched, the Court of Appeal for Ontario had already recognized, a decade prior, "that LGBTQ parents are as much a child's parents as adoptive parents or biological parents, and that a gap existed in the parentage scheme."[867] This recognition happened in *Rutherford v. Ontario* (also commenced by Radbord). *A.A. v. B.B.* and *Rutherford* made it possible that two-mother families did not have to adopt their own children and so Radbord argued the Application and "the court found Ontario's birth registration scheme to be

[863] Ibid.
[864] Ibid., 9-10.
[865] Ibid., 10.
[866] Ontario, *News Release*.
[867] Radbord, *The Birth of the All Families Are Equal Act*, 98.

unconstitutional in 2006."[868] In that decision, Justice Rivard found that the CLRA was "clearly outdated"[869] and noted that the concept of parentage needed to be "reconceptuali[sed]":

> There is ... adverse-effect discrimination to lesbian mothers ... [I]t is up to the government to ensure that the disadvantaged are served equally by government services. The Applicants are correct that there is no reason that non-biological mothers should have to ask permission to recognize ... their relationships with their own children... They are arguing that the institution of parentage must be challenged, in order that their experiences can be part of that institution. They do not want a concession to difference, but a reconceptualization in light of their needs and experience of what is normal in our society.[870]

The Government of Ontario had one year to remedy the constitutional violation. Not long after, *Rutherford* Applicants intervened in *A. A. v. B. B.* The 2007 decision found that the *CLRA* failed to account for LGBTQ families and those who use assisted reproduction. Justice Rivard stated that equal marriage and advances in ART were not "on the radar" and so the *CLRA* does not address, nor contemplate, the disadvantages that a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer."[871] The court employed its *parens patriae*[872] jurisdiction to recognize that the child had three parents and in so doing the Court of Appeal quoted extensively from the materials submitted by the *Rutherford* Applicants. It is important to note that the Court was deciding against a narrow interpretation of the dyadic, heterosexual limit of the mother and father. However, the decision did *not* address the

---

[868] Ibid., 93.
[869] *Rutherford v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268, 30 R.F.L. (6th) 25 (S.C.J.)., at 31.
[870] Ibid., 195.
[871] [2007] O.J. No. 2, 35 R.F.L. (6th) 1 (C.A.), at 21.
[872] Recall from Chapter 1 that *parens patriae*, literally "father of the country," gives courts the jurisdiction to ensure that the best interests of the child are maintained. Generally, *parens patriae* is invoked in cases where appointing counsel for a child is required to protect and represent their interests (as in the case of a custody dispute, for example). The case most often referenced in discussions of *parens patriae* is the Supreme Court of Canada decision of *E. (Mrs.) v. Eve, [1986] 2 SCR 388*. Not all courts *have parens patriae* jurisdiction; provincial courts and provincial appellate courts are exempt. Justice Fowler was able to employ *parens patriae* because he is a Justice in the province's superior court. For further explanation, see "Legal Representation of Children in Canada: Parens Patriae Jurisdiction" https://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/p3.html. I return to discussions of *parents patriae* in Chapter 6.

constitutionality of the *CLRA* because the issue was not argued in the application. Intriguingly, despite *Rutherford* and *A. A.* – and the clearly documented constitutional violations – Ontario "took no meaningful steps to correct its outdated, discriminatory approach to parentage."[873]

Instead, the government (under Dalton McGuinty's Liberals) changed a regulation that made it possible – only for two-mother families using unknown donor sperm – to be named as "mother" and "father/other parent" respectively on their child's birth registration.[874] But, the statutory definition of parentage did not change and a co-mother, listed as "father/other parent", only had *presumptive* (not definitive) proof of parentage.[875] Non-biological parents still required an adoption order or declaration to confirm their parental status; a process involving significant delays and costs, not to mention insult.[876] Additionally, two-mother families using a known sperm donor could not include the "co-mother" on the birth registration, as there was no space for multiple parents to be listed or for birth parents who did not identify as "mother" or co-mothers who did not want to be listed as "other parent."[877] The Ontario government ignored the courts' decision *and* "the constitutional imperative to reconceptualise parentage to recognize diverse families."[878] In other words, the provincial government knew that its legislation was discriminatory and proceeded without making the necessary changes.[879]

As a result, families continued to experience discrimination because of their sexuality, gender, and method of conception. Radbord describes a situation in which one of the *Grand* applicants found herself in a costly battle in pursuit of legal parental recognition, and always

[873] Radbord, *The Birth of the All Families Are Equal Act*, 98.
[874] Ibid., 94.
[875] Ibid.
[876] Ibid.
[877] Ibid.
[878] Ibid.
[879] Ibid., 98.

disadvantaged because she was not the biological parent.[880] Applicants could have "claimed damages for the financial losses and emotional harms arising from the government's discrimination, yet no compensation was sought by, or paid to, the Grand Applicants as Charter damages."[881] Claiming damages could have remedied, minimally, the financial losses incurred from the parentage law, including paying for court orders to affirm parentage and the legal fees required for navigating Ontario's discriminatory regime.[882]

In addition to financial loss, Grand applicants (among many other Ontarians) "suffered emotional stress and psychological harm" as a result of encountering legal systems that did not recognize their familial relationships.[883] However, the Grand applicants wanted more than financial compensation; they wanted to "achieve systemic change for the benefit of the community rather than pursuing individual remedies."[884] While many applicants received correct birth registrations on June 23, 2016 – by declaration of parentage as part of the litigation – the overarching goal was that "the applicants wanted to make sure that others in the community, their friends and extended "queer family"" would benefit from the outcomes of *Grand*. The final *Grand* order required that the Attorney General, as the Chief Law Officer of the Crown, would "promote and advance" the principles of the *AFAEA* by providing direction to Legal Service Branches at relevant ministries to "review the relevant regulations and prescribed forms to ensure consistency with the AFAEA" and sending "hospitals, birth centres, and midwives... with information about the changes to parentage."[885] The Applicants asked the government to provide a variety of social and material supports for queer families and communities including legal

[880] Ibid., 99.
[881] Ibid., 98.
[882] Ibid.
[883] Ibid.,
[884] Ibid.
[885] Ibid.

education materials about the amendments, an annual bursary for post-secondary education tuition and expenses for children of queer families, queer inclusion training for healthcare and legal professionals (including mediators, mental health professionals, and the Office of the Children's Lawyer), and training for public school teachers and staff to address queer inclusion in Ontario's sexual education curriculum. [886] Applicants also asked for an "LGBTQ2+ liaison to the government" so stakeholders could advocate for equality advances via avenues other than litigation.[887]

In *Grand's* Minutes of Settlement, the Respondent – the Attorney General of Ontario – agreed not to oppose the Applicants' request for declarations of parentage that were sought in accordance with the draft orders.[888] Further, the Respondent, Attorney General Yasir Naqvi, consented to a declaration that:

> the CLRA violates section 15 of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be justified in a free and democratic society under section 1 of the *Charter* to the extent that the legislation does not provide equal recognition and the equal benefit and protection of the law to all children, without regard to their parents' sexual orientation, gender identity, use of assisted reproduction or family composition; and to the extent that the legislation does not provide equal recognition and the equal benefit and protection of the law to all families.[889]

This declaration included a stipulation that the *CLRA* would have "no force and effect under section 52 of the *Constitution Act*, 1982…" if "the declaration of invalidity is suspended for 9 months."[890] The Respondent also agreed to recommend that Cabinet approve a government bill in the Legislative Assembly, no later than September 30, 2016, proposing amendments to the *Children's Law Reform Act*, the *Vital Statistics Act*, and associated regulations and forms. The

[886] Ibid.
[887] Ibid., 99-100.
[888] Radbord, *The Birth of the All Families Are Equal Act*, 103-104.
[889] Ibid., 104.
[890] Ibid.

Minutes of Settlement also state that the Respondent's recommendations would ensure that Ontario law would "protect the security of all children" regardless of their parents' sexual or gender identity, use of ARTs, or family structure; preconception intention will be the basis against with parentage is recognized in same-sex relationships and ART; a donor will not be declared a parent based solely on donation; parentage will be defined in a way that recognizes the possibility of more than two parents; and the definition of "birth" will be revised so that it is trans-inclusive.[891] Finally, the *Minutes* also lay out the repercussions should the government have failed to introduce the bill by the deadline, some of which included that the Applicants in *Grand* would be able to proceed with "all or part of the constitutional challenge to the provisions identified in the Application."[892]

Clearly, the road to the *AFAEA* was bumpy for Ontario families. Unlike BC's *FLA*, decades of litigation preceded the expansion of legal parentage in Ontario and, as this chapter will demonstrate, the highlights of the *AFAEA* are still constrained by normative intimacy.

5.3 The *All Families Are Equal Act*

For Kirsti and Jennifer Mathers McHenry, it was very important that the *AFAEA* did not simply extend legal parentage to families who looked "just like" them; that is, White, married, and professional.[893] She recalls that there was considerable discussion about "who should be covered and how extensive the reform would be" because they wanted the extension of parentage to be equitable. Kristi recalls their goal that extending legal parentage to parents "like her" was not sufficient and could have been dealt with via a speedy lawsuit. Instead, her goal was to be more "inclusive" to ensure that legal parentage was extended to trans and non-binary parents, for

[891] The full list of principles is available in Radbord, *The Birth of the All Families Are Equal Act*, 104-105.
[892] Ibid., 105.
[893] Kirsti Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.

example.[894] To achieve that end, "[there was] a lot of back and forth" and moments when the Mathers McHenrys "threatened to walk away from the process and sue [the government]" for their unwillingness to make significant enough changes to legislation. [895] It was at this time that Radbord switched gears and launched *Grand*. Mathers McHenry describes some of the tensions during the process:

> I think we had the first reading of the *All Families Are Equal Act*, but again there was just stalling, and we weren't making any progress. We did protest at Queen's Park at one point; Kathleen Wynne was announcing some things around LGBTQ rights, and I think she was saying some nice thing that "all families are equal." But we weren't moving, we just weren't getting it done so we decided we would protest and then Joanna sued the government in *Grand v. Ontario*, because we weren't getting there, we just weren't going to get across the finish line without putting some real pressure on.[896]

The Mathers McHenrys wanted to ensure that the new legislation would include common queer kinship structures, like multiple intended parents, but the negotiations were not always easy. Kirsti describes a meeting where she, Jennifer, and Joanna Radbord left after stalled negotiations:

> There was [one experience where] we had been in a meeting with one of the lead people who was working on the *All Families Are Equal Act* with the government, and she was supposed to be taking us through the amendments. We had gone and taken away their draft legislation and made all kinds of suggested improvements to add. And we had this meeting with Joanna, Jennifer, and I, and this woman [from the provincial government], where she was taking us through which of our amendments they had accepted, and the answer was none. So, we just walked. We were like "okay there's no point in having this meeting, we don't need to go line by line through what you rejected and we don't care why you've checked it out, particularly, so we're going to go figure out next move."[897]

Perhaps startled by their tenacity, a provincial representative quickly followed up, inviting them to continue the negotiations: "the phone call was 'can you come up right now and figure this out because we don't want this kind of break down in the relationship so let's see if we can get this

[894] Ibid.
[895] Ibid.
[896] Ibid.
[897] Ibid.

done.'"[898] What follows is a summary of the *AFAEA's* high points, as they relate to the expansion of legal parentage.

5.3.1 Highlights of the All Families Are Equal Act

The *AFAEA* made several advances to ensure equality for queer families and/or families using assisted reproductive technologies. Among them: parentage is no longer defined by relationships of blood or adoption; egg and sperm donors are not legal parents; parentage is primarily determined by pre-conception intention and not genetics; a child can have up to four legal parents (without the parents needing a court order); in surrogacy arrangements, intended parents no longer require declarations; birth registration documents use gender-neutral language; and blood or legal relationships are no longer a factor in determining the best interests of a child under s. 24(3) of the *CLRA*.[899] These points are outlined in greater detail below.

The *AFAEA* repealed Part I and II of the *CLRA* so that pre-conception intention, not biology, is the focus of determining legal parentage. This provides children with the security of familial recognition and does not require parents to shoulder the costs of court orders or the emotional costs of delaying legal recognition. Section 5 of the *AFAEA* says that a donor is *not* a parent. Per the *AFAEA*, a donor includes someone who provides an egg, sperm without sexual intercourse, sperm via sexual intercourse (*with* a pre-conception agreement).[900] For example, if a lesbian couple uses at-home insemination with a known donor, the women – who are the intended parents – have the legal security that they will be equally recognized as the mothers of their child and the donor will *not* be declared a legal parent.[901] This would be the case even if the

[898] Ibid.
[899] Radbord, *The Birth of the All Families are Equal Act*, 95.
[900] *All Families Are Equal Act* (Parentage and Related Registrations Statute Law Amendment), 2016, S.O. 2016, c. 23, s. 5. https://www.ontario.ca/laws/statute/s16023#top
[901] Radbord, *The Birth of the All Families are Equal Act*, 95.

donor took on "an avuncular role, popularly known as a "spuncle"" and had regular contact with the child, he would still not be considered a parent. Radbord notes that the donor could, like anyone else, make a claim to custody and access and the claim might be granted if the judge considered it to be in the child's best interests.[902] However, the donor's biological contribution is no longer a factor when considering the child's best interests under s. 24(3).[903]

Section 6 stipulates that the birth parent is a parent unless a pre-conception surrogacy agreement stipulates otherwise. Relatedly, Section 7 provides that a person who donates sperm through sexual intercourse is a parent, unless there is a written pre-conception agreement, signed by all parties, stating otherwise. For children conceived through sexual intercourse, there is a presumption of parentage that favours the spouse of the birth parent at the time of the birth, a person who was married or living in a conjugal relationship with the birth parent within 300 days before the birth, the person who certifies the birth, or a person who is found by a court to be a parent. This presumption is consistent with parentage provisions in most Canadian jurisdictions and reflects "traditional" schemas which assumed that birth mother's husband or partner is the legal father. Similarly, Section 8 states that, when ARTs are used, if the birth parent had a spouse at the time of conception, the spouse is a parent of the child. There are two exceptions: if the conception is in the context of surrogacy or if the spouse did not consent to be a parent prior to the child's conception. In the case of lesbian spouses, these provisions ensure that both parents are now able to show their names on the birth registration, whether they have used a known or unknown donor. Further, an adoption order is not required and both mothers are fully and equally recognized as legal parents to their child.[904]

---

[902] Ibid.
[903] *All Families Are Equal Act* s. 24(3).
[904] Radbord, *The Birth of the All Families are Equal Act*, 95.

In the case of pre-conception parentage agreements, Section 9 notes that up to four people can co-parent *and* be legally recognized as parents from birth (without the need for a court order). For this to happen, one of the parents must be the birth parent and the parties must have a written pre-conception agreement indicating their intent to co-parent. Parents may choose to consult a lawyer to draft these agreements, but the stipulation is not intended to require parents to have legal counsel.[905]

Surrogacy agreements fall under this category of changes. Importantly, the *AFAEA* created a legislative scheme for determining legal parentage for children born via surrogacy. The *AFAEA* allows for written agreements between intended parent(s) and the surrogate stipulating that the surrogate is not the parent. However, the parties must enter into this agreement pre-conception, it must be written, and the parties must have independent legal advice (including each spouse if there are two intended parents). There cannot be more than four intended parents and conception must occur through assisted reproduction. The legislation does not distinguish between traditional and gestational surrogacy (that is, when a surrogate carries *and* donates her egg vs. when a surrogate carries but the egg is not hers). Notably– and this was a source of contention from witnesses during Standing Committee submissions – unless the surrogacy agreement provides otherwise, for seven days from the time of birth, the surrogate and the intended parent(s) share the legal rights and responsibilities of a parent. Then, with the consent of the surrogate (but not before the seven day 'cooling off' period), the intended parents become the legal parents and the surrogate no longer has legal rights and responsibilities. However, should there be a dispute, the surrogacy agreement is *not* enforceable by law, though it may be used as evidence of intention. If the surrogate does not or is unable to consent or is unable to, any

[905] Ibid.

party to the surrogacy agreement can apply to a court for a declaration of parentage. Again, the best interests of the child are given "paramount consideration" in this context.[906]

As noted earlier, in 2007 the Court of Appeal for Ontario granted declarations of parentage to recognize a three-parent family in *A. A. v. B. B*.[907] using its *parens patriae* jurisdiction. After that decision, judges granted declarations of parentage *if* the relationship of parent and child was established and the order was in the child's best interests.[908] The *AFAEA* "adopts a more restrictive approach to declarations of parentage than had been developed at common law" since, historically, courts did not use their *parens patriae* jurisdiction "unless there was an unintended gap in legislation."[909] Radbord shared several concerns with this approach, for example, whether it is possible "to obtain a declaration of parentage in many circumstances in which declarations were previously available, in children's best interests."[910] If, for example, a declaration is available to a family with more than two parents, if the parents have evidence of a pre-conception intention and act quickly to obtain recognition. As the legislation reads, if four people decide to co-parent *prior* to birth of the child but also *post*-conception, it is not possible to show the intended parents' particulars on the birth registration nor will it be possible to obtain a declaration that all four are parents, given the focus on the precise timing of the parties' agreement. Further, one cannot obtain a declaration for a child who has been adopted. This is particularly important because it is a common issue "after the adoption of a foreign-born child by a LGBTQ parent who did not disclose their spousal relationship to secure the adoption."[911] Some LGBTQ parents seek to adopt a child from abroad, knowing that some countries will not consent

[906] Ibid., 96.
[907] *A.A. v. B.B.*, 2007 ONCA 2 (CanLII)
[908] Radbord, *The Birth of the All Families are Equal Act*, 95.
[909] Ibid.
[910] Ibid., and *All Families Are Equal Act*, s. 13(2)(1).
[911] Ibid. This issue was also highlighted by three interview participants: FF, QQ, and NN.

to adoption with queer parents. In these cases, couples may proceed but with one party representing themselves as single (and, presumably, heterosexual). Under previous legislation, parents in this circumstance would obtain a declaration to ensure legal parentage.

The *AFAEA* also makes several amendments to the *Vital Statistics Act* to eliminate discrimination and reflect the new rules of parentage. For example, s. 28 of the *AFAE* removes references to "mother" and "father" in the provisions for certifying a child's birth. A new birth registration form was created which allows parents to choose their "title" as "mother", "father", or "parent" and parents can choose any surname for their child. Additionally, the *VSA* makes it possible for children to have only one name if that reflects their families' cultural practices and traditions.[912] Radbord notes that this change was achieved through a settlement process in response to "a threatened constitutional challenge by indigenous parents."[913]

Amendments to other statutes included eliminating references to "relationships by blood" and "natural" parents; and the definition of "spouse" under s. 29 of the *Family Law Act*.[914] Further, changes were made to the *Succession Law Reform Act* and new provisions were added with respect to parentage in the case of posthumous conception.[915] The *Child and Family Services Act* incorporated the new regime of parentage with respect to adoption and child protection. The *AFAEA* also amends the *Legislation Act* so that gender-specific terms in Ontario legislation refer to any gender, instead of the previously binary-affirming language of "both sexes."[916] Laws governing intimate life (marriage, parentage, citizenship) have long relied on

---

[912] Ibid. See also: *Vital Statistics Act*, R.S.O. 1990, c. V.4, s. 10(4). https://www.ontario.ca/laws/statute/90v04#top Notably, this is only possible the parent (or person naming the child) provides "evidence" to the Registrar General *and* if the Registrar General approves the name.
[913] Ibid., 96.
[914] Ibid., 96-7.
[915] Ibid., 97.
[916] Ibid.

"nature" for their authority. That is, as I explore in Chapter 6, the reason that a man in relationship with a pregnant woman was considered the presumptive biological father. In the absence of the ability to test for paternity (until quite recently), the law drew on cultural mythologies (and idealizations) of conjugality. Similarly, the law relied on the biological "truth" of dimorphic sex to recognize only male or female, despite decades of evidence to suggest that there are at least five sexes.[917] In this way, the law has profound effects on how legal subjects are identified, by the state, and how subjects identify themselves.

As a result of these sweeping changes, Ontario parents now register their children's births in ways that can more accurately reflect their kinship arrangements. Additionally, the amendments ensured that "persons who currently meet the criteria in sections 6 to 10 of the CLRA (as amended by the AFAEA)" are legal parents, even if their children were born before January 1, 2017.[918] Families could then choose to correct their child's birth registration to accurately reflect their parentage, for example, lesbian co-mothers who did not want to be listed as "father" or "other parent" and/or non-binary and trans parents who wish to use " "alternate parental nomenclature."[919] Prior to the *AFAEA* there were birth registrations that entirely omitted parents– in the case of multi-parent families where the birth registration could only list two parents (but had a pre-conception agreement for three or four persons to parent together).[920] For some lesbian spouses who complied with the law following *Rutherford*, the co-mother was not shown on the birth registration because a known sperm donor was used. *AFAEA* enabled parents – whose documents did not reflect their parentage structure – to be added to their child's birth

[917] Anne Fausto-Sterling. "The Five Sexes: Why Male and Female Are Not Enough." *The Sciences* (March/April) (1993).
[918] *Grand v. (Ontario) Attorney General*, 2016 ONSC 3434.
[919] Radbord, *The Birth of the All Families are Equal Act*, 96.
[920] Ibid.

registration, with the agreement of all other parents on the birth registration (or with a statutory declaration that the other parents are incapable) and without requiring a court order.

However, not all parents were able to access "secure, correct, and respectful registrations" because consent is required by all parties presently listed on the registration. This could be particularly difficult for parents who transitioned after a child's birth, if the co-parent is unwilling to change the parental designation to affirm the other parent's gender. Radbord describes a situation in which the former spouse of one of her clients – a Grand litigant – "insists that she is, and should be, the only "mother" of their child." Radbord's client has a declaration of parentage that she is indeed a parent of their child and "finds it offensive that she cannot be shown or described as her child's "mother", without her former partner's consent when that is how she and the child understand her identity."[921] Radbord "urged" the Attorney General Naqvi to consider that a parent's "own self-identification on their child's birth registration should be amenable to change without the consent of any other parent" especially since "accurate birth registrations are a safety issue for trans people and their children" and many trans people cannot afford the costs of pursuing a declaration change to their child's registration. Further, correcting the birth registration's parental nomenclature "is required to respect a person's own self-identification; it is not something that should require the other parent's approval."

Adoptive families were also unable to correct their birth registration post *AFAEA*. According to Radbord, the provincial government was unwilling to change adoption birth registrations because it was "necessary to have transparency about adoption":

> The adoption birth certificate, they say, lets the child know that an adoption took place. Of course, for co-mother families, the adoption only took place because the law was discriminatory: this was the only means for the co-mother to obtain parental recognition. A step-parent adoption registration does not assist the child in learning the "truth" of their adoption; it causes confusion by falsely insisting that one of the parents is a step-parent. It

[921] Ibid.

> should be possible to obtain a clean, accurate long form birth registration for these children.[922]

Radbord's reflection highlights a tension between a family's genetic and biological "truth" and social "truth" and what form of truth takes priority, under what circumstances, and for whom. This debate was present for BC's *FLA*, reflected in commentary about the legislation's restructuring of the family, and it powerfully demonstrates the continued hold of the heterosexual, two parent family model as the "natural" and "authentic" family form. Despite legal reforms recognizing more than two legal parents, the "truth" of the heterosexual nuclear family retains normative force.

According to Mathers McHenry, whatever disagreements they experienced with staff were ameliorated once the Attorney General got involved. She recalls "the AG was incredible to work with, he got into the weeds, like he really did seem to understand the experiences of LGBTQ families and the implications for straight families as well."[923] For example, the government (and witnesses during Standing Committee submissions) were concerned about the actual operation of "chosen" and "intended" parentage and its consequences for straight women who have unplanned pregnancies and have legitimate claims to child support.[924] Kirsti noted that "the government was very interested in women who frequently end up in poverty" or financial hardship because fathers are not providing adequate child support.[925] The province's preoccupation with child support reflects Harder and Thomarat's point that when the family can provide support, the state is "spared the burden of providing for them."[926] In fact, the state's

---

[922] Ibid., 98.
[923] Kristi Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[924] Ibid.
[925] Ibid.
[926] Lois Harder and Michelle Thomarat. "Parentage law in Canada: The numbers game of standing and status." *International Journal of Law, Policy and the* Family 26, no. 1 (2012): 69.

vested interested in the privatization of family support is intimately connected to the recognition of diverse family forms.[927] Brenda Cossman describes this via the outcome of *M v. H*: "the lesbian legal subject that was recognized was a highly privatized subject—a subject who sought the recognition and enforcement of the private obligation of her partner."[928] For Cossman, this demonstrates the "re-privatizing trend" to expand the number of people with private support obligations.[929]

In a fascinating series of events, the *AFAEA* passed unanimously when Patrick Brown, leader of the Progressive Conservative party (PCs) "demanded that party members who did not support the bill absent themselves from the vote."[930] In fact, Brown even postponed the swearing into office of a recently elected PC member – who had garnered much attention for his "considerable objections" to the amendments – until after the vote to prevent the new Member of the Provincial Parliament from voicing concerns.[931]

Bill 28 "An Act to amend the Children's Law Reform Act, the Vital Statistics Act and various other Acts respecting parentage and related registrations" was introduced on September 29, 2016 and received Royal Assent on December 5, 2016. In her reflection on the process, Radbord wrote "It took more than a decade, and it is not perfect, but the *Grand* litigants made a fundamental and positive change for families in Ontario."[932] The success was a result of litigation and activism – working on *Cy and Ruby's Act*, engaging in public education and advocacy, and eventually achieving success only when the provincial government was forced "to

[927] Ibid. See also: Cossman, Brenda. "Sexing citizenship, privatizing sex." *Citizenship Studies* 6, no. 4 (2002): 483-506.
[928] Cossman, *Sexing citizenship*, 490.
[929] Ibid.
[930] Harder, *How queer!?*, 22. Citing: "New Ontario law says same-sex parents don't have to adopt their own kids." *Canadian Press*. November 20, 2016, https://www.ctvnews.ca/politics/new-ontario-law-says-same-sex-parents-don-t-have-to-adopt-their-own-kids-1.3182012.
[931] Harder, *How Queer?!*, 22.
[932] Radbord, *The Birth of the All Families are Equal Act*, 99.

address the equality issues on a clear timetable once we commenced the Grand litigation."[933] The principles underlying the legislative amendments were negotiated during the court process and even after the province began drafting the legislation.[934] Throughout this process, Radbord notes that her team remained:

> intimately involved in the legislative process, and celebrated the passage of the AFAE, but did not settle the *Grand* case until we were satisfied that related policy and operational issues had largely been addressed. One of the lessons of *Grand* is that those seeking legal changes should not debate whether to deploy litigation or activist strategies; both need to be used in concert.[935]

Grand's success means that "future generations of children of LGBTQ parents will only know equality of status and the security of immediate parental recognition."[936] However, an important piece of this story is that Ontario was *forced* to make all families equal. As one interview participant noted,

> … My experience is that the government is very reluctant to address the issues faced by minority communities particularly where there's an element of controversy about the extension of equality. It has always been a huge, monumental fight and it's always been achieved through litigation and the *All Families Are Equal Act* comes out of litigation. [The government] was forced to do what they did. We litigated, we settled… but it still took a constitutional challenge. And we embarrassed [the government] with the interim order where they had to pay us costs. And we had a good coalescing of people; it came together but it took litigation to do it so it's always the community pushing the government forward to make changes using the courts, usually the courts…[937]

Though *Grand* litigants and *AFAEA* supporters "won," the victory was hard-fought. Even its advocates note that *AFAEA* is not perfect and several community representatives (lawyers, litigants, and community activists) made oral and written submissions before the Standing Committee in November 2016 to address these concerns. Overall, their advocacy, public

[933] Ibid.
[934] Ibid., 99. *Rutherford* was inspired by Radbord's son who, at the time that *AFAEA* received Royal Assent, was a Page in the Ontario Legislature.
[935] Ibid.
[936] Ibid.
[937] QQ. Interview with author. Edmonton, Alberta. February 9, 2021.

education efforts, and persistence forced the province's hand, once again, to amend sections to better reflect the unique needs of queer families. Perhaps unsurprisingly, the most heated debate surrounding Bill 28 was about expanding legal parentage and "redefining the family." In the next section, I present the findings from my discourse analysis of Hansard debates, Standing Committee debates, Standing Committee submissions, news media, and professional blogs.

5.4 Debating the All Families Are Equal Act

5.4.1 Re-engineering the family and the "war" on mothers

As Lois Harder notes, the *AFAEA* attracted attention from conservative religious groups, media "and transphobic members of both the social conservative and gay community."[938] All political parties supported the legislative reforms which meant that "the bill's opponents had a very limited platform to air their views."[939] However, what was aired spoke volumes. For example, in a *National Post* editorial, John Sikkema (a lawyer representing the Association for Reformed Political Action) shared his concerns over the changes to legal parentage by decrying the expansion of family relationships to include those who are not related by "blood." He wrote:

> Bill 28 erases the basic, core rule of our law that a person is the child of her natural parents and deletes all references to "mother," "father," and "natural parents" from Ontario statutes, replacing them simply with "parent." It also removes references in some statues to persons being related "by blood," while expanding its meaning in others to include new forms of legal family relationships that are not, in fact, blood relationships.[940]

He also worried over the particulars of multi-parent kinship arrangements and implied that the health and safety of children born to multi-parent families, were at risk. He asked "Will the child rotate between four homes? Who will make decisions about the child's health and education?"

---

[938] Harder, *How queer!?*, 320.
[939] Ibid.
[940] John Sikkema. "Ontario's new law will put children second to parenthood" *National Post*, 28 November 2016. https://nationalpost.com/opinion/john-sikkema-ontarios-new-law-will-put-children-second-to-parenthood

He suggested that these decisions are hard for dyadic, monogamous relationships and are often decided in courts when couples separate. Given this, Sikkema was disturbed that Bill 28 "create[d] separated families by design."[941] While it is true that these decisions are sometimes difficult for parents to make, Harder notes that "the degree of planning, coordination, negotiation and rationality required to form families through pre-conception agreements and, possibly, multiple-parent families" renders his concerns "rather curious." She points out that the law already supports "hapless [heterosexual]" parents without using home visits or "tests of suitability" (in the case of adoption) and yet, queer parents who must intend, plan, and prepare long in advance of welcoming their child are not immediately granted parental status when their child is born. For Harder, "the contrast in intention between these planful parents and any number of heterosexual couples who are suddenly surprised by a pregnancy cannot be overstated."[942]

Sikkema's socially conservative position was reflected by others' concerns about the legislation's "re-engineering" of the family and, in particular, the "war on mothers." Dr. Charles McVety, President of Canada Christian College (Whitby, Ontario) and President of the Institute for Canadian Values, had much to say about Bill 28 during the Standing Committee on Social Policy's meetings. He was "very happy" about parts of the legislation that he felt affirmed the legal status of the fetus. For example, he ascertained that the legislation recognizes the legal personhood of a child at the time of conception (by using the language of "child" or "children"). In fact, he goes on to state that his family history is deeply intertwined with fighting for legal personhood because his grandmother, Jean McCaffrey, was a "close friend" and roommate of Nellie McClung's. In a popular argumentative twist, McVety asserts that his concerns about the

[941] Ibid.
[942] Harder, *How Queer*, 321.

AFAEA's impacts on the family are a "fight" for women's rights, like the Persons Case.[943] For McVety, and social conservatives like him, the rights of women are intimately connected to motherhood and tied to the traditional nuclear family. According to McVety and his compatriots, the bill sought to "re-engineer the family in a way that has never been done in the history of mankind [sic]."[944] Further, this bill was an assault on "science" via a "specious argument that it is doing this to fulfill the needs of the modern family—the modern family that has somehow changed from biology and science."[945]

McVety represented a vocal minority who asserted that the Liberal government was staging an assault on the family. He argued that Bill 28 sought to remove the category of "mother" from the law and that this decision was "wrong-headed" because "science" proves that a birth parent is a mother. Unfortunately, for McVety and others like him, science can only prove that some people with uteruses can, and do, give birth. The translation from 'person who gives birth' to 'mother' is a socio-cultural interpretation of biological processes that rely on the assumption that women can give birth and giving birth makes women mothers. This interpretation was then enshrined in legislation ("the mother is she who gives birth") which then gets taken up as a reflection of biological fact. However, legislation is less reflective of biological fact than it is a collection of socio-cultural interpretations of our observations. Much like science, law relies on facts that are "partial and contingent interpretations of what humans observe."[946] For example, if McVety's assumption were true, that mothers give birth, then women who experience infertility could not become a mother by any other means.[947] Alas, he

[943] Ontario. Legislature. Standing Committee on Social Policy. 41st Parl., 2nd Sess., October 18, 2016 (SP-31).
[944] Ibid.
[945] Ibid.
[946] Jill A. Fisher. "Gendering Science: Contextualizing Historical and Contemporary Pursuits of Difference." In *Gender and the Science of Difference*, 3. New Brunswick: Rutgers University Press, 2004.
[947] Ibid.

was so concerned about the replacement of "mother" with "birth parent" that he declared these revisions a "war on mothers." This war would threaten the "bedrock of society" because, while "a mother can take the place of all others," no one else "can take the place of a mother."[948] McVety's absolutism gets him into trouble because he is forced into a rigid biologism that even he, likely, does not believe (presumably he thinks women who adopt children are mothers, for example).

Queenie Yu, a former independent candidate for Scarborough-Rouge River and self-acclaimed "founder and leader" of the "Stop the New Sex-Ed Agenda" campaign shared similar concerns about erasing mothers.[949] Yu centered these concerns in her experience as a member of Toronto's community of colour and as a child of immigrants. She and Cheri DiNovo proceeded to have a pointed exchange. Yu argued that legislators had not appropriately consulted the Chinese community or other newcomer Canadians, whose proficiency in English would prohibit them from engaging meaningfully in the democratic process. Of Bill 28's drafters, Yu reflected "What they said was, "So much for diversity, inclusion and equality."" DiNovo reminded Yu that Bill 28 had a decade-long history as a *Charter* challenge and asked Yu "Do you believe that LGBTQ families' children should have equal rights under the law as children born to straight families?"[950] Yu suggested that she believes in equality but not in "cutting out the mother" which

[948] Ibid. Notably, "science" itself has not always been consistent in its interpretations of the "essence" of womanhood. As Jill Fisher describes, from the eighteenth to twenty-first centuries, femininity, according to science, has been rooted in the uterus, ovaries, hormones, and brain (respectively) (ibid., 10).
[949] In a "Candidate Q&A" Ms. Yu says that "family values" are important to her and she chose to run to force Kathleen Wynne's government to repeal overhauls to the sexual education curriculum. Yu said "Many Ontarians, especially those of cultures with more traditional values, disapprove of Kathleen Wynne's sex-ed curriculum. I want to represent them and send a strong message to all politicians: it is time to eliminate the Wynne sex-ed curriculum which goes against the values which a large majority embrace" ("Queenie Yu: Scarborough-Rouge River byelection candidate Q and A" *Toronto.com*. August 25, 2016. https://www.toronto.com/news-story/6825339-queenie-yu-scarborough-rouge-river-byelection-candidate-q-and-a/).
[950] Ontario. Legislature. Standing Committee on Social Policy. 41st Parl., 2nd Sess., October 16, 2016 (SP-31).

she likens to China's abuse of women's reproductive rights through the one-child policy.[951] In fact, Yu noted "Chinese immigrants didn't know that the Wynne government would actually outdo the Communists and get rid of mothers entirely."[952]

Both McVety and Yu's comments demonstrate a strong resistance to both real and perceived changes that undermine traditional nuclear family structures. Further, both also articulated a deep concern about the timing of the bill: Yu said that it was "rammed through"[953] and McVety told members "you only introduced this bill 12 days ago. It's being rushed through in record time."[954] Either unaware of the genesis of the bill, or taking a moment to grandstand, McVety suggested that legislation of this nature requires "months" of work:

> Complicated legislation like this usually takes months and this is days. We have examined the bill with lawyers and with social policy advisers, and we believe that the bill needs to be dramatically rewritten to respect the age-old position of mother. Yes, it also removes "father," and you may ask me why I don't focus on "father." Well, nobody really cares about the fathers. We care about the mother, because the mother is the bedrock of civilization, the bedrock of society. So yes, we can submit proposed amendments, and I would start by not striking "mother" from family law.

McVety's openness about not focusing on fathers is illustrative of the gendered construction of familial life where women are both subjugated and exalted in, and by, ideologies of motherhood.[955] However, given the overlap of fathers' rights movements and family law change, the absence of an argument surrounding the erasure of fathers is worth consideration.

In her interview, Kristi Mathers McHenry reflects on her experience confronting these discourses while the bill was being debated:

> … I was walking down the street one day with my boss, and there was a little truck with video screens all over them and it was railing against "the eraser [sic] of mothers."

---

[951] Ibid.
[952] Ibid.
[953] Ontario. Legislature. Standing Committee on Social Policy. 41st Parl., 2nd Sess., October 18, 2016 (SP-50).
[954] Ontario. Legislature. Standing Committee on Social Policy. 41st Parl., 2nd Sess., October 16, 2016 (SP-31).
[955] See, for example: Claudia Card. "Against Marriage and Motherhood." *Hypatia* 11, no. 3 (1996): 1-17; hooks, bell. *Feminist theory from margin to center.* Boston: South End Press, 1984; Rich, Adrienne. *Of woman born: Motherhood as experience and as institution.* New York: Norton, 1976.

> Nobody seemed to care that much if we erased fathers, but mothers had to remain as a concept in law… and I said [to my boss] "holy shit that's about our law!"

Mathers McHenry recalled feeling shocked by people's outrage over removing the word mother before determining the source of their discontent: "You can't oppress women with motherhood if you don't define motherhood."[956] She explained that the *AFAEA* worked to create inclusivity and in so doing "[takes] away all those things that make it okay for dads to just be sperm donors."[957] In other words, redefining gender roles in parenting, theoretically, narrows the possibilities of women being subjugated in their roles as mothers. Mathers McHenry hoped that if the sole standard for parenthood was "the person who cares for a child" then there would be no meaningful difference (and thus, opportunity for marginalization) between mothers and fathers, cis or trans parents.[958]

Perhaps without meaning to, McVety affirmed Mathers McHenry's observation: social conservatives do not care about fatherhood in the way they care about motherhood. For McVety, mothers are the "bedrock of society" and changes to the definition of mother threaten the foundations of our political and social communities. This perspective reflects Laura Mamo's findings that the increased use and availability of ARTs generate concerns about "the boundaries of human sexuality, reproduction, and kinship; the parameters of legitimate and illegitimate sexual expressions; and the lines between sanctioned and unsanctioned linkages among sexuality, marriage, procreation, and family." [959] Further, shifts in reproductive practices and kinship are often only visible because of the "controversies they provoke."[960] Historically,

---

[956] Kristi Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[957] Ibid.
[958] Ibid.
[959] Laura Mamo. "Affinity Ties as Kinship Ties." In *Queering Reproduction: Achieving Pregnancy in the Age of Technoscience*, 193. Durham: Duke University Press, 2007.
[960] Ibid.

kinship was understood as "those related by blood and those related by marriage" but this definition has been "profoundly destabilized in the twenty-first century" as the possibilities, and visibility, of social connections become more expansive than this framework allows. For example, Mamo notes that ARTs challenge assumptions about gender, kinship, and social relations because they do not require heterosexuality and their function is not constrained by paternity. Critics argue that "anatomical sexual difference" is required for social reproduction and queer families disrupt the natural (and therefore desirable, necessary) kinship system.[961]

A submission by Parents As First Educators – an organization committed to "[supporting] the authority of parents over the education of their children through grassroots activism" – said that "the presence of parents of two genders is important for childhood development" because "children receive gender specific support from having a mother and a father."[962] Mr. Joe Clark, a Toronto-area writer and self-described supporter of gay and lesbian communities, was also deeply disturbed by the "rewriting" of biology allegedly undertaken by the bill. In particular, he said:

> None of you were ever elected, least of all on a mandate, to socially engineer the province of Ontario. You were not elected to define motherhood out of existence. You really weren't elected to suppress and deny femaleness, girlhood, womanhood and motherhood, but that's what this bill does… You simply do not have the authority to make sweeping changes of this scale, and they can't be fixed by tinkering. You have to delete every attempt to redefine motherhood and fatherhood in sex-neutral terms. Mothers are drawn from the biological sex "female" and fathers from the biological sex "male." I can't believe I have to be the one to tell you that. The cure is worse than the disease here. Remember, you had one job: clearing up parental rights for gay and lesbian couples. Yet you arrogated the right to redefine motherhood and fatherhood and simply deny biological sex. Really, how dare you?...[963]

---

[961] Ibid., 198.
[962] Ontario. Legislature. Standing Committee on Social Policy. Submission (Teressa Pierre, Director, *Parents as First Educators*). Exhibit No. SP41-2/01/666. November 1, 2016.
[963] Ontario. Legislature. Standing Committee on Social Policy. 41st Parl., 2nd Sess., October 18, 2016 (SP-45).

DiNovo responded that in fact, far from "erasing" motherhood, the bill creates *more* opportunities for mothers to exist.[964] Clearly, though, the issue was not about erasing motherhood but about expanding who may become a "mother" such that it includes those who may not fit into dyadic, heterosexual, cis-gendered, motherhood. These "scripts" serve to normalize and naturalize "heterosexual reproduction and pathologi[ze] other forms of parenting" while simultaneously reinforcing the idea that kinship is produced through heterosexual sex.[965] The concern is that by expanding "the field of procreators," the possibilities of parentage and kinship expand as well. The resistance to these changes articulated by McVety, Yu, and others[966] demonstrate that same-gender parents and other forms of "queer" parenting "alter the ways people understand and make meaning out of social connections."[967]

Unsurprisingly, each interview participant firmly believed that biology is *not* the sole determining factor (or even an important factor) in defining family. However, the primacy of biology is still firmly rooted in many people's beliefs when it is time to legally define, and expand, familial relationships. As one participant noted, the law steers very clear of defining "the family" precisely because the project would be too complex.[968] Instead, the law defines relationships – like parent and spouse. Perhaps this reflects, as Claudia Card notes, that "'family' is itself a family resemblance concept"[969] and "many contemporary lesbian and gay partnerships,

---

[964] Ibid.
[965] Mamo, *Queering Reproduction*, 198.
[966] The *Standing Committee on Social Policy* received several written submissions from concerned individuals and organizations. For example, *REAL Women of Canada* submitted a letter stating that "this bill turns on its head the former understanding of "family" which was individuals united by marriage, blood and adoption" (Ontario. Legislature. Standing Committee on Social Policy. Submission (*REAL Women of Canada*). Exhibit No. SP41-2/01/501. November 1, 2016.). Teressa Pierre also cited the poor developmental outcomes for children raised outside of a "natural marriage" like poverty, lower rates of post-secondary attendance, and an increased likelihood of substance use (Ontario. Legislature. Standing Committee on Social Policy. Submission (Teressa Pierre, Director, *Parents as First Educators*). Exhibit No. SP41-2/01/666. November 1, 2016).
[967] Mamo, *Queering Reproduction*, 198.
[968] DD. Interview with author. Edmonton, Alberta. December 3, 2020.
[969] The idea of a "family resemblance concept" comes from Ludwig Wittgenstein's discussion of the word "game." Wittgenstein suggests that we come to understand the meaning of "game" through a variety of words that may have

households, and friendship networks" do not fit into traditional conceptions of family and are not "sanctified by legal marriage" even though they understand themselves a family.[970] In fact, in their interview, GG said:

> When I think about the concept of family I don't even think about biological relationships. It doesn't even cross my mind which is interesting; I've clearly been doing this [work] for a long time. The first thing I think about is who intended to be family. A family wants to be family. That's how you define the family, the people who see themselves as family are family. And I think that's beautiful. Family is that intention to [be a] family [and] that intention to be obligated to each other.[971]

This perspective was affirmed by each interview participant and many also reflected on the change in social definitions of family over the course of their lifetimes and careers. Notably, the criticism that Bill 28 received was out of scale with the reforms being proposed; Bill 28 did not erase motherhood (or fatherhood) or even prohibit parents from using the terms "mother" or "father." Instead, the Bill (and subsequent *AFAEA*) made it possible for parents to choose the nomenclature with which they were most comfortable and did not limit the meaning of "mother" to those who had given birth.

The criticisms waged against the *AFAEA* reflect Patricia Hill Collins' assertion that the relationships between biology, science, and law create a kinship system wherein biological connections provide "rights," much like citizenship.[972] The *AFAEA* does little to actually "re-engineer the family." First, as with most family law, family remains undefined. For legislation to

---

little to do with a game, as such. In this approach, one need not examine the "essential core in which the meaning of a word is located and which is, therefore, common to all uses of that word. We should, instead, travel with the word's uses through "a complicated network of similarities overlapping and criss-crossing" (*Philosophical Investigations*, 66. Oxford: Basil Blackwell, 1953). See also: Biletzki, Anat and Anat Matar. "Ludwig Wittgenstein." *The Stanford Encyclopedia of Philosophy* (Spring 2020): 1-24. See also Kapusta, Stephanie. "Contesting Gender Concepts, Language and Norms: Three Critical Articles on Ethical and Political Aspects of Gender Non-conformity" (PhD diss., University of Waterloo, 2015); Heyes, Cressida. *Line Drawings: Defining Women through Feminist Practice*. Ithaca: Cornell University Press, 2000.

[970] Card, *Against Marriage and Motherhood*, 5.

[971] GG. Interview with author. Edmonton, Alberta. November 26, 2020.

[972] Patricia Hill Collins. "Will the "Real" Mother Please Stand Up?: The Logic of Eugenics and American National Family Planning." In *Revisioning Women, Health and Healing: Feminist, Cultural and Technoscience Perspectives*, 266-282. Edited by Adele E. Clarke, Virginia Olesen. London: Routledge, 2013.

re-engineer the family, it might first have to define the family or actually eliminate legally defined roles like parent. Second, the expansion of legal parentage did not change existing parental nomenclature. Those wishing to use the language of "mother" or "father" can do so easily. Adding the term "parent" can only take away from the meaning of terms like mother or father if their definitions are rooted in singularity. Thus, critics' issue is not with the erasure of motherhood but the expansion of motherhood. Third, the *AFAEA* is deeply concerned with *creating* legal families, not doing away with families. As Harder explains, while the Progressive Conservatives attempted to amend the legislation by giving parents the opportunity to choose "mother", "father", or "parent" on a child's birth registration, the Liberals and New Democratic Party did not support the motion. As a result, the *AFAEA* references "parents" generally and allows people to "represent themselves to the world and to their children" in a way that reflects their "own desires, social norms and perceived need for social intelligibility."[973]

5.4.2 Best interests of the child

The "best interests of the child" is a long-standing legal test and a commonly used discourse frame by both progressives and conservatives alike. The legal test comes from Article 3 of the *Convention on the Rights of the Child* which states that "the child has the right to have his or her best interest assessed and taken into account as primary consideration in all actions or decisions that concern him or her, both in the public and private sphere."[974] The principle was enshrined in the 1959 *Declaration of the Rights of the Child* (para. 2), the *Convention on the Elimination of All Forms of Discrimination against Women* (arts. 5 (b) and 16, para. 1 (d)), and in a variety of

[973] Harder, *How queer!?*, 322.
[974] United Nations. "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)", *Convention on the Rights of the Child*, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11%20

international laws.[975] The concept of the child's best interest aims to ensure "the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child" and importantly, ""an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."[976] Finally, determining a child's best interest requires attending to their "physical, psychological, moral and spiritual integrity…" in a manner that affirms their personhood.[977]

As a discourse frame, the "best interest of the child" operates in two ways. First, advocates like the Mathers McHenrys draw on the principles advanced by the *Convention* to support legislative changes that affirm children's rights to psychological and emotional safety. In this case, the frame is used to support gender- and queer-equality seeking efforts that support both parents and children. Second, critics use this frame to advance homophobic, transphobic, and sexist narratives about changing family structure (like McVety and Yu). The flexibility of the frame in the debates surrounding Bill 28 demonstrate the dynamism of the discourse and perhaps also, its political limitations. On the one hand, *AFAEA* advocates advanced its merits by asserting that legislative reforms were in the best interests of children. DiNovo relied on this

[975] Ibid., at 2.
[976] Ibid., at 4.
[977] Ibid., at 5. In Canadian case law, the concept appears many times. For example, in *Young v. Young* 1993 CanLII 34 (SCC), [1993] S.C.J. No. 112 (Q.L.), Justice L'Heureux-Dubé says the best interests of the child is a child-centric analysis, and "is the positive right [of the child] to the best possible arrangements in the circumstances of the parties", and should not focus on harm, although the presence or absence of harm may be an important factor (at 102). The test is contextual and future focused encompassing a myriad of considerations. It is "person-oriented" rather than "act-oriented" requiring a consideration of the "whole person viewed as a social being" (at 71). It is important to note that this legal test has also served to subjugate women of colour, Indigenous women, and poor women. Susan Boyd describes how "modern child protection legislation relies on the assessment of risk, based on a belief in the ability to predict future harm to children" and, quoting Karen Swift, she writes "the ideology of risk can distort and deflect attention away from the relations of race, class and gender that are structured into child welfare processes, stripping them of their ideological baggage. single mothers especially are constructed as a 'risk class', 'who can legitimately be intruded upon, scrutinized indefinitely and held to account for their daily activities' (2010: 143)." Indigenous mothers in Canada are painfully aware of the "history of colonialist and racist processes of regulation of indigenous families and yet simultaneously erases this history through the application of the best interests of the child standard (Kline 1993)."

frame several times in legislature by arguing that the *AFAEA* is about children's safety: "It's about the safety of the babies, that parents who are not the birth parents can look after the physical health issues of the child."[978] Here, DiNovo is not simply appealing to arguments about equal rights, but the physical safety, indeed *life*, of children.[979] She also linked children's safety to their parents' equality by arguing that children cannot be safe unless their family structure is legally recognized and affirmed. She said:

> Finally, we're talking about the health and well-being of children who are being born almost as we speak. We need our children to be safe—all of our children… They cannot be safe if their parents are not equal; it's that simple.[980]

Interview participants and advocates of the bill took up the "best interest of the child" to support legislative change. For example, when asked about the role of the state in recognizing and affirming "family diversity", NN said it is *the* sole responsibility of the state to reflect the diversity of its citizens. In fact, NN noted that "when the laws don't reflect the realities of their population, then everybody is hurt."[981] They presented a similar argument to DiNovo and noted that the focus on parents' interests elides the important role that family recognition plays in children's safety and wellbeing. For NN, non-recognition is "damaging to [children] emotionally and it's risky in terms of their security and their safety…" and as a result, the law ought to be "as close as possible to the lived reality of the people that the law is purporting to protect."[982] Another participant, FF, made the case that heterosexual couples could learn from queer parents with respect to considering the best interests of a child. For example, FF described a 10-week program for intended parents that covers topics like how to conceive, look at third parties, co-

[978] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., October 3, 2016 (538).
[979] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., October 3, 2016 (540).
[980] Ibid.
[981] NN. Interview with author. Edmonton, Alberta. February 22, 2021.
[982] Ibid.

parenting options, adoption, surrogacy…. they look at everything. There's so much work that goes into it. I just always say the heterosexual community has a lot to learn about parenting from the LGBTQ family."[983]

The importance of parents' legal recognition, and the discrimination between heterosexual and queer parents, is reflected in *Grand* litigants' affidavits. Benjamin Fitzgerald Howe, who was 13 at the time of his submission, wrote:

> It doesn't make sense to me that our family is treated differently from other families. First, you need to think about what being a parent means. Is a parent necessarily someone who gives birth to you, or is a parent someone who takes care of you throughout your childhood? I know my answer - my parents are the people who love and care for me. Keri Lynn is no less of a parent to me than Carolyn. I have 2 parents who care for me and love me and treat me the same way that any other family would, straight, gay or Lesbian.
>
> It doesn't make sense to me that one parent is not recognized as a parent, whereas the other is, just because she gave birth to me. In Keri Lynn's case, she was forced to go through a tedious process of adoption to be legally recognized as my parent. In the case of a straight family, as soon as a child is born, both parents are immediately recognized from birth. Lesbian and gay families need to be recognized as proper families in the same way.
>
> In our family, Keri Lynn did not have to adopt Sam because she could put her name on his birth certificate. But then we found out that it still didn't mean that she was being treated the same as a straight parent. This is wrong because Keri Lynn should be treated the same as a biological parent.
>
> This situation makes me worry. I wouldn't want Sam treated differently than me because I have an adoption order and he does not. We are brothers. We have the same moms. It's really hard to know that Sam isn't as protected as me around who his parents are.[984]

His affidavit reflects an intimate understanding of the impact of differential legal recognition on the health and wellbeing of his younger brother. His words also demonstrate that "no childhood takes place entirely outside of heterosexuality; childhood is given meaning and produced through

[983] FF. Interview with author. Edmonton, Alberta. January 27, 2021.
[984] Ontario. Legislature. Standing Committee on Social Policy. Submission (Benjamin Fitzgerald Howe). Exhibit No. SP41-2/01/063. October 18, 2016.

it."[985] That is, even for children raised in queer families, the primacy of heterosexuality as "normal" and "natural" is apparent, understood, and distressing. This argument was made by Intervenors in *M.D.R.* (which was then cited in *A.A. v. B.B.*) who summarize the importance of legal parentage for children and parents. Legal parentage is a "lifelong immutable declaration of status" which allows a parent to meaningfully, and fully, participate in their child's life; a parent must consent to their child's future adoption; legal parentage determines a child's lineage and ensures a child will inherit intestacy; a parent can obtain provincial health insurance and social insurance for their child as well as a passport or airline tickets; a parent can register their children in school and make decisions surrounding their health and wellness; and a parent can confer citizenship.[986]

In their interview, GG affirmed that a family's security is intimately connected to the rights that parents have to their children, "including the children they're not genetically related to or the ones they didn't gestate." [987]

The expansion of legal parentage is particularly important for queer and trans communities and was a focus for proponents of the *AFAEA*. Responding to McVety's remarks, and conservative Christian backlash generally, DiNovo reframed Christian duty as one that calls on Christians to "protect" children. She uses this argument to assert that protecting children, as a "call to us from God," extends to trans and queer children because they are at greater risks for harms like suicide.

> I would say to anyone who professes faith of any kind, certainly all of our scripture professes love and calls upon us, no matter what our faith, to love our neighbour as ourselves. And guess what? Some of our neighbours are LGBTQ2S. We are called upon—in fact, it is our duty—to love them, and love means accepting them and treating

[985] Mamo, *Queering Reproduction*, 225.
[986] *A.A. v. B.B.,* 2007 ONCA 2 at 14. See also: *M.D.R. v. Ontario* (Deputy Registrar General), 2006 CanLII 19053 (ON SC), <https://canlii.ca/t/1nhs7>.
[987] GG. Interview with author. Edmonton, Alberta. November 26, 2020.

> them as you would someone in your family, someone like you. That's what it calls us to do. Anything short of that is not faithful. It's not faithful. Can I repeat that again? It's not faithful, and particularly where children are concerned, it's not faithful. When we think of what all of the world's holy books have to say about children, we get that message loudly and clearly: It is our duty as adults to protect all of our children, whatever family they are born into, whatever they look like, whatever their families look like. That is a call to us from God.[988]

For McVety, and those like him, children need protection *from* queerness. This position assumes that queerness is a form of harm but also that children are born straight and cisgender. According to this argument, the bill compromised children's safety by "creating uncertainties"[989] and "[ignoring] children's interest in knowing their [genetic] origin."[990] Henry and Elaine Togeretz, from Lynden, Ontario wrote to the Standing Committee to express their (presumably shared) aversion to the proposed amendments. In a co-signed email they urged the Committee to think about the "natural state of humans" which requires a "male and a female" to conceive *and* that it is in a child's best interests to be raised by the same genitors, in a "loving, committed, marriage relationship."[991] Their plea referenced a Catholic psychiatrist's declaration that the "deliberate deprivation of a father or a mother" from a child as "state-sanctioned child abuse" as well as the American College of Pediatricians ("ACP") 2013 research that "homosexual parenting" is "inappropriate, potentially hazardous to children, and dangerously irresponsible."[992] Like other critics, they deployed a slippery slope argument and asked what would come after passing Bill 28, notably, "should we change our laws to reflect every request by minority groups?"[993] Like

---

[988] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., November 29, 2016 (1906).
[989] Ontario. Legislature. Standing Committee on Social Policy. Submission (*REAL Women of Canada*). Exhibit No. SP41-2/01/501. November 1, 2016.
[990] Sikkema, John. "Freudian slips can be found in Ontario's 'All Families Are Equal Act'." *LifeSite*. November 28, 2016.
[991] Ontario. Legislature. Standing Committee on Social Policy. Submission (Henry and Elaine Togeretz). Exhibit No. SP41-2/01/008. October 17, 2016.
[992] Ibid. Despite its name, this organization is a conservative association of paediatricians and, is, in fact, a fringe group. The profession is more centrally represented by the *American Academy of Pediatrics*.
[993] Ibid.

the Togeretz's, another Ontario resident, Suzanne Marson, insisted that "the LGBT community" shows "no regard for the rights of the unborn just their own rights" and that Bill 28 does not ensure children's wellbeing but instead is "selfishness on the part of a person longing to be a parent."[994] REAL Women of Canada similarly suggested that Bill 28 "redefines society's understanding of "family" and obliterates the history and blood lines of the family."[995]

As discussed in Chapter 2, these arguments reflect David Vellemen's concern with children's rights to know their origin and the consequences that not knowing one's genitors has on one's psycho-social development. However, as Sally Haslanger argues, the "problem" that Vellemen (and others, like the Toegertz, Marson, and REAL Women) present is difficult to take seriously because children from non-normative families are likely to be as happy (or unhappy) as children from normative families. The issue is not the family structure as such, but the "cultural stigma of not being able to fit the bio-normative model of the nuclear family" and the legal ramifications of non-recognition.[996]

The significance of the "best interest of the child" discourse is eloquently explained by Alexa DeGagne's examination of rights discourse in relation to children. DeGagne suggests that this discourse frame is so significant for three reasons. First, it effectively shifts the public's focus from the sexual relationship between parents and "the claims of homosexuals" to "the needs of the children." Critics of the amendments "continuously enforc[ed] the moral, healthy, and normal nature of the male/female two-parent marriage" which effectively casts non-heterosexual family forms as "less than, and as unworthy of state protections, rights and

[994] Ontario. Legislature. Standing Committee on Social Policy. Submission (Suzanne Marson). Exhibit No. SP41-2/01/010. October 17, 2016.
[995] Ontario. Legislature. Standing Committee on Social Policy. Submission (*REAL Women of Canada*). Exhibit No. SP41-2/01/501. November 1, 2016.
[996] Sally Haslanger. "Family, Ancestry, and Self: What is the moral significance of biological ties?" in *Resisting Reality: Social Construction and Social Critique*, 169. Oxford: Oxford University Press, 2012.

benefits."[997] Second, queer families' right to legal equality is framed as trampling on the rights of the child who is "an innocent bystander with the potential to be a heterosexual, reproducing, contributing member of society."[998] Further, queer folk have "already failed as…proper citizen[s]" since the queer adult is unable to "reproduce moral, healthy, productive citizens…"[999] As a result, the argument goes: "the future citizen should be given rights at the expense of the failed citizen."[1000]

Third, critics' use of the best interest of the child discourse "prioriti[zes] the rights of children to a father and a mother" over national and international children's rights standards enshrined by the *United Nations*, like emotional health and safety, education, basic health care, potable water, food, and freedom from abuse, neglect and exploitation.[1001] The conservative backlash over the *AFAEA* advances a "privatized children's rights discourse" that a nuclear family is the only right children need since " the family can and should fulfill all of the needs of the child."[1002] *AFAEA's* supporters' use of the same discourse frame also worked to privatize children's rights by, once again, asserting that the family (though in this case, the queer family) can *also* provide all the needs of the child. This reflects tensions – that I explore below, drawing on DeGagne's work – between mainstream LGBT organizing and queer social justice projects[1003] as well as the continued privatization of the family (in any form) and the de-sexualization of the queer family.

5.4.3 Making queer history or creating queer inclusion?

[997] Ibid.
[998] Ibid.
[999] Ibid.
[1000] Ibid.
[1001] Ibid.
[1002] Ibid.
[1003] DeGagne, *Investigating Citizenship*, 187.

On November 29, 2016 Yassir Naqvi posted a photo[1004] to his Twitter featuring smiling faces and celebratory cake to mark the occasion of the Bill-28's passage. From left to right in the photo are Yasir Naqvi, Jennifer Mathers McHenry, New Democrat Member of Provincial Parliament Cheri DiNovo (who first introduced the Bill), Kirsti Mathers McHenry, and several young children. The caption said "Yes we had cake to celebrate the passage of "All Families Are Equal Act" - recognizing all parents, LGBT or straight," articulating one of the strongest discourse themes surrounding the *AFAEA*– making queer history. At the core of the Mathers McHenrys' goals for the *AFAEA* was the inclusion of trans and intended multi-parent families. They considered suing the government, given that Radbord and Jennifer Mathers McHenry are litigators, but the outcomes of previous cases (in which Radbord was involved) were narrow remedies, even when the judge declared the law violated equality protections. Instead of pursuing a similar path, the Mathers McHenrys decided against an individual lawsuit.

> We stopped and we said look "if Jennifer and I sue, we're a married couple, or otherwise extremely privileged [and] we're not actually a diverse family, we're pretty heteronormative, or like married queer people who are employers, not radical." So you're going to get a decision for other people like us, or parents, you're not going to get a decision that three parent families are okay, you're not going to get a decision that four parent families are legal."[1005]

Even with these intentions some of the success surpassed expectations. For Mathers McHenry, the most significant contribution of the *AFAEA* was "making parentage queer" by moving towards "redefining parentage."[1006] In particular, the legal recognition of "queer family forms" was a surprise. This included moving away from language like "both sexes" to "all genders" and "mother and father" to "parent". She described the emotional impact of this experience:

[1004] Yasir Naqvi. Twitter post, November 29, 2016, 3:25 PM. https://twitter.com/Yasir_Naqvi/status/803726613833728000.
[1005] Kirsti Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[1006] Ibid.

> We included a lot of queer family forms that at the beginning, frankly, I did not think we were going to get what we got. There were two pieces that really [hit home] when it passed, and when you saw the legislation. It was the consequential amendments– we changed the references to "both sexes" to "all genders". And there was a consequential amendment that just did away with gender binary, we didn't mean to. We didn't set out to do that. But to have every piece of legislation in Ontario now be much more gender inclusive, really brought tears to our eyes and then the other piece that important, was we moved away from this language of "mother and father" to "parent."

In particular, the possibility of four legal parents was a central concern for the Mathers McHenrys. In her interview, Kirsti Mathers McHenry reflects on this process as a place where they "put stakes in the ground" because four-parent families are a common queer configuration. The example she provided was a lesbian couple approaching a gay couple to say "we don't really care whose sperm, and then you guys be the dads we'll be the moms."[1007] In fact, she noted the appeal for sharing responsibilities (and leisure) among four parents: "I think it's genius. I really wish we had done it to be honest– we've got all these friends and the moms just toddle off to Hawaii, and the kids [stay with the dads]."[1008] Beyond the possibilities of child-free vacations, she notes that in multi-parent families there is no sound argument to exclude "biological outsiders" if they identify as a parent and "want in." For her, the *AFAEA* needed to recognize four legal parents: "for us as parents, there is no rational way to distinguish between the situation of the man married to the man who donated sperm and me. We're both biological outsiders, but by marriage participating in this parental activity. And if you're identifying as a parent, you want in. Why would you leave one person out like that?"[1009]

However, selling the public on this configuration was more difficult. She believes this came from how queer, "in the fundamental sense of the word", a multi-parent kinship configuration is. She explained that many straight people would not understand "someone would

[1007] Ibid.
[1008] Ibid.
[1009] Ibid.

have four natural parents, right from the get-go…" and convincing people of this possibility required a tremendous amount of advocacy. Queer and ART families affirm that reproduction does not require heterosexuality and thus, families are not "bound by paternity" or anatomical sexual differences.[1010] The strategy they deployed is common for queer organizing– relying on the "we're just like you" narrative to demonstrate that queerness can also be "normal" and "natural."[1011] She described the strategy in her interview as one that focused on "humanizing" queer parents using language like "our friends" and "using their names, talking about their arrangement in explicit detail." In doing so, they were able to transform the queer family from a hypersexual, amoral configuration to one where there are "kids who are loved by four people from the second they arrive in the world."[1012]

Kristi clearly differentiated between this arrangement from step-parenting or adopting by virtue of the pre-conception intention; in their advocacy they described the process, invoking Berlant's "first comes loves…" frame. In her interview she said, "it's not a step [situation] and it is not an adoption– four people came together and decided to have a child, now there's child and that child has four parents, and here are their names and here's how they're related." Curiously, she also noted that this arrangement "doesn't have to be polygamy, although polygamy is fine" but *also* noted that the four-parent configuration articulated by advocates "is not that far past heteronormative boundaries." In fact, Kristi said that ultimately, advocates presented queer families as "married couples, that was how we sold it."[1013] Her description of the advocacy

[1010] Mamo, *Queering Reproduction*, 193.
[1011] See for example: John D'Emilio. "Will the Courts Set Us Free?" In *The Politics of Same-Sex Marriage*, 39-64. Edited by Craig A. Rimmerman and Clyde Wilcox. Chicago: The University of Chicago Press, 2007; DeGagne, *Investigating Citizenship*; Diane Richardson. "Desiring Sameness? The Rise of a Neoliberal Politics of Normalization." *Antipode* 37, no. 3 (2005): 515-535; and DeWayne L. Lucas. "Same-Sex Marriage in the 2004 Election." In *The Politics of Same-Sex Marriage*, 243-272. Edited by Craig A. Rimmerman and Clyde Wilcox. Chicago: University of Chicago Press, 2007.
[1012] Kirsti Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[1013] Ibid.

strategy involves a curious slippage from affirming how queer four-parent families are to how "normal" they are– married couples who are only a slight extension of heteronormativity. One could argue that this political strategy is just that, a strategy, and one that follows a similar trajectory to mainstream lesbian and gay successes like equal marriage. I argue that the strategy was effective not simply because it relied on normalizing queerness but because the family form they advanced is *not* queer. As Kristi noted, four intended parents are a modest departure from the dyadic heterosexual standard and mimics many "blended" step-families. In her examination of *Proposition 8*, DeGagne argues that American social conservatism's reliance on the patriarchal, heteronormal family required equal marriage activists to "assimilate to or resist" these discourses. The articulation of the "idealized heteronormal family, complete with designated normalized gender and sexual identities, roles and responsibilities" was an assimilation strategy used by same-sex marriage activists much like *AFAEA's* advocates. Also like mainstream same-sex activists, *AFAEA* proponents argued that multi-parent families are just like two-parent parent families and the expansion of legal parentage is the next step in equality for non-heterosexual families.[1014]

In another move to normalize four-parent families, DiNovo argues that the multi-parent families the *AFAEA* envisions are no different than "every divorced heterosexual couple who then remarries." Her claim was that four-parent families are *not* "a completely revolutionary idea" or a "social experiment." Though the reference to divorced, and re-partnered, heterosexual couples is not the same thing as the legal recognition of four parents, the rhetorical strategy is designed to normalize the queer family.[1015] In fact, DiNovo goes so far as to say that the expansion of legal parentage is "just equality" while also stating that bill 28 represented an

[1014] DeGagne, *Investigating Citizenship*, 5.
[1015] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., November 29, 2016 (1905).

important part of queer history and one that was long overdue. She said that the road to bill 28 has a "long history" fraught with political losses and lost lives. DiNovo's argument draws a connection between the expansion of legal parentage to historical queer moments like the HIV/AIDS crisis and discriminatory blood donation bans and contemporary issues like suicide rates in trans communities.[1016] She said "It's a long history that has brought us here, a long history, and it has been a hard-won history. We've lost a lot of people in that history, and by "lost" I mean actually lost. Without going into the AIDS crisis… But today we have a chance to do something to move us ahead, and that is, let's pass this bill."[1017] She added that the current political climate makes it even more important for equal rights to be enshrined in the law by noting that many countries still have laws against queer sexualities and many queer people still experience violence because of their sexuality (within, and not far from, Canada). In fact, DiNovo argued that the "post-Trump" world demands citizens to "have the courage" to "resist those very forces." She actually notes that some of the critics who surfaced during bill 28's debate were her "old adversaries" on equal marriage debates.[1018]

Other MPPs lauded the efforts while also begrudging the amount of time it took the province to respond meaningfully to years of legal decisions like equal marriage, *AA v. BB*, *Rutherford*, and then *Grand*. Catherine Fife made similar remarks to DiNovo by reminding the House that the expansion of legal parentage is part of a historical equal rights legacy and that it was "incumbent" on legislators to ensure *AFAEA's* success given that over a decade had passed since the Ontario Court of Appeal ruled that the province's parentage laws were discriminatory.[1019] Fife also called attention to the rather embarrassing reality that the courts had

[1016] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., October 3, 2016 (531).
[1017] Ibid.
[1018] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., November 29, 2016 (1904).
[1019] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., October 3, 2016 (531).

to demand the province to "do its job" to ensure equality for Ontario's parents.[1020] The messages of equality for queer families was echoed several times by Yasir Naqvi during legislative debates. Naqvi's comments carefully set-aside polarizing rhetoric about family reengineering and erasing motherhood to focus on "love", "opportunity", and "equality". For example, he compels the House to commit giving all children "opportunities to succeed and thrive" and to support parents in "doing what parents do: give love to their children."[1021]

He argues that love is the "essence" of bill 28 and the "debate" is no debate at all. In fact, he argues that there is no debate for legislators because the foundation of the bill is "something that is innate to us as human beings."[1022] He also highlighted the importance of gender-neutral language as a step towards equality for queer and trans communities while affirming that those who still wish to use "mother" and "father" can.[1023] He also subtly deploys normalizing language, similar to Mathers McHenry's description of their advocacy efforts, and works to situate diversity as positive. He argued that "whatever shape a family takes, the most important thing is that children grow up knowing that they have the love and guidance of their parents, a strong and stable place to call home, and certainty about whom their parents are."[1024] Once again, advocates use the normality of heterosexuality as the reference point for articulating queer equality. Here, multi-parent families under bill 28 are just as loving, stable, and normal as two-parent (heterosexual) families. Indeed, Naqvi likens the expansion of legal parentage to fundamental human rights much like equal marriage activists. He said, "members of the LGBTQ2+ community must have the same rights as their heterosexual peers: the right to love

[1020] Ibid.
[1021] Ibid.
[1022] Ibid.
[1023] Ibid., (529).
[1024] Ontario. Legislature. Debates. 41st Leg., 2nd Sess., November 29, 2016 (1904).

and marry the person of their choosing, and the right to start and raise a family."[1025] Finally, Naqvi normalizes multi-parent families by suggesting that the province is merely reflecting the diversity that already exists and ensuring that parents can provide for their children in the way they have "always, always done."

While I am a strong proponent of enshrining equality, I am reminded of feminist and queer critiques of "inclusion" in the state. Pauline Rankin's analysis of sexuality and Canadian nationalism points out the long history of mainstream LGBT movement's use of "rights-based" strategies and the tension between queer communities' mobilizing and the homophobic and masculinist undertones of Canadian nationalisms, which affect federal, provincial, and territorial legislation and social policy.[1026] Kathleen Lahey's skepticism in the late 1990s remains a likely hypothesis today: "[d]espite the extension of the *Charter* to sexuality in growing numbers of cases, sexual minorities are now being overwhelmed by the continuing uncertainties of 'incremental discrimination."[1027]

Further, Carl Stychin cautions that lesbians, gays and bisexuals' attempt to construct themselves as "'good' citizens ... that is, 'normal' citizens," has little impact on nationalist discourse.[1028] Over twenty years ago, Rankin speculated that if Stychin was correct – that "an appeal to the heterosexual nuclear family becomes an anchor to grab in an increasingly confusing 'new' world order,"[1029] then queers ought to "brace ourselves for an escalation of the heterosexist nature of pan-Canadian nationalism in our increasingly globalised, neoliberal society." As such, "any reconstituted nationalism among sexual minorities must address the

---

[1025] Ibid.
[1026] Pauline Rankin. "Sexualities and national identities: Re-imagining queer nationalism." *Journal of Canadian Studies* 35, no. 2 (2000): 176-196.
[1027] Kathleen A. Lahey. *"Are We 'Persons' Yet?" Law and Sexuality in Canada*, 342. Toronto: University of Toronto Press, 1999.
[1028] Carl Stychin. *A Nation By Rights*, 3. Philadelphia: Temple University Press, 1998.
[1029] Ibid., 195.

"relational positionality" of lesbians vis-à-vis queer politics, feminism and the patriarchal, homophobic and racist practices of the Canadian state."[1030] Rankin implores queer theorists to produce a "critical analysis of national identities as constantly in flux" so that "new, inclusive, imagined communities" are possible.[1031] She suggests that this project must begin by "re-imagining" discourses "in new and exciting ways that are liberatory for both queer and non-queer communities."[1032]

I argue that the "liberatory" potential of inclusion- and rights-based strategies are limited when they rely on "sameness" or "normalizing" discourses equating queerness with heterosexuality. Harder describes this political tension by pointing out that the "legal recognition of queer relationships and families is a quintessential paradox" precisely because queerness "... resist[s] definition, challenging normative conceptions of how people are expected to represent themselves and relate to others. Queerness is an ongoing critical engagement with social intelligibility. It is unfixed."[1033] To illustrate this point, Harder draws on Judith Butler's exploration of the term "queer":

> if the term "queer" is to be a site of collective contestation...it will have to remain that which is, in the present, never fully owned but always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purposes.[1034]

Harder continues by noting that:

> such fluidity is antithetical to law and to legal recognition; domains in which clear definition is regarded as essential for effective adjudication. Moreover, in the absence of clarity, judges work to insert it, constraining language and rules in the service of order, as much (or more) as justice. Meanwhile, queer families who seek the protection that legal recognition affords –people who "desire the state's desire"– are also pursuing a certain solidity and security (Butler 2004, 111). They desire "to vacate the lonely particularity of

[1030] Rankin, *Sexualities and national identities*, 192.
[1031] Ibid.
[1032] Ibid.
[1033] Harder, *How queer!?*, 6.
[1034] Judith Butler. *Bodies that Matter: On the Discursive Limits of Sex*, 312. London: Routledge, New York: 1993.

> the nonratified relation and, perhaps above all, to gain both place and sanctification in that imagined relation to the state" (Butler 2004, 111).[1035]

One family form that continues to push the boundaries of inclusion and rights-based claims to inclusion are polyamorous families. In their interview, FF hypothesized that legal "challenges from polyamorous families" would be "inevitable." They note that their practice has shifted to mediation and as result, they received a case from a polyamorous family. However, they argue that there is considerable need for law reform when it comes to polyamorous family restructuring and need for input from polyamorous communities, though these gains may not be far off.[1036] FF recalled their skepticism surrounding trans equality and said "and look how quickly that changed." In fact, when they started practicing law, the landscape for lesbian and gay families was dismal:

> I'm not that old but when I started practicing law there was no same sex adoption, no same sex stepparents, no spousal support. There was nothing. And now that's completely changed for same sex couples…I never conceived that there would be equal marriage in my lifetime. I didn't think that that would ever be something that was achievable…[1037]

The tensions revealed in this section reflect Harder's argument that expansions of legal parentage are "examples of positive recognition and continued development that justify the country's positive reputation for queer inclusion."[1038] And yet, this expansion is constrained by limits on recognition that are fundamentally opposed to queerness itself. If queerness is merely a "form of manifesting difference" then the *AFAEA* affirms queerness, however, if queerness is about disruption, resistance, and contestation then there are serious limits to legislation's ability to

[1035] Harder, *How queer!?*, 2.
[1036] FF. Interview with author. Edmonton, Alberta. January 27, 2021.
[1037] Ibid.
[1038] Harder, *How Queer?!*, 324.

welcome queerness. Harder aptly argues that if "queer families desire legal recognition, there is a required sacrifice to legal norms…"[1039]

The expansion of inclusion beyond four intended, pre-conception parents pushes the boundaries of what queer equality and liberation looks like. Though advocates of the *AFAEA* prioritized legal parentage for up to four parents, even Mathers McHenry notes that this is not far beyond the configuration of many heterosexual families. Thus, as Stychin notes, queers are still "'good' citizens ... that is, 'normal' citizens."[1040] This is, perhaps, an illustration of the differences between "mainstream" LGBT activism versus "queer" activism. As Alexa DeGagné explains, queer activism, politics, and theorizing focuses on "challeng[ing] the normalization and regulation of sexualities, genders, and other social categorizations" and "it seeks to dismantle intersecting oppressions, and to produce communities in which the experiences, voices, needs and goals of the most marginalized and vulnerable are prioritized.[1041]

According to DeGagne, queer models of social justice are concerned with four principles: first, challenging the "elevated status of state-sanctioned marriage" (and, I argue, state-sanctioned relationship status more broadly); second, pursuing "alternative avenues" for social justice work, like "communities of care"; third, developing liberation projects concerned with "challenging state practices of *normalization*" and also focusing on "*intersecting* oppressions in relation to sexuality, race, gender identification and expression, physical and mental ability, and income"; and fourth, building "coalitions and solidarity with other marginalized communities."[1042]

[1039] Ibid.
[1040] Stychin, *A Nation By Rights*, 3.
[1041] DeGagne, *Investigating* Citizenship, 371.
[1042] Ibid., 371-378. Emphasis added.

5.4.4 What makes a parent? Are surrogates mothers?

Markens asserts that "because families, and mothers in particular, are believed to play an essential role in creating and socializing future citizens, reproductive issues, practices, and policies are central to how nations view themselves and their prospects for the future."[1043] While much has changed since 1978, when Louise Brown, the first "test tube baby" was born, the practice of surrogate parenting has changed the landscape of how we define parenthood and motherhood. Indeed, "when the process of conception changes, what do the social categories of "woman," "mother," and "family" mean?" And as we explore new social categories, is it possible to "rely on existing cultural values, laws, and beliefs to guide our choices, or are new understandings and legal frameworks required?"[1044] For decades, biological connection was considered paramount to defining legal parentage. Traditionally, the law accords privileged status "to those who are assumed to share an intimate biological relationship with a child based on the understanding of the role biology plays in the creation of parenthood"[1045] and the disruption of that assumed natural relationship reveals the extent to which the law organizes and creates kinship. As Markens points out, these questions are the crux of debates over surrogacy, many of which flared around the *AFAEA*.[1046]

Two primary concerns surrounding surrogacy amendments were raised. First, Dara Roth-Edney, a Toronto area social worker and reproductive counsellor, noted the amendments' assumption that there is a "shared parenting role between surrogates and intended parents."[1047] Roth-Edney's comments are rooted in her professional and personal experiences and she

[1043] Markens, *Unfamiliar Families?*, 3.
[1044] Ibid.
[1045] Roxanne Mykitiuk. "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies." *Osgoode Hall Law Journal* 39, no. 4 (2001): 773-4.
[1046] Markens, *Unfamiliar Families?*, 2.
[1047] Ontario. Legislature. Standing Committee on Social Policy. 41st Leg., 2nd Sess., October 18, 2016 (SP-43).

described these during her Standing Committee submission. Like Kristi Mathers McHenry's description of humanizing and naming multi-parent families, Roth-Edney uses a similar strategy to introduce her remarks by stating that she is the mother of two, born through gestational surrogacy. [1048] She describes her surrogates as "kind and thoughtful" and notes that while she, her husband, and the surrogates have maintained strong relationships, the surrogacy processes were "the most fraught experiences of [her] life."[1049] She recalled that "throughout both pregnancies, and for months after the babies were born, I was reminded that I was not considered to be their mother."[1050] For Roth-Edney, this was painfully apparent when their second daughter's ultrasound revealed "numerous fetal abnormalities" and the doctor refused to discuss these with her and her husband, even though the surrogate was "begging" the doctor to do so. She recalled:

> In his eyes, I had no standing. The dawning realization in both pregnancies that if we had to wait months for a parental declaration to acknowledge my role, that meant there was a chance I would not be recognized at all. To anyone who has not experienced this, I am not sure I can adequately portray how terrifying and heartbreaking it is to not be recognized as your child's parent.[1051]

She continues by noting that it is a "step forward to have intended parents also recognized as parents from birth" but she was also "deeply concerned about providing equal rights to surrogates after birth", which is a concern for both intended parents *and* surrogates.[1052] She described that in her practice, most surrogates do *not* want parenting rights and responsibilities and most intended parents are concerned if surrogates assert parenting rights. She highlighted the "ironic juxtaposition":

[1048] Ibid., (SP-42).
[1049] Ibid.
[1050] Ibid.
[1051] Ibid.
[1052] Ibid., (SP-41).

> … 99% of the surrogates I have ever spoken to are clear that the choice of who the intended parents designate as guardian should be anyone they want, as long as it's not them. The fact that surrogates do not want responsibility after birth for a baby that is not theirs is echoed by their most common apprehension, "What if they don't take their baby?"—ironically juxtaposed with the most common fear of intended parents, which is, "What if she doesn't give us our baby?"[1053]

According to Roth-Edney, shared responsibilities follow the adoption model, where a surrogate is understood as a "birth mother" and someone who "may have intended to parent her baby and needs time to decide if she wants to relinquish her rights."[1054] However, surrogacy arrangements are *not* adoptions. With surrogacy, it is clear from the start that the surrogate has no intention of parenting because she is helping others become parents.[1055] She asked: "if surrogates do not view themselves as mothers to these babies, if intended parents do not view them as mothers, and if children born from these arrangements are not raised by them as their mothers, why would the law establish and, in fact, insist on this role?"[1056]

I argue that there are three interrelated assumptions at work. First, as Roth-Edney pointed out, this model relies on an adoption framework which assumes that surrogates are mothers. Second, and relatedly, if the surrogate is a mother and there are also intended parents, then the responsibilities ought to be shared for a period following the birth of the child. Third, the search for responsibility also reflects the state's need for someone to claim responsibility for children since children are social *and* private subjects. Roth-Edney asserted that the blurring of boundaries between surrogate and intended parents was the result of "assumptions about what a mother is, assumptions about what a father is, assumptions about what a parent is" – assumptions which rest on traditional definitions rooted in biology. However, she noted surrogates are *not*

[1053] Ibid.
[1054] Ibid.
[1055] Ibid.
[1056] Ibid.

mothers because they do not identify as mothers, and they are not going to be raising the children they carry. Roth-Edney's identification as a mother is rooted in her sex identity, intention to parent, and practice of raising her children. She stated "I identify as a mother because I identify as female and I am raising the children that I had intended to have."[1057] Further, motherhood, fatherhood, and parenthood are understood through the concept of belonging: "Who do these children, for a lack of a better word, belong to; who had the intention to create them; who has the intention to raise them?"[1058] Not calling surrogates mothers is not a denigration of their role in creating families or their responsibilities, instead, Roth-Edney argues that thinking of surrogates as mothers is bestowing a title, and set of legal responsibilities, that surrogates do not want.[1059] This argument illustrates Mamo's assertion that ARTs delink reproductive processes that require us to rethink definitions of mother, father, and parent. For example, she argued "A pregnancy doesn't make somebody a mother. Sperm does not make somebody a father. These things are much more complicated than that, much more nuanced…" And yet, she proposes that the answers to this nuance are quite clear; parents are those who intend to be parents, those who are "putting the pieces together" to create a family.[1060]

Roth-Edney's conception of parenthood reflects the overarching aims of the *AFAEA* – that is, families and parenthood are created through *intention*, and more specifically, pre-conception intention. However, the vestige of biology as determinant of parenthood remains. One could argue that the waiting period provides some protection to surrogates and children. However, Roth-Edney asserts that the seven-day waiting period "offers a protection very few, if any, gestational surrogates are asking for." Instead, it forces responsibilities on surrogates that

[1057] Ibid.
[1058] Ibid.
[1059] Ibid.
[1060] Ibid., (SP-43). Emphasis added.

they do not wish to have while "[offering] no realistic protection for parents." The result is that surrogates have rights and responsibilities that intended parents want, and do not have, and the children are left in "untenable and vulnerable positions should there be a medical crisis."[1061] Roth-Edney notes that while the waiting period can be waived, the surrogacy agreements are legally unenforceable, which could nullify the presumed protection offered by the waiting time.[1062]

It is also possible that the "cooling off" period works to guard against the vulnerability of surrogates or fraud, in the case of traditional surrogacy, where a woman uses her own egg because "clinics, lawyers and counsellors are rarely involved in those scenarios."[1063] However, traditional surrogacy is the least common arrangement; most surrogacy arrangements are gestational, requiring the participation of clinics, lawyers, and counsellors, thus building in layers of protection. Sara Cohen, a Toronto area fertility lawyer and Adjunct Professor at Osgoode Hall Law School, was equally disturbed by this provision. In her written submission, Cohen articulated her shock that a surrogate has a seven-day "cooling off period" unless otherwise stated in an unenforceable surrogacy agreement. During the first seven days of a child's life decision-making is shared between the surrogate and intended parents which, for Cohen, is a provision which comes out of left field for its resemblance to adoption models.[1064] This model raises several practical concerns, aside from the theoretical anomaly of treating third party reproduction and adoption as similar structures. For example, Cohen queried how Ontario hospitals would treat surrogates, how disputes would be mediated regarding an infant's care, or

[1061] Ibid. See also: Elly Teman and Zsuzsa Berend. "Surrogacy as a family project: How surrogates articulate familial identity and belonging." *Journal of Family Issues* 42, no. 6 (2021): 1143-1165.
[1062] Ibid.
[1063] Ibid.
[1064] Ontario. Legislature. Standing Committee on Social Policy. 41st Leg., 2nd Sess., October 18, 2016 (SP-38).

what would happen if the surrogate was unable to make medical decisions. The practice, prior to the *AFAEA*, of hospitals respecting the intended parents' wishes would no longer work even though hospitals may not be the best arbiters of surrogacy agreements.[1065]

The *American Academy of Assisted Reproductive Technology Attorneys* (AAARTA) provided a submission to the Standing Committee on Social Policy outlining their own concerns with the surrogacy sections of the bill. The former opposed surrogacy amendments because they removed "judicial oversight" which left surrogates and intended parents open to "potential fraud and exploitation."[1066] The *AAARTA* noted that the unenforceability of surrogacy agreements exacerbated the possibilities of fraud and finally, like Roth-Edney, the *AAARTA* agreed that the adoption-like model of the amendments "[creates] great legal risk for all parties in what should be a legally stable process of family building."[1067] Cohen agreed, stating that the *AFAEA* eliminated judicial oversight and appropriate checks and balances, "demonstrating that it believes absolutely no oversight of any kind is necessary."[1068] This approach was radically different than the federal government's attempt to "add teeth" to its legislation by criminalizing compensation for surrogacy but failing to account for the possibility of fraud and coercion in provincial and territorial jurisdictions.[1069] In addition to "opening the door for fraud and coercion," Cohen believed that Ontario "grossly [misjudged] the on the ground reality, the desperation of people who want children and the vulnerabilities of the parties…" and "[sidestepped] its significant obligations and duties to children and women."[1070]

[1065] Ibid.
[1066] Ibid.
[1067] Ibid.
[1068] Ibid.
[1069] Ibid.
[1070] Ibid.

Several other parties provided submissions on this topic, many of whom shared socially conservative views like those expressed with respect to the best interest of the child and re-engineering the family. However, one comment is particularly noteworthy for its illustration of socially conservative conceptions of family and reproduction. Of the *AFAEA*, Suzanne Marson was also concerned about the requirement of pre-conception agreements. She wrote:

> However, this proposed legislation should be discarded because it gives parental rights under a contract signed pre-conception. No child should be born under a contract. They deserve the right to be born free.[1071]

Ideally, for conservatives like her, children are born under a marriage contract that defines husbands as fathers to any children born to their wives. Even when this is the case, children are not born free. They are entirely dependent upon adults' care, love, and security and they are legally recognized, and bound, to their parents. Marson's critique is then another articulation of the argument that the state is engaging in social engineering, which relies on a profound (or perhaps, willful) ignorance about the history and context of marriage and family law.

The resistance to "contracting" children is something I explored in some of my interviews. One participant wholeheartedly rejected the idea that people are concerned with contracting children. Instead, they argued that the resistance to contracting is actually about not wanting to confront women's historical and contemporary unpaid reproductive labour. In their interview, NN opined that people dislike the idea of "commercializing children" even though sperm donation had been commercial in Canada from the 1950s until the *Assisted Human Reproduction Act* in 2004, when payment became illegal (just like payment for eggs).[1072] The argument then is not about commercializing donations as such, but commercializing certain

[1071] Ontario. Legislature. Standing Committee on Social Policy. Submission (Suzanne Marson). Exhibit No. SP41-2/01/010. October 17, 2016.
[1072] NN. Interview with author. Edmonton, Alberta. February 22, 2021.

kinds of donations: donations from women's bodies.[1073] Compensating surrogates and or embryo donations reveals the work of these contributions and undermines the assumption that reproduction is altruistic. NN described this argument in their interview:

> It does feel to me like women have been doing unpaid work since the beginning of time. And to recognize that surrogacy for example is work, and that it should be paid and compensated, then brings everything into like a whole different realm around women's work and women's responsibility and it does feel like there is this sense that somehow there's something good about a woman who does this altruistically but bad about a woman who doesn't. Which is preposterous...[1074]

Given that surrogacy is still latently understood as a form of motherhood, it remains governed by dominant ideologies of motherhood. Marlee Kline defines "dominant ideologies of motherhood" as "the constellation of ideas and images in western capitalist societies that constitute the dominant ideals of motherhood against which women's lives are judged." These norms create expectations for women that "limit and shape" their choices and construct the dominant criteria of 'good' and 'bad' mothering." Further, these expectations are affirmed and reproduced by "dominant ideologies of womanhood" that maintain "dominant ideologies of family.[1075]

There are three "core expectations"[1076] within the dominant ideology of motherhood that, I argue, come to bear on the presuppositions inherent in the surrogacy amendments. First, motherhood "the natural, desired and ultimate goal of all 'normal' women";[1077] second, "[t]he individual mother should have total responsibility for her own children at all times";[1078] and third, "a mother is expected to operate within the context of the ideologically dominant family

---

[1073] Ibid.
[1074] Ibid.
[1075] Marlee Kline. "Complicating the ideology of motherhood: Child welfare law and First Nation women." *Queen's Law Journal* 18 (1993): 310.
[1076] Ibid.
[1077] Michelle Stanworth. "Reproductive Technologies and the Deconstruction of Motherhood." In *Reproduction Technologies: Gender, Motherhood and Medicine*, edited by Michelle Stanworth, 14. Minneapolis: University of Minnesota Press, 1987.
[1078] Betsy Wearing. *The Ideology of Motherhood: A Study of Sydney Suburban Mothers*, 72. Sydney: George Allen & Unwin, 1984.

form, one that is "heterosexual and nuclear in form, patriarchal in content,"[1079] and based on "assumptions of privatized female dependence and domesticity.""[1080] Surrogacy agreements and pre-conception agreements are then an affront to the "core expectations" of motherhood. Reflecting on the surrogacy regulations in the *Assisted Human Reproduction Act*, NN said that the goal was to ensure women would not be paid to be surrogates but the premise of paying a surrogate is much like paying other labourers for their work. They elaborated by comparing compensation for other parties involved in third-party reproduction:

> I feel like everybody else gets paid; the doctors get paid, the nurses get paid, and the embryologist gets paid, and the lawyer gets paid, and I get paid. I don't see anything wrong with a woman being paid and I think there's a difference between somebody being paid enough that it convinces somebody who wouldn't want to do this to do it, versus somebody who is recognized for what she's doing, which is difficult, and does have risks, and is a burden to her family.[1081]

The catch, though, is that dominant ideologies of motherhood do not recognize childbearing or rearing as work or as a burden. The erasure of women's reproductive labour as work also eschews the gender and class components inherent in surrogacy. NN also reflected on all the ways in which we, as subjects of capitalism, labour in ways we do not want to, but need to for money. For example, they described a story of a surrogate they worked with:

> A surrogate who told me that she lives in a part of the province that has mines and all the men in her family are miners – her brothers, her father, her grandfather, her uncles – they all work in the mines, and many of them have permanent damage and physical health conditions because of working in mines. They'll get paid for it. Clearly if they had the resources, none of them would work in the mines. Who wants to work in a mine if they had the money and didn't have to? But she said it's funny because nobody ever suggests that they're making a choice under undue influence or that they don't know what they're doing, or that they need somebody to make decisions or protect them. But when she said she wanted to be a surrogate, everybody freaked out and they said "why would you do that? You're putting your life at risk." And she's like "I'm risking my life to help

[1079] Ibid., quoted in Kline, *Complicating the ideology of motherhood*, 311.
[1080] Waring, *The Ideology of Motherhood*, 72, citing Chunn, Dorothy. "Rehabilitating Deviant Families Through Family Courts: The Birth of 'Socialized' Justice in Ontario, 1920-1940." *Journal of the Sociology of Law* 16, no. 2 (1988): 137.
[1081] NN. Interview with author. Edmonton, Alberta. February 22, 2021.

> somebody build a family, doing something that I can do while I'm at home when all the men in my family are risking their lives going underground." I think ultimately a lot of this is based on a very misogynistic view of women."[1082]

The confusion over who constitutes a parent, if surrogates are parents, and whether surrogacy and pre-conception arrangements are part of a broader "commercialization of children" reflect the need for social scientists to take reproduction seriously. Over a century ago, Frederick Engels argued that reproduction constitutes "production of human beings themselves" and is "fundamental to the social organization of any society."[1083] As a result, reproductive politics "provide[s] an unusually clear view of the ideological and structural foundation of societies as well as insight into the basis of specific social conflicts."[1084] This discourse theme demonstrates what Markens describes as the "complex, contradictory, and sometimes surprising terrain of discursive politics surrounds the politics of reproduction."[1085] She also notes that while "prevailing understandings of gender and family are not monolithic, uncontested, or even consistently applied", "traditional notions of motherhood are often used by women to promote women's interests."[1086] Though the *AFAEA* did not specifically focus on *women's* equality, DiNovo and others often mentioned equality for *mothers* and that the amendments actually created "more mothers." This was likely both an effective strategy to assuage criticisms about erasing motherhood but it also served to reinforce "more traditional and conservative notions of

---

[1082] Ibid.
[1083] Markens, *Unfamiliar Families?*, 5
[1084] Ibid., citing Engels, Frederick. *The Origin of the Family, Private Property and the State*. Chicago: Charles H. Kerr & Company Cooperative, 1884.
[1085] Markens, *Unfamiliar Families?*, 13.
[1086] Ibid. See also: Ann E. Kaplan. "The Politics of Surrogacy Narratives: 1980s Paradigms and Their Legacies in the 1990s." In *Playing Dolly: Technocultural Formations, Fantasies, and Fictions of Assisted Reproduction*, 116-133. Edited by E. Ann Kaplan and Susan Squier. New Brunswick: Rutgers University Press, 1999; and Ginsburg, Faye D. *Contested Lives: The Abortion Debate in an American Community.* Berkeley: University of California Press, 1989.

and arguments about gender, mothering, and family."[1087] Further, the mobilization of the adoption-model and the unenforceability of surrogacy agreements appear to reinforce dominant ideologies of motherhood.

5.5 Conclusion

In 2017 the case of Elaan and his "co-mammas" made national and international news headlines.[1088] Elaan was born to Natasha Bahkt in 2010 with the assistance of a sperm donor through the Ottawa Fertility Clinic.[1089] At the time, Bahkt's close friend and colleague Lynda Collins supported her as a birth coach ,and after Elaan was born, Collins became a close and active part of Elaan and Natasha's lives.[1090] Later, when Collins was considering adopting, she approached Bahkt with the idea of becoming a legally recognized co-parent to Elaan.[1091] However, because Bahkt and Collins were not in a "conjugal" relationship, Collins was legally unable to adopt Elaan; the provisions in Ontario's *Family and Child Services Act* meant that Collins could not adopt Elaan without Bahkt relinquishing her parenting rights.[1092] Bahkt and Collins brought their case before the courts and included several affidavits from people in their lives who could attest to Collins' serious and on-going role in Elaan's life and her ability to be a

---

[1087] See also: Kathleen M. Blee. *Women of the Klan: Racism and Gender in the 1920s*. Berkeley: University of California Press, 2008; Linda M. Blum. *At the Breast: Ideologies of Breastfeeding and Motherhood in the Contemporary United States*. Boston: Beacon Press, 2000; Judith Stacey. *In the Name of the Family: Rethinking Family Values in the Postmodern Age*. Boston: Beacon Press, 1996; and Verta Taylor. *Rock-a-by Baby: Feminism, Self-Help and Postpartum Depression*. New York: Routledge, 2016.

[1088] See Jan Bruck. "Best friends become first to co-parent in Canada." *BBC News*. March 22, 2017. https://www.bbc.com/news/av/39343045 and Julie Ireton. "Raising Elaan: Profoundly disabled boy's 'co-mommas' make legal history." *CBC News*. February 21, 2017. https://www.cbc.ca/news/canada/ottawa/multimedia/raising-elaan-profoundly-disabled-boy-s-co-mommas-make-legal-history-1.3988464;

[1089] Amanda Jerome. "Ottawa lawyers' declaration of parentage illustrates shift in family law." *The Lawyer's Daily*. February 28, 2017. www.thelawyersdaily.ca/articles/2610/ottawa-lawyers-declaration-of-parentage-illustrates-shift-in-family-law-.

[1090] Ibid.

[1091] Ibid.

[1092] Ibid.

good parent.[1093] Their case was successful and in January 2017 Collins was granted parentage of Elaan.[1094]

The success of their case came shortly after the *AFAEA* came into force and while the expansion of legal parentage was meaningful for many families, non-conjugal and/or post-conception arrangements, like Bahkt and Collins', are not recognized. The lack of recognition for non-conjugal families was a contention for QQ and NN, both of whom felt strongly about the inequality that remains for these families.[1095] In an article co-authored by Bahkt and Collins, they describe their significance of their story:

> The traditional family structure no longer reflects the realities of modern day parenting. As same-sex couples, single parents, blended families, and multiple parent families have demonstrated, non-traditional families can and do provide children with the love, support, and stability they need to flourish. Family law recognizes and protects many such non-traditional family compositions. Given this shift in both society and family law, it makes little sense to deny individuals the latitude to determine which important relationships should be brought within the scope of law."[1096]

Further, they note that there are several historical and contemporary examples of adults, who are not in a romantic relationship with one another, raising children together and forming "networks of care."[1097] This may include aunts, relatives, and family friends who play "essential [roles] in child rearing" when childcare is unaffordable, unavailable, or it is in the best interest of the child and adult to share child rearing tasks.[1098] bell hooks defines the tradition of multiple parents as "revolutionary parenting."[1099] The practice resists the idea that women ought to be the primary

[1093] Ibid.
[1094] Ibid.
[1095] QQ. Interview with author. Edmonton, Alberta. February 9, 2021; NN. Interview with author. Edmonton, Alberta. February 22, 2021.
[1096] Natasha Bakht and Lynda M. Collins. "Are You My Mother: Parentage in a Nonconjugal Family." *Canadian Journal of Family Law* 31 (2018): 148.
[1097] Ibid.
[1098] Ibid.
[1099] hooks, bell. *Feminist Theory: From Margin to Center*, 2nd edition, 144. Cambridge: South End, 2000.

caregivers and that parents are coupled, heterosexual, biologically related to their children.[1100] She explains:

> Child care is a responsibility that can be shared with other childrearers, with people who do not live with children. This form of parenting is revolutionary in this society because it takes place in opposition to the idea that parents, especially mothers, should be the only childrearers. Many people raised in black communities experienced this type of community-based child care. Black women who had to leave the home and work to help provide for families could not afford to send children to day care centers and such centers did not always exist. They relied on people in their communities to help. Even in families where the mother stayed at home, she could also rely on people in the community to help. She did not need to go with her children every time they walked to the playground to watch them because they would be watched by a number of people living near the playground.[1101]

As Bahkt and Collins state, multi-parenting is both revolutionary *and* evolutionary. The " communal caring for children by numerous people in addition to biological mothers" is also called "alloparenting."[1102] According to anthropologist Sarah Blaffer Hrdy, alloparenting dates back thousands of years and kinship care is historically characterized by cooperative care of children.[1103] Hrdy argues that humans would never have evolved if women were required to raise children on their own; because humans are dependent for many years, mothers had to rely on non-biologically related social support to help raise their children.[1104] Bahkt and Collins suggest that this practice "has seen a resurgence" and in many Western jurisdictions, "adults are similarly seeking multiple paths to family formation, including intentional *non conjugal* parenting units…"[1105]

[1100] Ibid., 144-145.
[1101] Ibid.
[1102] The *Oxford English Dictionary* defines alloparent as "An adult animal or person involved in parent-like care of an individual which is not his or her offspring." (The Oxford English Dictionary, sub verbo "alloparent.")
[1103] Sarah Blaffer Hrdy. *Mothers and Others: The Evolutionary Origins of Mutual Understanding*, 32. Cambridge: Belknap Press of Harvard University Press, 2009.
[1104] Ibid., 270.
[1105] Bakht and Collins, *Are You My Mother*,143. *Emphasis added*.

A keen interest in recognizing non-conjugal relationships was reflected in Kirsti Mathers McHenry's interview. She asserted that the goal of their work on the *AFAEA* was to "set the stage for different kinds of family forms as well" and that the "next frontier" in family law would be exploring non-conjugal relationships and the extension of legal rights, responsibilities, and benefits to those in non-conjugal relationships. In fact, she noted that the Covid-19 pandemic has punctuated the need for reliable childcare and the enormous responsibilities that caregivers have. In a time when many families were thrown headfirst into circumstances where they would benefit from extended networks of caregivers, it is unusual that the state continues to articulate a narrow understanding of parentage. She said:

> Why do we care if people sleep together? And in the time of COVID, where parenting is so onerous, demanding, overwhelming, and impossible to reconcile with any kind of paid for care, why don't we all have six parents? Why are we putting up barriers to more parents loving kids? And then in a time of broken marriages and remarriages we need a framework that's adaptable. I think if you just went back to what is in the best interests of the child– which is supposed to be the test we all care about– more adults caring about them and available to them is not bad.[1106]

In fact, many of these arrangements have been showcased in popular television shows like "Full House." Kristi Mathers McHenry noted that she and her family had begun re-watching shows like "Full House" and "Sister Sister" where parents are in non-conjugal relationships. She reflected on how "surreal" it was to see these shows, and their depiction of functioning, non-conjugal families, against a backdrop of contemporary legal constraint of those relationships. She said, "It's really surreal to watch those shows because you're like "why would we make that harder, why wouldn't you give tax benefits to Joey and Jesse when they move in with Danny to raise his three daughters?" Why would we keep those family units in artificial boxes that just limit the resources available and limit the support available?"[1107]

[1106] Kirsti Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.
[1107] Ibid.

These questions are profound and pressing: why is the state concerned about sex? And, why is the state concerned about sex when children are present? It is clear that the traditional nuclear family "no longer reflects the realities of modern day parenting" (though, as Stephanie Coontz and bell hooks note, this model was always a myth, and when present, only available to White middle class families).[1108] Bahkt and Collins argue that because "same-sex couples, single parents, blended families, and multiple parent families have demonstrated non-traditional families can and do provide children with the love, support, and stability they need to flourish" and so denying "individuals the latitude to determine which important relationships should be brought within the scope of law" is illogical and impractical.[1109] However, as I explore further in the following chapter, the presence, absence, and quantity of sex present in family relationships continues to be a significant site of consternation for the state. What does the absence of sex between co-parents say about the significance of the family, the possibility of kinship, and the nature of relatedness? Perhaps, in addition to multi-parentage in the context of polyamory, non-conjugality tests the very foundations of social assumptions about what family and kinship ought to look like and the state's investment in producing and reproducing particular family forms.

In her survey of "queering reproduction," Laura Mamo describes the impact of assisted reproductive technologies on kinship:

> What started in the 1970s as an unintended convergence of sex without reproduction and reproduction without sex has produced some fundamental questions regarding intimacy: what constitutes a family? What and who is a mother, a father?[1110]

[1108] Bakht and Collins, *Are You My Mother*, 143. See also: Coontz, Stephanie. *The way we never were: American families and the nostalgia trap*. New York: Basic Books, 1992; hooks, bell. *Feminist Theory: From Margin to Center*. London: Pluto Press, 1984.
[1109] Bakht and Collins, *Are You My Mother*, 148.
[1110] Mamo, *Affinity Ties as Kinship Ties*, 222.

Additionally, the increased availability and use of assisted reproductive technologies also prompted families, legislators, elected officials, and lawyers to consider questions of "relatedness" like "how is relatedness formed and given meaning?" and "in what ways do blood and genes signal relatedness?"[1111] Of particular importance to my research is exploration of the ways in which dyadic heterosexual parenting (generally understood as "normal and natural") and queer multi-parenting is regulated and understood.[1112] Mamo suggests that kinship "is a kind of doing, an assemblage of meanings and practices that are interlinked with other cultural, social, political, and economic phenomena" and that the boundaries between "the biological" and the "social" are much more porous than traditional social scripts about family, conception, and the state depict.[1113] In fact, the findings from her study of lesbian families' use of assisted reproductive technologies demonstrated the "decentering" of "traditional notions of family, kin, and belonging."[1114]

This chapter presents different findings. Like BC's *FLA*, ON's *AFAEA* raised similar questions about parentage, kinship, genetics, and relatedness, especially in its foregrounding of queer families and multi-parent families. The result is a re-centering of traditional notions of family, kin, and belonging. This reflects the reality that much of LGBTQ politics are concerned with expanding access to citizenship rights such as the rights to be married, to divorce, to pass benefits to one's partner at one's death, to adopt children, to visit one's partner in a hospital, and so on" but as Mamo highlights, these efforts are also really about "belonging and recognition." However, these efforts come with a "price tag": "who will one recognize as legitimate members

[1111] Ibid.
[1112] Ibid.
[1113] Ibid., 223.
[1114] Ibid.

of societies? How will one know who to let in and who to keep out?"[1115] The pursuit of belonging and recognition "troubles the "normal"" and works to "destabilizes traditional relationships between (hetero)sexuality and membership within the polity.

Feminist and queer scholars have long critiqued the patriarchal, heteronormative family and its centrality to the state and the law, and feminist scholars, in particular, have demonstrated how "traditional common law approaches to the family have privileged white, able-bodied, middle-class, heterosexual families (and white, able-bodied, middle-class, heterosexual men in particular)."[1116] The *All Families Are Equal Act* could not have happened were it not for cases like *M v. H., A.A. v. B.B.,* and *Grand v. Ontario* and "the decades of work of countless advocates for alternative family forms, including those involving single parents, same-sex couples, multi-generational families, and parents who make use of reproductive technologies."[1117] Alas, the legal context necessarily constrains how far families can depart from the norm. Clearly, families can get a fair distance, but the power of the norm itself remains.

In the following chapter, I examine legislation, case law, and social policy concerning multi-parentage in the context of polyamory and polygamy in Canada. I explore the tension between Western states' "vigorous" imposition of heterosexual monogamy – as a part liberal democratic and gender equality– and the disavowal of polygamy for its "potential to exploit women and children, and its thwarting of the democratic ideal,"[1118] explored in *Reference re: Section 293 of the Criminal Code of Canada*. Nestled uncomfortably between the two is polyamory – the "ethical" practice of non-monogamy – a kinship arrangement that was found to be *in* the best interests of the child in two recent cases: a 2018 Newfoundland and Labrador

[1115] Ibid. See also: Michael Warner. *The Trouble with Normal*. New York: The Free Press, 1999.
[1116] Bakht and Collins, *Are You My Mother*.
[1117] Ibid., 107.
[1118] Harder and Thomarat, *Parentage law in Canada*.

Supreme Court decision, *C.C. (Re)* [2018] NLSC 71 Carswell Nfld 110 and a 2020 British Columbia Supreme Court Decision *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767.

CHAPTER 6: THE FUTURE (AND HISTORY) OF MULTI-PARENT KINSHIP IN CANADA

6.1 Introduction

The previous two chapters examined the expansion of legal parentage in British Columbia and Ontario and found that their respective legislation governing parentage – the *Family Law Act* and *All Families Are Equal Act* – made positive, but narrow, moves towards expanding legal parentage. In both cases, legislation is grappling with multiplicity – the shift from a narrow monogamous frame to a multiple parent frame and the degree to which conjugality figures into legally recognized parentage. This chapter shifts the focus from reproductive technologies to *social* technologies. At the centre of this tension – between accommodating scientific advances and questions of alternative moral structures for how we live together – is the question of how we raise children and the relationships among conjugality, kinship, race, and the nation.

In this chapter, I examine three legal cases concerning parental multiplicity in Canada: *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [*Polygamy Reference*] and two provincial court decisions concerning polyamorous parentage: 2011 BCSC 1588, *C.C. (Re)*, 2018 NLSC 71 [*C.C. (re)*] and *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767 [*BCSC 767*]. The assertion that intimate life is governed by the state challenges mainstream conceptualizations of liberalism's "public private divide."[1119] These cases clearly reveal the role of the state in "regulating intimacies" as well as the state's flexibility in "shifting the boundaries" between the public and private. The shifting boundaries work to accommodate, affirm, or reproduce forms of idealized intimacy along lines of race, gender, class,

[1119] Debra Thompson. "Racial ideas and gendered intimacies: The regulation of interracial relationships in North America." *Social and Legal Studies* 18, no. 3 (2009): 354.

and sexuality.[1120] As Debra Thompson points out, the governance of race and gender has been a key site through which states have "identif[ied] familial intimacy as a site of power."[1121] Adjacent to these forms of regulation are also expansions of, or seeming challenges to, norms surrounding intimacy in Canada.

In the *Polygamy Reference* (2011), Justice Bauman ruled that s. 293 of the Criminal Code – prohibiting polygamy – is consistent with the *Canadian Charter of Rights and Freedoms* (except where it pertains to minors under the age of 18). Further, he found that where s. 293 breaches freedoms under the Charter, the breach is justifiable in a "free and democratic society,"[1122] s. 293 supports the "institution of monogamous marriage,"[1123] and advances Canada's international human rights obligations to protect women and children.[1124] A few years later, in 2018, a Newfoundland and Labrador Judge handed down another multi-parent verdict in *C.C. (Re)*, granting legal parentage to three adults in a polyamorous relationship with one another. And then in 2021, a BC Supreme Court judge made a similar declaration, noting that the *FLA* clearly did not envision polyamorous relationships (*BCSC 767*). In *C.C. (Re)* and *BCSC 767*, both judges cited the best interests of the child, the limitations of existing legislation, and the need for legislation to catch-up to changing family forms. Notably, both judges cited *AA v. BB*– one of the significant decisions leading to the *AFAEA*, explored in Chapter 5– and argued that these polyamorous parents could, indeed, act in the best interests of their children.

Thus, in addition to expanding legal parentage to families using ARTs, many of whom are queer, in some cases the law can envision polyamorous multi-parentage. These cases do not

[1120] Ibid.
[1121] Ibid.
[1122] *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at 1352.
[1123] Ibid., at 1350.
[1124] Ibid., at 1351.

represent a wide-ranging social transformation but are indicators of a shift in the ways in which parentage can be captured by the law. Now parentage need not be rooted in dyadic conjugal relationships, but can allow for tryadic ones, too. However, there are still limitations on the state's imagination here. I argue that these happy throuples' success was largely because their conjugal configurations affirmed hetero- and homonormative scripts for intimacy, mirrored dominant ideologies of motherhood, and relatedly, provided easily recognizable (and gendered) parental roles for the state to recognize and affirm. The result is that Justices Fowler and Wilkinson affirmed the possibility and normality of poly-conjugality and the possibility that this arrangement is in the best interests of the children. In contrast, Justice Bauman perceives polygyny's poly-conjugality as deviant, a threat to the nation, and harmful to women and children. And yet, both polyamory and polygyny exist on a spectrum of poly-conjugality. The differences between the relationship structures are less distinct than the differences in their (shifting) social locations. Polyamory's increasing visibility and moves towards inclusion *require* the ongoing exclusion and denigration of "other" forms of poly-conjugality, like polygyny.

To explore the tensions and possibilities these cases present, this chapter proceeds in four sections. First, I present a brief history of poly-conjugality in Canada and the state's role in governing the form and subjects of marriage. Second, I analyze the state's role in criminalizing polygyny – including the racialized and gendered discourses surrounding these decisions. I focus on the *Polygamy Reference* to examine the ways in which multiplicity in parenting is constrained by monogamy. Third, I turn to the increasing visibility of polyamory, and more specifically, 'poly parentage' to demonstrate how the parents in *C.C. (Re)* and *BSCS 767* are granted legal parentage because of their conjugal arrangements. Woven throughout, I present the findings from

my discourse analysis, culled from interview transcripts, legal documents, government reports and statements, and news media. Fourth, I conclude by arguing that multi-parentage in Canada becomes a problem in two circumstances: if the conjugal relationships between the parents do not follow a heteronormative and "monogamish"[1125] script, or if the structure of the family challenges the logic of parentage as a special form of property relationship.

6.2 The multiplicity and meaning of 'poly' in Canada

This chapter is centrally concerned with multi-parent kinship arrangements in the context of polygamy (and more specifically, polygyny) and polyamory. As outlined in Chapter 2, polygamy is an umbrella term that refers to plural marriage in two contexts– polygyny, the marriage of one man to many wives, and polyandry, the marriage of one woman to many husbands. Generally, when references are made to poly*gamy*, the speaker is discussing poly*gyny*. And, indeed, in Canada there is no evidence of polyandry. This chapter explores polygynous multi-parentage and henceforth uses the term polygyny or polygynous, unless quoting directly.

Under international human rights law, there is a consensus that polygyny "violates women's right to be free from all forms of discrimination."[1126] While there is a significant body of literature on the harms of polygyny to women and girls, there are also compelling critiques of the condemnation of polygyny on the grounds of "harms to women," since women lack other forms of de facto equality.[1127] A narrow and exclusive focus on the harms of polygyny to women and girls ignores sources of women and girls' oppression outside the family as well as the fact

[1125] As outlined in Chapter 1, this term was coined by Dan Savage to describe his own marriage where he and husband Terry Miller "[allow] occasional infidelities, which they are honest about." See Oppenheimer, Mark. "Married, with Infidelities." *New York Times Magazine* June 30, 2011. https://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html
[1126] Rebecca Cook and Lisa Kelly. "Polygyny and Canada's Obligations under International Human Rights Law." *Family, Children and Youth Section Research Report, Department of Justice*. September 2006: 1.
[1127] Ibid., 2.

that monogamous relationships are hardly a bulwark against harm.[1128] Carissima Mathen argues that this lens "distorts the reality of gendered oppression within marriage" in order to make the case of "the feared and hated practice of polygamy." Thus, to uphold the primacy of monogamy, "women's inequality is erased from juridical consciousness."[1129] My study of polygyny endeavours to think critically about forms of oppression and marginalization that exist within the practice, without reducing polygyny to oppression.

My interest in polygyny is two-fold. First, polygyny has a long history of being criminalized and stigmatized in Canada and the regulation of this form of intimacy is inextricably linked with conceptions of race, class, gender, and sexuality. However, the fervour with which the Canadian state opposes polygyny is at odds with the number of practitioners (historical and contemporary) and rests on shaky assertions about the harms of polygyny to the state and citizens. Even in the *Polygamy Reference*, Justice Bauman's conclusions draw on minimally satisfactory evidence about the necessity of monogamy for a democratic state. Evidently, polygyny does symbolic work for the liberal state in reaffirming the deviant sexual "other" against the increasingly acceptable monogamish sexual citizen. Second, polygyny is an obvious site of multi-parentage. In a time when Canadian jurisdictions are expanding the legal recognition of multi-parentage, polygyny continues to be unthinkable. Why is it that multi-parentage in the context of polygyny a moral taboo and legal crime while legal parentage is being expanded in other contexts?

In my analysis, I am attentive to the ways in which discussions of polygyny, including the cultures and people who practice it, are singularly focused on the discourse of harm.[1130] But,

---

[1128] Carissima Mathen. "Reflecting Culture: Polygamy and the Charter." *Supreme Court Law Review* 57 (2012): 373.
[1129] Ibid.
[1130] Nathan Rambukkana. "Mapping Polygamy." In *Fraught Intimacies: Non/Monogamy in the Public Sphere*, 77. Vancouver: University of British Columbia Press, 2015.

as Angela Campbell's work demonstrates, there are a multiplicity of ways in which members of polygynous communities experience their lives. The "assumption that all of polygamy's stories are reducible to one master-narrative" undermines the autonomy and diversity of participants' experiences.[1131] In her cross-cultural study of the lives of women and children in polygynous families, Campbell states:

> Given the diversity within the global community of women in polygamous marriages, it is extremely difficult to draw a single, unqualified conclusion as to how women experience polygamy. While some women might suffer socially, economically and health-wise as a result of polygamous life, others might benefit. The way in which a woman experiences polygamy will depend largely on a number of social and cultural factors, such as the number of co-wives she has and her relationship with them, cultural perceptions of polygamy, and her role and responsibilities within her marriage and family.[1132]

Taking Campbell's assertions seriously, this chapter is attentive to the "complex and complicated, fraught and frustrating intimate spaces of polygamous non-monogamy" and other practices of non-monogamy, like polyamory.[1133] The case I make for considering polygyny in nuanced ways is not a case *for* polygyny (in the same way that I do not make a case for polyamory), but an invitation to consider how cultural readings (including legal decisions) of polygyny are influenced by gendered, racialized, and property-infused logics.

If Canadians think polygyny is the ugly stepsister in the idealized family, polyamory may be the eccentric first cousin. Defined by Elizabeth Sheff, polyamory involves "consensual openly- conducted, multi- partner relationships in which both men and women have negotiated access to additional partners outside of the traditional committed couple."[1134] This form of

---

[1131] Angela Campbell. "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis," in *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports*, Report #1, i–63. Ottawa: Status of Women Canada, 2005.
[1132] Ibid.
[1133] Rambukkana, *Fraught Intimacies*, 77-78.
[1134] Elizabeth Sheff. *The Polyamorists Next Door: Inside Multi-Partner Relationships and Families*. London: Rowman & Littlefield, 2013: 1

intimacy is increasingly represented in media, but Christian Klesse found much of the coverage affirms "stereotypes, titillation or excoriation."[1135] For example, John Paul Boyd suggests that for many, "TLC's *Sister Wives* and the infamous Canadian religious community in Bountiful, British Columbia" are the examples that surface during discussions of polyamory.[1136] There are, however, some important distinctions to be made between polyamory and the practice of polygyny (though, as I will argue, there are more similarities than differences).

Bountiful is a community of Fundamentalist Church of Jesus Christ of Latter-Day Saints observers where polygyny is the dominant and idealized marriage practice that is "mandated by scripture and distinctly *patriarchal*."[1137] By contrast, those in polyamorous relationships (according to recent Canadian survey data), are not carrying out polyamory as a representation or connection to spirituality and generally purport their commitment to equality among partners (regardless of gender, sexuality, or parental status).[1138] Moreover, polygyny is a form of marriage that is strictly between one husband and many wives, whereas polyamory does not require marriage and there is no set structure along gendered or hierarchal lines.

However, one must not assume that polyamory is inherently equitable while polygyny is not. Unfortunately, this assumption is often advanced in writing on polyamory that eschews analysis of its own power relations.[1139] Justice Wilkinson suggests that polyamorists might find this critique "jarring" because polyamory "often defines itself as "ethically superior" to what it

---

[1135] Christian Klesse. "Contesting the culture of monogamy: consensual nonmonogamies and polyamory." In *Introducing the New Sexuality Studies*, edited by Nancy L. Fischer and Steven Seidman, 326. New York: Routledge, 2016 and "Theorizing multi-partner relationships and sexualities– Recent work on non-monogamy and polyamory." *Sexualities* 21, no. 7 (2018): 1117.
[1136] Ibid.
[1137] Ibid.
[1138] Ibid.
[1139] Shelley M. Park. "Polyamory Is to Polygamy as Queer Is to Barbaric?" *Radical Philosophy Review* 20, no. 2 (2017): 297-328.

considers less ethical or less enlightened forms of intimacy." [1140]And yet, the critique is salient precisely because mainstream poly discourse often centers the sexuality of White western affluence. Jin Haritaworn, Chin-ju Lin, and Christian Klesse identify three central problems in contemporary, mainstream poly writing:

> First, the produced discourses are frequently unaware of their capacity for setting up their own regimes of normativity. Second, they tend to endorse an abstract individualism at the expense of critiquing the structural power relations around race/ethnicity, gender, sexuality, and class ... Third, the posited universalistic model of affect ties in with an imperialist model of the West as sexually and emotionally advanced and superior.[1141]

Rambukkana suggests that these factors "largely evacuat[e] questions of power relations."[1142] In this chapter I work to address this gap by articulating the relations of power that render certain forms of 'poly' intelligible and others criminal. While the *Polygamy Reference*, on the one hand, and *C.C. (Re)* and *BCSC 767* on the other, appear to be diametrically opposed, the decisions in these cases affirm the centrality and desirability of monogamy to the Canadian state. Further, Lois Harder and Michelle Thomarat illustrate that the state's interest has less to do with "protecting" women and children than it does with protecting democracy. In the context of multi-parentage, Harder and Thomarat argue that the state's limit of two official parents, in a monogamous relationship, is a "sticky conceptual bond" premised on the "victory" of Western liberal democracy.[1143] They explain:

> This bond, according to some theorists of the western liberal tradition, is indicative of the triumph of the Enlightenment's freely choosing individual over the social constraints of inherited status. The uniting of two people, and only two people, in matrimony, has been claimed as a defining feature of liberal democracies, a key distinction between the egalitarianism of the west and the patriarchy of the rest, in which the specificity of attraction to one's singular beloved defines the break between a society oriented towards

[1140] Eleanor Wilkinson. "What's Queer about Monogamy Now?" In *Understanding Non-Monogamies*, edited by Meg Barker and Darren Langdridge, 245. New York: Routledge, 2010.
[1141] Haritaworn, Jin, Chin-ju Lin, and Christian Klesse. "Poly/logue: A critical introduction to polyamory" *Sexualities* 9, no. 5 (2006): 519.
[1142] Ibid.
[1143] Lois Harder and Michelle Thomarat. "The Law and the Parent: the Numbers Game of Standing and Status." *International Journal of Law, Policy and the Family* 26, no. 1 (2012): 66.

> choice and futurity, and one mired in the heavy obligations of its genealogical past (Povinelli 2006, 210).[1144]

Clearly, "monogamous marriage as the embodiment of liberal equality" is a farce but, as Harder and Thomarat demonstrate, "the vigor with which western states have imposed the monogamous norm" indicate the state's attachment to monogamy as an expression of equality, liberalism, and democracy.[1145] This "legal fiction" is supported by laws surrounding inheritance, of property, wealth, and citizenship, and is "directly tied to the heterosexual, monogamous marital, or at least marriage-like, form."[1146] Further, the fiction is present in the *Reference*, *C.C. (Re)*, and *BCSC 767*. In the *Polygamy Reference*, monogamy, and by extension, the sanctity of the Canadian state, is reinforced through the denigration of polygyny. In *C.C. (Re)* and *BCSC 767*, monogamy is upheld through a modest expansion of its terms, by recognizing two monogamish families who mirror other components of the idealized Canadian family like heterosexuality, idealized femininity and masculinity, hetero- or homonormativity, and parentage as a special form of property.[1147] In the following section, I provide a brief history of the *Polygamy Reference* and present my analysis of this case.

6.3 The Polygamy Reference

I have long been fascinated with the case of Bountiful, British Columbia. A quick Google search reveals a perfunctory description of Bountiful's geographic orientation in the southern BC, followed by several pages of news articles detailing various investigations, cases, and opinion editorials on Bountiful's polygynist community. One can assume that polygyny is practiced

[1144] Ibid.
[1145] Ibid., 66.
[1146] Ibid., 68-69.
[1147] I am drawing on Brenna Bhandar's exquisite conceptualization of "status contract" wherein a *person's* legal and social standing functioned as a form of property in society. See: "Status." In *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*, 149-179. Durham: Duke University Press, 2018.

privately in other parts of the country, but Bountiful is the focus of most investigations because it is the largest, openly practicing polygynous community in Canada. After nearly two decades of investigations by the *Royal Canadian Mounted Police* ("RCMP") and failed attempts to lay charges against community members, the *Polygamy Reference* went to the British Columbia Supreme Court in 2011.

This case arose from the "ongoing question of how to best deal with 'the problem of polygamy' in Bountiful"[1148] and in 1990 and 1991, the *Royal Canadian Mounted Police* conducted a 13 month investigation in Bountiful, British Columbia. The RCMP concluded by recommending that Dalmon Oler and Winston Blackmore (two leaders in the community) be charged with practising polygamy.[1149] Joanna Sweet notes that the Ministry of the Attorney General chose not to prosecute because lawyers within the Ministry were concerned that the polygamy provision in the Criminal Code would likely be found unconstitutional.[1150] As a result, the Attorney General was compelled to pursue a judicial reference instead.[1151] By Order in Council on 22 October 2009, the Lieutenant Governor in Council referred two questions to the Court for hearing and consideration pursuant to the Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 1 [CQA]:

[1148] Joanna Sweet. "Equality, democracy, monogamy: Discourses of Canadian nation building in the 2010–2011 British Columbia polygamy reference." *Canadian Journal of Law and Society* 28, no. 1 (2013): 3.
[1149] Ibid.
[1150] Ibid.
[1151] In 2005 another RCMP investigation took place and following that, Attorney General Wally Oppal ordered that a special prosecutor be appointed to determine whether charges should be laid. Richard Peck was appointed, and he recommended that s 293 be referred to the courts to ascertain its constitutionality. However, Oppal disagreed with Peck's recommendation and appointed a different special prosecutor, Leonard Doust. Doust also recommended a reference, so in 2009, Oppal appointed a third special prosecutor, Terrence Robertson. Robertson recommended that charges be laid against Dalmon Oler and Winston Blackmore and in January 2009 Oler and Blackmore were each charged with one count of practicing polygamy. Oppal's dreams of an Oler and Blackmore prosecution were stayed when Madam Justice Sunni Stromberg-Stein denied Robertson's appointment as special prosecutor in September 2009. Stromberg-Stein found that Oppal did not have authority to appoint a third special prosecutor when Doust, the second special prosecutor, gave a recommendation with which Oppal disagreed. She found that the AGBC had gone "special prosecutor shopping" for someone who was willing to prosecute polygamy.[1151] Further, she indicated that Oppal was required to follow Doust's recommendations of proceeding with a reference.

a. Is section 293 of the Criminal Code of Canada consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?

b. What are the necessary elements of the offence in section 293 of the Criminal Code of Canada? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

There were three parties to this reference: the Attorney General of British Columbia ("AGBC"), the Attorney General of Canada ("AG Canada"), and the Amicus Curiae ("Amicus")[1152]. Chief Justice Robert J. Bauman of the British Columbia Supreme Court ("BCSC") appointed George MacIntosh, a Vancouver litigator, to act as Amicus to the court. Since both the Attorneys General took the position that s. 293 was constitutionally sound, the Court appointed the Amicus to argue in opposition. In consultation with the Amicus, the AGBC was directed to notify persons or groups who might be interested in the reference. As a result, eleven parties representing a range of interests participated in the proceedings:

- Beyond Borders: Ensuring Global Justice for Children ("Beyond Borders");
- The British Columbia Civil Liberties Association ("Civil Liberties Association");
- The British Columbia Teachers Federation ("BCTF");
- The Canadian Association for Free Expression ("CAFE");
- The Canadian Coalition for the Rights of Children ("CCRC") with the David Asper Centre for Constitutional Rights ("Asper Centre");
- The Canadian Polyamory Advocacy Association ("Polyamory Advocacy Association");
- The Christian Legal Fellowship;
- The Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS") and James Oler in his capacity as bishop of the FLDS;
- REAL Women of Canada ("REAL Women");
- Stop Polygamy in Canada; and
- West Coast Legal Education and Action Fund ("West Coast LEAF").

[1152] Sweet explains the role of the Amicus: "an Amicus is a "friend of the court," and in this case, an uninterested party appointed to challenge the provision in the strongest possible terms. If this had been a prosecution, the persons charged with practicing polygamy contrary to s 293 would have challenged the constitutionality of the provision. Since it was a reference, this task fell to the Amicus" (4). The Amicus argued that the prohibition of polygamy violated sections 2(a), 2(d), 7, and 15(1) of the Canadian Charter of Rights and Freedoms. Four groups, holding interested person status, joined the Amicus: the Fundamentalist Church of Jesus Christ of Latter Day Saints and James Oler, the Canadian Association for Free Expression, the Canadian Polyamory Advocacy Association, and the British Columbia Civil Liberties Association.

The Civil Liberties Association, CAFE, the Polyamory Advocacy Association, and the FLDS argued against the constitutionality of s. 293 and the remaining groups generally argued in support.[1153] On his own behalf, and that of his congregation, Mr. Blackmore sought party status in the *Reference*, but was dismissed.[1154] Instead, he was granted "interested person status,"[1155] but chose not to participate in the *Reference*.[1156] Part of what made the *Reference* so unusual was that British Columbia authorized the Lieutenant Governor in Council to refer questions to the trial court. In his decisions, Chief Justice Bauman noted that in other provinces, usually the Court of Appeal alone provides reference opinions.[1157] Additionally, he stated that this type of reference "enables the participants to create an evidentiary record impossible in the typical appellate reference."[1158] Finally, he said:

> The participants in the present proceeding embraced that opportunity and compiled a record that is remarkable not only for its size, but also for the breadth and diversity of its contents. Indeed, it is no exaggeration to say that the record embodies the bulk of contemporary academic research into polygamy.[1159]

Much of this research – submitted via affidavits – concerned the harms to women and children posed by polygyny,[1160] the harms to unmarried men and boys from polygynous communities,[1161] societal threats posed by polygyny,[1162] and the protection of "monogamous marriage" (which

[1153] *Reference re: Section 293* at 22.
[1154] Ibid.
[1155] Paragraph 24 of the *Reference* defines the scope of the Interested Persons: "The participatory rights of the Interested Persons were more limited than those of the three parties, and were specified in a case management order. In sum, the Interested Persons were permitted to participate in the evidentiary phase of the reference and to make both oral and written submissions as determined by the Court. They were also required to ensure that neither their evidence nor submissions were unnecessarily duplicative of those of the parties or other Interested Persons."
[1156] Ibid.
[1157] Ibid., at 26.
[1158] Ibid., at 27.
[1159] Ibid.
[1160] *Reference* at 16, 8, 9.
[1161] Ibid., at 382, 586; see also: Bramham, Daphne. *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect*. Toronto: Random House Canada, 2008.
[1162] Ibid., at 501, 502.

served as a proxy for liberal democratic western values).[1163] These themes are consistent with many scholarly analyses about conversations surrounding kinship during socio-political upheaval.[1164] Indeed, Mathen suggests that polygyny, specifically, is frequently viewed as a "pressing social problem" during times of social change (like equal marriage): "It is interesting... that the issue of what to do about polygamy has resurfaced at the same time as other socio-legal developments reformulating the notion of "family"."[1165] The *Polygamy Reference* came a few years after Canada's *Civil Marriage Act* and in the midst of its own province's *FLA* reform process.

On November 23, 2011, Chief Justice Bauman issued his decision, arguing that s. 293 of the *Criminal Code* is consistent with the *Canadian Charter of Rights and Freedoms* (except where it pertains to minors under the age of 18). Justice Bauman found that where s. 293 breaches freedoms under the *Charter*, they are justifiable in a "free and democratic society" and that s. 293 supports the "institution of monogamous marriage" while also advancing Canada's international human rights obligations.[1166] More specifically, in response to the first question, s. 293 *is* "consistent with the Canadian Charter of Rights and Freedoms except to the extent that it includes within its terms, children between the ages of 12 and 17 who marry into polygamy or a conjugal union with more than one person at the same time."[1167] In response to the second

---

[1163] Ibid., at 1041.
[1164] As noted in Chapter 2. See also: Luxton, Meg. "Changing Families, New Understandings." *Vanier Institute for the Family* (2011). https://vanierinstitute.ca/wp-content/uploads/2015/12/CFT_2011-06-00_EN.pdf and Coontz, Stephanie. *The Way We Never Were: American Families And The Nostalgia Trap*. Basic Books, 1992.
[1165] Carissima Mathen. "Reflecting Culture: Polygamy and the Charter," *Supreme Court Law Review* 57 (2012): 359. Indeed, the familiar argument that legalizing equal marriage would lead to all sorts of criminal and deviant behaviour was common leading up to the *Civil Marriage Act*. As noted in the text, the *Reference* was occurring in British Columbia at almost the same time as the province was undertaking a significant legislative overhaul of the *Family Law Act*. While this connection is not stated in the *Polygamy Reference*, Mathen's hypothesis regarding the co-incidence of polygamy panic and other changes to family law is worthy of more careful consideration.
[1166] *Reference* at 16 and 1358-1367.
[1167] *Reference* at 1359.

question, he found that s. 293 "does *not* require that the polygamy or conjugal union in question involved a minor or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence."[1168]

As summarized by Mathen, Justice Bauman accepted that the law's criminalization of a religiously motivated practice "constitutes a *prima facie* violation of section 2(a) of the *Charter*" but that the Attorneys General had "clearly met the burden of demonstrating that it is demonstrably justified in a free and democratic society."[1169] He also found that, as it applies to minors, the law violates s. 7 of the *Charter*.[1170] He rejected arguments that s. 293 violates section 2(b) or section 2(d) of the *Charter* – the fundamental freedom of expression and other modes of thought and communication and fundamental freedom of association, respectively.[1171] He also rejected that, when applied to adults, s. 293 violates the principles of fundamental justice.[1172] As Chief Justice Bauman stated in the opening of his decision:

> I have concluded that this case is essentially about harm; more specifically, Parliament's reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage.[1173]

Unsurprisingly, the *Reference* received significant public attention, nationally and internationally. Activists, legal scholars, members of the Church of FLDS, and politicians weighed in on the possibilities and limitations of the *Reference*. Largely, public debate (and submitted evidence) favoured the *Criminal Code* prohibitions. However, some groups, like the *Canadian Polyamory Advocacy Association*, *Canadian Association for Free Expression*, *British*

[1168] *Reference* at 1364, emphasis added.
[1169] Mathen, *Reflecting Culture*, 360-361. Section 2(a) protects the fundamental freedom of conscience and religion. Also, *Reference* at 1330-1352.
[1170] Ibid., also *Reference* at 1353-1357. Section 7 protects the right to life, liberty, and security of the person against deprivations not in accordance with the principles of fundamental justice.
[1171] *Reference* at 1099-1105 [freedom of expression] and 1106-1127 [freedom of association].
[1172] *Reference* at 1185.
[1173] *Reference* at 5.

Columbia Civil Liberties Association, and the *Fundamentalist Church of Jesus Christ of Latter Day Saints*, argued against the constitutionality of s. 293. For example, the Canadian Polyamory Advocacy Association was concerned that the broad language of s. 293 prohibiting "any kind of conjugal union with more than one person at the same time, whether or not it is recognized as a binding form of marriage" captured Canadians practicing polyamory[1174] and the BC Civil Liberties Association argued that "prosecution under s. 293 is an inappropriate method" of addressing the harms caused by polygyny.[1175] Predictably, Winston Blackmore argued that s. 293 was unconstitutional because it infringed on his (and his congregation's) religious freedom, freedom of association, and right to equality and liberty.[1176]

As noted earlier, most of the debate (also reflected in Justice Bauman's decision) surrounded the real or plausible harms to women and children posed by polygynous marriage. There was considerably less (or no) attention given to the impact of polygynous marriage on parenting, declarations of legal parentage, and parental rights and responsibilities. This makes sense, given the *Reference's* consideration of s. 293, however, as I demonstrate below, the absence of discussions surrounding parenting is quite striking given that the *Reference* hinged on claims about harms to women and children. While BC was expanding legal parenting via the *FLA*, the *Reference* clamped down on polygynous multiplicity. I argue that polygynous multiplicity (of parents or spouses) is untenable for the Canadian state because of the nature of conjugal relationships between polygynous adults, the presumptively unrestrained sexuality present in polygyny, and the state's investment in securing a legible kinship system. The

[1174] As such, the CPAA sought an Order for the Attorneys General to disclose, in advance of the proceedings, if polyamory was captured under s. 293. The Application was dismissed by Justice Bauman citing that the Attorneys General provided sufficient clarity for the CPAA in advance of the proceedings (SCBC Ruling re: CPAA Application for Position of AGs).
[1175] David Eby. Affidavit. January 28, 2010 (Application for British Columbia Civil Liberties Association for Leave to Intervene).
[1176] Winston Blackmore. Affidavit. January 21, 2010 (Application for Winston Blackmore for Leave to Intervene).

expansion of legal parentage (and its subsequent negotiation of who constitutes a family) requires the enforcement, or reinforcement, of the familial other; the kinship system against which 'good' and 'ethical' multi-parent families are measured. Canadians need not look further than Bountiful for the easiest foil; the condemnation of polygamy as a patriarchal, oppressive, and marginalizing institution is common, culturally reinforced, and historically rooted.

Polygamy has been a criminal offence in Canada since 1890, emerging in response to the criminalization of polygamy in the United States and a desire to quash the immigration of polygamous American Mormons to Canada.[1177] The idealization of monogamy as the most desirable and normal intimate arrangement is inextricably linked with discourses of Whiteness and civility in Western political theory and legal traditions. Hegel, a founding father of Western political thought, wrote an account of human history based on the superiority of the European Christian West.[1178] He argued that history "travels from East to West; for Europe is absolutely the end of history, just as Asia is its beginning."[1179] For Hegel, monogamous marriage was key to advancing civilization and political order but also a necessary condition for "the divine or heroic founding of the state."[1180] In fact, he argued that monogamy is the "Spirit's highest achievement" because it lays the "foundation to the transcendent unity of the modern state, while polygamy marks the slavishness and disorder of the despotic political systems of Africa and Asia."[1181] Hegel's schema rests on assumptions and stereotypes of European supremacy that produced racial hierarchies among nations.[1182] One of the consequences of this framework is that non-White nations were considered "hostile to a civilized state," which justified the social, legal,

[1177] Carter, *The Importance of Being Monogamous*, 42-50.
[1178] G.W.F. Hegel. *Philosophy of right*. Trans. F. W. Dyde. New York: Cosimo Inc, 1821/2008.
[1179] Denike, *The Racialization*, 857-8 quoting Hegel, G.W.F. *Philosophy of history* [1824–1827]. New York: Cosimo Inc, 1837/2007, 103.
[1180] Ibid., quoting Hegel, *Philosophy of right*, 88.
[1181] Ibid., 858-9, Hegel, *Philosophy of right*, 88.
[1182] Denike, *The Racialization*, 859.

and economic exploitation of non-White nations and their people and conflated Whiteness with monogamy, civility, and intellectual superiority.[1183] If Whiteness and monogamy went hand-in-hand, polygyny and racialization became inextricably linked. Thus, regardless of the actual race of those practicing polygyny (as in the case of Bountiful), the kinship practice is marked by a history of racialization.

The idealization of monogamy and denigration of polygyny is produced and reinforced by settler colonialism, liberalism's focus on choice, freedom, and property, and liberal multiculturalism's "tolerance" of diversity. This articulation is clear in the *Reference* and in efforts to manage the sexual threat to democracy by legislation. In 2014, Stephen Harper's Conservative government created the *Zero Tolerance for Barbaric Cultural Practices Act* ("Barbaric Cultural Practices Act") to "[demonstrate] that Canada's openness and generosity does not extend to early and forced marriage, polygamy or other types of barbaric cultural practices."[1184] From the Conservative's perspective, polygamists were foreign and seeking refuge in Canada. As such, the *Barbaric Cultural Practices Act* proposed to amend the *Immigration and Refugee Protection Act* to include "polygamy-specific inadmissibility provision[s]."[1185] These provisions would make it possible for temporary and permanent residents to be found inadmissible, without needing a criminal conviction, thereby being subject to removal.[1186] As Megan Gaucher argues, even though the practice of polygyny is "not unique to immigrant

[1183] Ibid.
[1184] Canada. "Zero Tolerance for Barbaric Cultural Practices Act: An overview." (2014). https://www.canada.ca/en/news/archive/2014/11/zero-tolerance-barbaric-cultural-practices-act-overview.html.
[1185] Ibid.
[1186] Ibid.

populations," it is still framed as an externally-imposed "threat to Canadian values."[1187] This construction reveals the Canadian state's commitment to supporting monogamy.[1188]

Gaucher's research revealed that both supporters and critics of s.293 draw on narratives of harm to advance their position. For supporters, s.293 protects women and children from the harm of polygamy and for critics, s.293 exacerbates harm by marginalizing, stigmatizing, and criminalizing women and girls in polygynous communities.[1189] She argues that the Canadian state's primary motivation for preserving monogamy is to maintain a particular type of citizenship[1190] which relies on the "celebration" and "privileging" or monogamy by political, legal, and social structures.[1191] Drawing on Sarah Carter's historical analysis of monogamy in Canada, Gaucher argues that monogamy became a way in which the Canadian state could "[govern]… through ritual" like marriage and divorce law or through social, and legal exclusion like refusing rights or criminalization.[1192] There are serious and pervasive implications of governing through ritual and criminalization. First, since intimate rituals like marriage are considered "private," the obviousness of its function as a regulatory mechanism is less clear and harder to contest. The disjuncture between mainstream lesbian and gay organizing and queer organizing on the issue of equal marriage is a perfect example.[1193] For many lesbian and gay Canadians, the passing of the *Civil Marriage Act* was a historic moment in the lesbian and gay rights movement that signified the Canadian state's affirmation of the dignity of their intimate lives. At the same time, many queer activists and scholars reflected on the homonational and

[1187] Megan Gaucher. "Monogamous Canadian Citizenship, Constructing Foreignness and the Limits of Harm Discourse." *Canadian Journal of Political Science* 49, no. 3 (2016): 519.
[1188] Ibid.
[1189] Ibid., 519-520.
[1190] Ibid., 520.
[1191] Rambukkana, *Fraught Intimacies*.
[1192] Gaucher, *Monogamous Canadian Citizenship*, 523.
[1193] See: Alexa DeGagne. "Investigating Citizenship, Sexuality and the Same-Sex Marriage fight in California's Proposition 8" (PhD diss., University of Alberta, 2015).

neoliberal qualities of equal marriage and the limitations of desiring the state's desire.[1194] Prior to the *Civil Marriage Act*, lesbian and gay Canadians were similarly regulated in their inability to have their intimate relationships recognized equally under the law. Polyamorous and polygynous relationships face the same barriers (though, as Shelley Park acknowledges, very few queer movements are open to acknowledging the similarities between polyamory and polygyny).

Second, the multi-pronged approach to governance (ritual, refusal, and criminalization) reinforces the idea that monogamy is "intrinsic" to Canada's national identity and that monogamy is the most widespread form of intimacy.[1195] By normalizing monogamy, Gaucher argues that the Canadian state can both "produce and reproduce a narrative that encourages state allegiance and disciplines sexual behaviour" thereby creating sites of intervention where our intimate lives are governed by the state.[1196] Third, the regulation of intimate possibilities has a temporal feature. The governance of intimate life is as much about the sorts of intimate arrangements one can engage in now as it is about a way of constructing a particular intimate future. The state relies on families to produce the next generation of citizens and so the governance of intimate life is also a governance of the future. Much like the role that children played as proto-citizens in Chapters 4 and 5, their presence in the *Polygamy Reference* is central.

6.3.1 Harms to women, children, and the future of the nation

As noted earlier, the *Reference* did not explicitly focus on legal (or social) parentage. However, the *Reference's* focus on harms to women and children reveal the ways in which assumptions

[1194] See: Lisa Duggan. "The new homonormativity: The sexual politics of neoliberalism." In *Materializing democracy: Toward a revitalized cultural politics*, 175-194. Durham: Duke University Press, 2002; Garwood, Eliza. "Reproducing the homonormative family: Neoliberalism, queer theory and same-sex reproductive law." *Journal of International Women's Studies* 17, no. 2 (2016): 5-17; Mole, Richard C.M. "Homonationalism: Resisting nationalist co-optation of sexual diversity." *Sexualities* 20, no. 5-6 (2017): 660-662; and Puar, Jasbir. "Rethinking homonationalism." *International Journal of Middle East Studies* 45, no. 2 (2013): 336-339.
[1195] Gaucher, *Monogamous Canadian Citizenship*, 523.
[1196] Ibid.

about parentage are communicated through proxy discourses. The *Reference* draws on a popular discourse frame that positions children as proto citizens (much like the *AFAEA* in Chapter 5). In this formulation, children are citizens-to-be who require the protection of the state and the family to ensure their physical safety, but more importantly, their inculcation in the Canadian ideological imaginary. Anne McClintock's description of the relationship between family and national reproduction illustrates this beautifully. She notes that nations are often described using the "iconography of familial and domestic space."[1197] Indeed, the term "nation" comes from the Latin verb "nasci" meaning "to be born" and "natio" meaning race or breed.[1198] The trope of the family functions in two primary ways: as a "natural" sanction for social hierarchy, bound by an "organic unity of interests" and as a way in which to conceptualize time.[1199] This "family metaphor" simultaneously provided a singular way in which to understand national history while also erasing the history of how the family became an institution.[1200]

Like most institutions, its members are not equal. Leon Kuczynski and Susan Lollis argue that social scientific research is increasingly attentive to the ways in which children have been regarded as "incomplete" or "unfinished products," understood only through the lenses and agendas of adults.[1201] Scholarly disciplines have approached studies of "the child" in different ways, but recently there has been a commitment to "developing an alternative to the passive conception of the child that developed under the conceptual framework of socialization theory."[1202] This stands in contrast to traditional conceptualizations of children as empty

[1197] McClintock*, Family Feuds*, 63.
[1198] Ibid.
[1199] Ibid.
[1200] Ibid.
[1201] Leon Kuczynski and Susan Lollis. "The Child as Agent in Family Life." In *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space, and Disciplines*, edited by Hillel Goelman, Sheila K. Marshall, Sally Ross, 197. Toronto: University of Toronto Press, 2004.
[1202] Ibid., 198.

receptacles for the "intergenerational transmission of values, knowledge, and other products of adult culture" which flowed unidirectionally from adult to child.[1203] This perspective – dubbed the socialization model – was both "unrealistically optimistic about the conformity of individuals" to social standards and "promoted a model of society that was deterministic, uniform, and unchanging"[1204] Further, the socialization model profoundly undermined the "active and innovative capacities of children in interpreting and modifying the ideas of the previous generation."[1205]

Despite these contemporary scholarly findings that children are full persons with rights and intellectual, bodily, and emotional autonomy and intelligence,[1206] discourses surrounding the welfare of children in polygynous households and the impact of polygyny on children generally is highly reflective of the socialization model summarized by Kuczynski and Lollis. Additionally, and more importantly, these discourses also highlight the ways in which children have an exalted status in the national imagination. The child functions as both a test of real or perceived harm and the possibility of transmitting and reproducing collective national values. Key to the transmission of "correct" values is monogamous marriage (or, as I argue later, at least not polygynous marriage). This is reflected in several statements below, from both the *Reference* itself and affidavits submitted during the proceedings. For example, in reviewing evidence and witness's transcripts, Justice Bauman argues that marriage is a "critical source of public good" and the dyadic structure of marriage "habituated children to notions of equality and other

---

[1203] Ibid.
[1204] Ibid., citing Dennis H. Wrong. "The oversocialized conception of man in modern sociology." *American Sociological Review* 26 (1961): 183-193.
[1205] Ibid., citing Edward Sapir. "The emergence of the concept of personality in a study of cultures." *Journal of Social Psychology* 5 (1934): 408-415.
[1206] Bronagh Byrne and Laura Lundy. "Children's rights-based childhood policy: A six-P framework." *The International Journal of Human Rights* 23, no. 3 (2019): 357-373; Mhairi Cowden. "Capacity, claims and children's rights." *Contemporary Political Theory* 11, no. 4 (2012): 362-380; and Marta B. Esteban. "Children's Participation, Progressive Autonomy, and Agency for Inclusive Education in Schools." *Social Inclusion* 10, no. 2 (2022): 43-53.

important norms of citizenship."[1207] He specifically highlighted John Witte Jr.'s testimony– provided by the Attorneys General–on the foundations of western monogamous marriage. Witte is cited as "an expert in legal history, marriage and historical family law, and religious freedom."[1208] He submitted that marriage "mutuality" is "critical for the state because it creates balance, it creates structure, it creates ballast for the polity…"[1209] Further, this "balance" provides children with "norms of citizenship" so that they can correctly understand the harmonious balance of "authority and liberty… [and] equality and charity."[1210] Witte Jr. then cited Aristotle to argue that dyadic marriage is the "first school of justice" which means that the home is a source of "goods for the state."[1211] Later in his decision, Justice Bauman summarized Witte Jr.'s statement of the harms posed to children, which he closely linked to the harms posed to women and society more broadly. He noted that polygamy's harm "flow[s]" to society. These harms are:

> … threats to the social order and a greater need for social supports as women lacking education and opportunity to enhance themselves, as well as their children, find themselves impoverished upon divorce or the death of their husbands; harms to good citizenship; threats to political stability; and the undermining of human dignity and equality.[1212]

Witte Jr.'s testimony, and Justice Bauman's uncritical agreement, demonstrate the legacy of socialization model thinking about children– children must be protected from exposure to polygyny not only because of the harms to children as such but also because children are the receivers (and future transmitters) of "important norms of citizenship."[1213] Children, in this view, are a public good that extends beyond the realm of the private family, an argument that parallels

[1207] *Reference* at 174.
[1208] *Reference* at 168.
[1209] *Reference* at 174, citing Transcript, 10 January 2011, p. 20, l. 17 - p. 21, l. 6.
[1210] Ibid.
[1211] Ibid.
[1212] *Reference* at 233.
[1213] *Reference* at 174.

debates surrounding multi-parentage in the *AFAEA.* There, the concerns that conservative thinkers articulated centered on the harms that multiple parents pose to children, including inappropriate sex and gender socialization (read: socialization that is not centered on cisgender or heterosexual frameworks). The *Polygamy Reference* envisions the Canadian family in ways that support the dominant ideology of the family and dominant ideologies of motherhood and fatherhood. Within these frameworks, the rights and interests of women and children are conflated (this serves to infantilize women and exalt children) and women's autonomy is undermined through the assertion that women in polygynous communities are universally oppressed and victimized.

My interview with MM confirmed these findings. They noted that the *Reference* ignores the fact that polygynous communities have a variety of kinship practices that may affirm women's autonomy. They noted that women's ability to determine parenting responsibilities, roles, and structures was not "static" and, as a result, "could change over time."[1214] For example, their research in Bountiful revealed that parenting relationships between co-wives could be positive, if the wives had "similar objectives and approaches to parenting" or, in some cases, if the co-wives were also genetic sisters. And yet, one of the tensions that co-wives revealed to MM were the "extended family dynamic[s]" that arose when a sister wife "disciplined or corrected the behavior of one of their own children" in a manner that was inconsistent with their own beliefs.[1215] This finding reinforces women's autonomy and interests distinctive from those of their children and each other by revealing the ways in which they navigate intimate decision making. Far from being uniformly oppressed, MM's research demonstrates places where co-

[1214] MM. Interview with author. Edmonton, Alberta. July 27, 2021.
[1215] Ibid.

wives make distinctive choices about parenting and relationships, much like mothers in monogamous marriages often do.

And yet, Chief Justice Bauman is exclusively focused on the harms that polygyny brings to children. He cites their poor educational and behavioral outcomes as the likely result of "higher levels of conflict, emotional stress and tension in polygamous families" and specifically from "rivalry and jealousy among co-wives."[1216] His generalizations rest on his assertion that polygamy's harm is based on the "critical fact" that religion and cultural context do not matter because "they can be generalized and expected to occur wherever polygamy exists."[1217] Thus, the harms of polygamy are not based on particular inequalities, like Bountiful's access to medical care or education (which would negatively impact any community), but inherent in its very structure. Moreover, these harms are not localized– they are transmitted intergenerationally and across communities. That is, polygyny's harms to women and children are threats to the foundations of liberal democracy and citizenship.

For example, Chief Justice Bauman suggests that polygyny exposes children to the "internalization" of "harmful gender stereotypes"[1218] like "patriarchal hierarchy and authoritarian control of women" and thus it "institutionalizes gender inequality."[1219] By extension, he asserts that members of polygynous communities have fewer rights than their non-polygynous neighbours in "societies which prohibit the practice."[1220] His characterization of polygyny as fundamentally harmful to children, women, and civil liberties is less an argument in favour of securing safety and rights for children and women and more an argument about the fundamental

[1216] *Reference* at 9.
[1217] Ibid., at 14.
[1218] Ibid., at 12.
[1219] Ibid., at 13.
[1220] Ibid., at 13.

incompatibility of polygyny with liberal democracy and freedom. Put differently, the *Polygamy Reference* is an affirmation of monogamy's centrality to liberal democratic citizenship. To make this point, Justice Bauman again connects the harms of polygyny to evidence from affidavits that cite the inherent "mutuality" of monogamous marriage as a "critical source of public good."[1221] He continues by referencing evidence that suggests the "dyadic structure" of monogamous marriage exposes children to ideals like equality and "other important norms of citizenship."[1222] Presumably, Justice Bauman and his interlocutors are ignorant (or selective) of the inequalities and harms present in so many monogamous relationships, or the ways in which heterosexual monogamy produces hierarchies of gendered power. As Harder observes, monogamy historically functioned to serve the needs of men who, under *paterfamilias* and the doctrine of coverture, took over women through marriage.[1223] Under this model, "two would become one, and that one would be the husband"[1224] Further, the heterosexual monogamous model is not a "natural fact" but was formed through persistent legal and political efforts to affirm heterosexual monogamy and "prohibitions on alternative family forms and on autonomy within the family."[1225] One of these efforts was the legal definition of marriage as "one and one"– one man and one woman, and more recently under the *Civil Marriage Act*, one person to another. Monogamy became central to membership in the nation-state, informally (as a social practice) and formally (as the basis of citizenship).

[1221] Ibid., at 174.
[1222] Ibid.
[1223] Lois Harder. "How queer!? Canadian approaches to recognizing queer families in the law." *Whatever: A Transdisciplinary Journal of Theories and Studies* 4 (2021): 310, citing Nancy Cott. *Public Vows: A History of Marriage and the Nation*, 11-12. Cambridge: Harvard University Press, 2000.
[1224] Ibid.
[1225] Ibid., 311, citing Susan Boyd. "Marriage is more than just a piece of paper: feminist critiques of same sex marriage." *National Taiwan University Law Review* 1 (2013): 268.

Citizenship as a social and formal institution plays a central role in the construction of the nation-state and its members. Sunera Thobani describes citizenship as the "signifier par excellence of membership in the nation-state…"[1226] which is born from an institution (the modern state) that "reflect[s] the height of the evolution of the human being as a modern political subject..."[1227] Polygyny, of course, is at odds with modernity as it is conceived by the *Polygamy Reference*. Whereas monogamy represents gender equality, familial harmony, successful children, and a successful state, polygyny is the vestigial form that threatens monogamous democracy's evolutionary triumph. In fact, the triumph of monogamy and democracy is not evolutionary, but political. We know this because of all of the work that the law must do in order to ensure monogamy's pride of place. The reference itself is evidence of this work.

Citizenship regimes have also been integral in articulating hierarchies of sexuality. Specifically, the ideal heterosexual citizen is one "whose sexuality is contained within the private realm of family and conjugality."[1228] Historically, lesbians and gays were denied this form of citizenship and their recent inclusion has largely been premised upon normalization politics that positions lesbians and gays as just like their heterosexual counterparts.[1229] The extension of legal parentage to lesbian and gay parents has operated in much the same way, as my analysis in Chapters 4 and 5 makes clear. What these chapters also demonstrate are the ways in which the problem of poly parentage continues to be a determinant of Canada's modernity and "sexual democracy".[1230] Diane Richardson conceives of sexual citizenship as a form of "national

---

[1226] Sunera Thobani. "Nationals, Citizens, and Others." In *Exalted Subjects: Studies in the Making of Race and Nation in Canada*, 69. Toronto: University of Toronto Press, 2007.
[1227] Ibid.
[1228] Brenda Cossman. "Sexing citizenship, privatizing sex." *Citizenship Studies* 6, no. 4 (2002): 485.
[1229] Ibid.
[1230] Diane Richardson. "Rethinking sexual citizenship." *Sociology* 51, no. 2 (2017): 214, citing Leticia Sabasay. "The emergence of the other sexual citizen: Orientalism and the modernisation of sexuality." *Citizenship Studies* 16, no. 5–6 (2012): 605–662.

boundary making," rendering certain nations as tolerant (liberal) through their negotiations of acceptable intimate practices.[1231] For her part, the state's intervention into intimate life is about negotiating "potential sexual political subjects" who might conform to Western sexual hegemony.[1232]

The *Reference* makes clear that Bountiful's members are failed sexual subjects whose intimate arrangements contradict Canada's sexual democracy. These harms are compounded, for Justice Bauman, by the lack of paternal care and "disciplinary attention" that a father provides to his children.[1233] This argument was similarly reflected by conservatives' concerns, in Chapter 5, over the *AFAEA*'s "re-engineering" the family.[1234] In another iteration of concern for heterosexual monogamy, the *Polygamy Reference* focuses on the crisis of masculinity, explored below.

6.3.2 Masculinity and "male parental investment"

The construction of masculinity for boys and men featured prominently in the *Reference* and was illustrated in three ways. First, concern over the large pools of unmarried men and boys that polygyny produces; second, the phenomenon of "lost boys" (unmarried men and boys who are excommunicated from their communities); and third, limits that polygyny places on men's ability to invest in their children. These arguments were made by Justice Bauman, several expert witnesses, as well as the Attorneys General of Canada and British Columbia in their closing arguments. For example, the Attorney General of Canada argued that:

> Polygamy causes the proportion of young, unmarried men to be high, up to 150 men to 100 women. This sex ratio imbalance, which has also been identified by numerous other

[1231] Ibid.
[1232] Ibid.
[1233] *Reference* at 9.
[1234] Samuel Smith. "Ontario Seeks Redefinition of Family; Mother, Father Replaced by Up to 4 'Parents'." *The Christian Post*. November 1, 2016.

> expert witnesses in the *Reference*… logically means that "junior boys" must be forced out of polygamous communities in order to sustain the ability of senior men to accumulate more wives.[1235]

The consequence of this is that polygyny "[generates] a class of largely poor, uneducated and unmarried men" who, according to the AGs, "are statistically predisposed to violence as well as being further victimized."[1236] Similarly, the Attorney General of British Columbia argued that "there is substantial cross-cultural evidence that even a modest degree of polygyny may have an enormous impact on levels of crime and anti-social behaviour."[1237] These claims were supported by the testimony of Joseph Henrich, professor of human evolutionary biology at Harvard University. Henrich compiled a report to "provide background information on the nature of polygyny and to examine the implications of its increased practice in a modern Western society."[1238] To make his case, Henrich noted that his theoretical framework "[uses] principles drawn from evolutionary biology, and by reviewing evidence regarding mating and marriage from psychology, anthropology, sociology, and economics, as well as material from other disciplines."[1239] Based on his research, Henrich contends that a "non-trivial increase" in the practice of polygyny would "result in increased crime and antisocial behaviour by the pool of unmarried males it would create."[1240] He argues that an increase in polygyny is "quite plausible" if it became legalized "given what we know about both male and female mating

---

[1235] Attorneys General of Canada Closing Argument at 77, citing Exhibit 41 at 32: Expert Report of Dr. McDermott, filed July 16, 2010 *and* Exhibit 4: Expert report of Dr. Henrich, 15 July 2010 (see exhibit "B" at 40); Exhibit 48: Expert report of Dr. Grossbard, 16 July 2010 (see exhibit "B" at 5-6). Online: https://aspercentre.ca/wp-content/uploads/2017/08/AG-Canada-Closing-Argument.pdf

[1236] Attorneys General of Canada Closing Argument at 79, citing Exhibit 41 at paras. 32-34: Expert report of Dr. McDermott, 16 July 2010 *and* Exhibit 4: Expert report of Dr. Henrich, 15 July 2010 (see exhibit "B" at 40); Dr. Grossbard, 7 December 2010, p. 16: 7-22. See also: *Reference* at 518, 586.

[1237] Attorney General of British Columbia Closing Argument at 237. Online: https://aspercentre.ca/wp-content/uploads/2017/08/AGBC-Closing-Argument.compressed.pdf

[1238] Exhibit B: Affidavit of Joseph Henrich, July 15, 2020, p. 21.

[1239] Ibid.

[1240] Ibid.

preferences…"[1241] Notably, the data upon which Henrich based his arguments drew extensively on evidence from primate mating patterns in evolutionary psychology, and not on research with humans.

My conversation with LL raised important reflections on this argument, notably, the ways in which the law produces and reproduces gendered assumptions about masculinity and femininity, which then serves to naturalize their expressions. For example, they noted that the Canadian legal system "assumes that men, by virtue of masculinity, are inherently aggressive, sexually voracious beings, and it's up to women to domesticate them in some ways."[1242] Additionally, they pointed out that the focus on harms to men and boys erases the historical and contemporary context in which social harm is created. This context is gendered and racialized, and "dictates what is seen as more harmful…"[1243] to intimacy, women, and children (and conversely, what times of racial and gendered identities are "safe" for women and children). Thus, the *Reference's* reliance on the argument about men and boys reinforces a sexualized national narrative connected to monogamous citizenship by affirming the necessity of a one-to-one logic of heterosexual relations.[1244]

This logic also informs the dominant ideologies of motherhood that affirm nuclear family maternal stereotypes, for example, that women are naturally more caring and reproductive labour is their natural domain. One of the features of this framework is "intensive mothering" which affirms that mothers ought to be selfless, "sacrificial", and exclusively focused on their children.[1245] Historically, literature on the family has paid less attention to dominant ideologies

[1241] Ibid.
[1242] LL. Interview with author. Edmonton, Alberta. June 15, 2021.
[1243] Ibid.
[1244] Gaucher, *Monogamous Citizenship*, 523.
[1245] Jane Lewis, ed. *Children, changing families and welfare states*. Cheltenham: Edward Elgar Publishing, 2006.

of fatherhood, though discourses of idealized fatherhood are just as significant (as discussed in Chapter 5). Within the traditional nuclear family, fathers are the breadwinners, protectors, and leaders of their home and progeny. Historically, the question of "who is the father?" was defined by the law as the man who was married to, or in a married like relationship, with the mother. Since biological paternity could not be determined definitively until quite recently, the law relied on assumptions about conjugality to determine biological relatedness.[1246] Fiona Kelly argues that the "legal fiction of biological fatherhood" prevailed, in part, because it affirmed the nuclear family script of monogamy, heterosexuality, and fertility between husband and wife.[1247] As such, "the law has historically been more committed to protecting the traditional patriarchal family than to accurately representing biological fact."[1248] The law's desire for a father figure is, perhaps, nowhere more secure than in the context of polygyny. Given polygyny's structure of plural marriage with one man and many wives, there is potentially less ambiguity about fatherhood than in monogamous, dyadic, heterosexual relationships. And yet, despite the assurance of fatherhood and the abundance of maternal care, polygynous families are not beneficiaries of the Canadian state's recognition. The answer to this conundrum may be Kelly's assertion that the law is open to a degree of "malleability" in defining legal fatherhood to preserve the private nuclear family and avoid "fatherless families."[1249]

The *Reference* demonstrates that the law does not find enough fathers in polygynous families thereby creating a form of "fatherless family." Henrich makes this argument in his testimony and Justice Bauman affirms this belief. Henrich suggests that "polygynous men invest

[1246] Fiona Kelly. "Producing paternity: The role of legal fatherhood in maintaining the traditional family." *Canadian Journal of Women and the Law* 21, no. 2 (2009): 315.
[1247] Ibid., citing Roxanne Mykitiuk. "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies." *Osgoode Hall Law Journal* 39 no. 4 (2001): 781.
[1248] Kelly, *Producing Paternity*, 315.
[1249] Ibid.

less in their offspring both because they have more offspring and because they continue to invest in seeking additional wives" and as a result "children in a more polygynous society will receive less parental investment."[1250] In response, Justice Bauman went one step further to say that parental investment – secured through monogamous marriage (and thus, monogamous parenting) – is the best way to ensure gender and marriage equality, equality for children, and familial protection. He wrote:

> As I said above, the prevailing view through the millennia in the West has been that exclusive and enduring monogamous marriage is the best way to ensure paternal certainty and joint parental investment in children. It best ensures that men and women are treated with equal dignity and respect, and that husbands and wives (or same sex couples), and parents and children, provide each other with mutual support, protection and edification through their lifetimes.[1251]

Notably, Chief Justice Bauman's inclusion of "same sex couples" reflects Kelly's argument about the law's openness to biological or social forms of fatherhood, insofar as the openness can affirm a private nuclear family structure. The legislative expansion of parentage in BC and ON can also be read as efforts to ensure that fathers are not entirely excluded from lesbian families (even as sperm donors are "just" donors and do not have a claim to legal fatherhood). As I examine below, in the cases of *C.C. (Re)* and *BCSC 767*, the law increased the circumstances in which men can be fathers (by granting legal parentage to two polyamorous throuples). This illustrates courts' "freedom to reinforce the place of fathers in families," "resist fatherless families," and selectively determine paternity to "fulfil particular ideology [sic] ends."[1252] These ideological ends are co-constructed along lines of race to determine that which is foreign to the nation and that with is foreign within the nation's territory.

[1250] *Reference* at 884.
[1251] *Reference* at 884.
[1252] Kelly, *Producing Paternity*, 317.

6.3.3 The racialized "other"

In addition to its focus on the "impact of marriage on "gender equality" and democracy," the *Polygamy Reference* also expressed concern with the "consequences [of polygamy] for racialization and Canadian national belonging."[1253] At first glance, it appears that the racialization of polygyny does not easily fit with Bountiful. After all, as MM notes, Bountiful is "monolithically white."[1254] Yet, the evidence and testimony included in the *Reference* demonstrate that the history surrounding the polygyny debate "tells of the deep fears and profound sensitivities around the origins, allegiances, and distinctions of blood that served to naturalize racial difference and racial hierarchy."[1255] Indeed, the racialization of polygyny in the Bountiful reference draws on a long history of this association in North America. In 1879, the United States Supreme Court decided *Reynolds v. United States*, rejecting Mormon arguments that polygamy was protected under rights to religious freedom. The unanimous decision, written by Justice Morrison R. Waite, asserts that "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."[1256] In fact, much like Chief Justice Bauman, the decision affirms that marriage is the foundation of society and government since

> out of its fruits spring social relations and social obligations and duties with which government is necessarily required to deal. In fact, whether as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.[1257]

[1253] Sweet, *Equality, democracy, monogamy*, 3.
[1254] MM. Interview with author. Edmonton, Alberta. July 27, 2021.
[1255] Denike *The Racialization*, 853.
[1256] *Reynolds v. United States*, 98 U.S. 145 (1878) at 164.
[1257] *Reference* at 165-166.

This argument continues a long tradition of Orientalism, which, as Martha Ertman points out, enabled polygyny to be framed as "inherently backward [and] sensual" and therefore its denigration becomes natural and "inevitable."[1258] With democracy thus bound to monogamy and Whiteness, the logic of racializing Mormons is complete.[1259] Polygyny is framed as harmful through the process of constructing polygynous communities as racialized threats to the White (private, nuclear) family.

Similar arguments were also rehearsed in Canada. As early as 1890, legislators were debating the prohibition of polygamy in the Canadian House of Commons. Some articulated a Hegelian belief that polygamy was "utterly alien and antagonistic to any system of enlightened free government."[1260] Importantly, racialization of polygamy was not an isolated event in these debates. Hon. Dickey argued that it was "a very dangerous" move to "exempt any Indian" from prohibitions to polygamy because "it may have the effect of excepting the very class to whom the Bill is intended to apply."[1261] And of course, Canadian legislators were also very concerned with Mormon immigration to Canada and the risks of plural marriage that could accompany them.[1262] "The specter of Mormon polygamy" afforded government officials the opportunity to continually revisit "an urgent political crisis" by way of an "imminent threat" to national identity.[1263] And while this is certainly true historically, as Joanna Sweet observes, this threat was also redolent in British Columbia's *Polygamy Reference*. [1264] Perhaps the most explicit example of these racist tropes can be seen in Chief Justice Bauman's serious consideration of

[1258] Martha Ertman. "Race treason: The untold story of America's ban on polygamy." *Columbia Journal of Gender & Law* 19 (2010): 290.
[1259] Ertman found that Americans continued to conflate "White Mormons with people of color" in literary examples like "They ain't whites; they're Mormons" (289).
[1260] Canada. Parliament. Debates, 6th Parl., 4th Sess., (1890): 585.
[1261] Canada. Parliament. Debates, 6th Parl., 4th Sess., (1890): 142.
[1262] Carter, *The Importance of Being Monogamous*.
[1263] Denike, *The Racialization*, 853.
[1264] Sweet, 3.

immigration concerns related to polygyny. Citing the speculative observation of an expert witness, Chief Justice Bauman uncritically quotes Henrich as follows:

> The other thing to keep in mind is that if immigrant communities become stable and become like polygynous communities in other countries that have legalized polygyny, the fertility is always higher in polygynous communities. It's just robust. So these communities are going to grow faster and merely by population demographics there will be more polygynous - communities will expand faster than monogamous communities. And also I still think it's possible that because of our evolved psychology, that the idea of polygynous marriage will just spread - it's possible that it will spread amongst the majoritarian population. Of course I'm only speculating here...[1265]

Henrich's argument is a thinly veiled anti-Islamophobic sentiment, masquerading as concern over the harms of polygyny. The fear surrounding the "racialized other" – and in the case of polygyny, the masculine racialized other – demonstrate Anne McClintock's analysis of the gendered construction of nationalism. McClintock argues that "all nations depend on powerful constructions of gender" and though nationalism relies on an "ideological investment in the idea of popular unity", nations have demonstrably long histories of institutionalizing gender difference.[1266] Many Canadian families "do not resemble the (Christian) ideal of conjugal monogamy that has been enforced and institutionalized as the norm"[1267] and yet, it appears that only people who choose certain forms of plural conjugality and parentage (polygyny) are racially othered.[1268] Denike notes that "polygamy was treated as an extraordinary aberration among White people, as something that was abhorrent to the "civilized" world, though it was accepted as "natural" to other races (referred to variously Asian, African, Mongolian, Oriental, or Indian)." And by limiting the recognition of plural parentage and conjugality, the Canadian state "[naturalizes] racial difference and racial hierarchy."[1269] Thus, as Denike argues, the

---

[1265] *Reference* at 555, quoting from *Transcript*, 11 December 2010, p. 73, ll. 20 – p. 75, l. 39.
[1266] Anne McClintock. "Family Feuds: Gender, Nationalism and the Family." *Feminist Review* 44 (1993): 61.
[1267] Denike, *The Racialization*, 142.
[1268] Ibid.
[1269] Ibid.

stigmatization and criminalization of polygyny has been accomplished through a concentrated effort by the Canadian state to eradicate the practice.[1270]

Clearly, these efforts have not resulted in polygyny's complete erasure and because Statistics Canada does not gather data on the number of polygynous families, it is difficult to determine the extent to which decisions like the *Reference* impact practitioners' choices. However, Chief Justice Bauman shows his cards when he clearly states that polygyny is practiced in "*isolated* fundamentalist Mormon communities" and "a *small* number of North American Muslims may also engage in the practice."[1271] If the practice of polygyny is "isolated" and "small," it stands to reason that a several hundred-page decision on polygyny's primordial threat is incommensurate with the actual problem. Clearly the problem of polygyny is not based on numbers (or even potential numbers, since fears over its "spread" have not come to pass) but on what it signifies: deviance, other-ness, and a threat to modernity. The link to modernity is so strong that Chief Justice Bauman captures the connection between monogamy and democracy by suggesting that:

> The theory is that imposed monogamy may eventually lead to democracy by dissipating the pool of unmarried men that rulers harness in wars of aggression, and by imposing a basic principle of equality among men; the king and the peasant become alike in only being able to have one wife.[1272]

He revisits this point several times in the *Reference*, to make the point that "the prohibition of polygamy has been linked, both temporally and philosophically, with the rise of democracy and its attendant values of liberty and equality."[1273] Reading between these lines, it becomes clear

[1270] Denike, *The Racialization*, 142.
[1271] *Reference* at 236. Emphasis added.
[1272] Ibid., at 536.
[1273] Ibid., at 1318.

that "attendant values of liberty and equality" are understood as Western (White) values that must be protected from non-Western (non-White) insurgences.

There are, however, examples where other forms of "poly" relationships are affirmed. In fact, the Canadian Polyamory Advocacy Association ("CPAA") was included in the *Polygamy Reference* as part of the Amicus. Justice Bauman's relative inattention to them demonstrates that polyamory was not conceived as a threat. Indeed, he indicates that s. 293 of the *Criminal Code* does not include polyamory since those relationships "are based on equality and self-realization."[1274] In the following sections, I examine two recent cases of polyamorous parentage where the presiding judges, like Justice Bauman, are not threatened by the structure.

6.4 Beyond the "rule of two" in *C.C. (Re)* and *BCSC 767*

Despite the state's efforts to quash polygyny, there are notable instances where "the rule of two"[1275] does not apply. As outlined in Chapter 5, moving beyond the rule of two began with *A.A. v. B.B.* in Ontario in 2007, when Justice Rosenberg ruled that "D.D." had three legal parents– two mothers ("A" and "B") and a father ("C"). Justice Rosenberg concluded that depriving D.D. of one of his mother's legal parentage would be "contrary" to his best interests. Further, the only way to grant legal parentage to all three parents was through *parens patriae*, since A.A. and C.C. could not apply for adoption without depriving B.B. of her parentage.[1276]

A.A. v B.B. has subsequently been cited in over 80 cases (including *C.C. (Re)* and *BCSC 767*) and marks a notable shift in Canadian family law.[1277] These cases demonstrate that the "traditional family structure" – heterosexual, monogamous couple and their biological children –

[1274] Ibid., at 961.
[1275] I borrow this phrase from Haim Abraham. "A Family Is What You Make It: Legal Recognition and Regulation of Multiple Parents." *Journal of Gender, Social Policy and the Law* 25 no. 4 (2019): 407.
[1276] *A.A. v. B.B.*, 2007 ONCA 2 (CanLII) at 37.
[1277] This number is current as of a September 11, 2022 online search on the Canadian Legal Information Institute.

is increasingly distant from people's lived experiences and that "rising divorce rates, stepfamilies, cohabitation, co-parenting, assisted reproductive technologies, LGBT families, and open adoptions have all contributed to this development."[1278] This section explores two of these developments, in the cases *C.C. (Re)* and *BCSC 767*, where judges granted legal parentage to adults in polyamorous relationships. Both cases illustrate an expansion of what types of kinship arrangements are considered in the "best interests of the child" and offer a window through which we might be able to see the future of legal multi-parentage in Canada. Despite their seeming departure from the norm, I argue that these cases reveal that there is still an idealized Canadian family who is White, monogamous, and heterosexual. However, liberalism's desire to govern kinship requires a modest expansion of the ideal family to include the idealized *queer* family: the *homonormative* family. White Canadian nationalism maintains its centrality in this family form through the expression of inclusion, diversity, and "monogamish" relationships. While *C.C. (Re)* and *BCSC 767* demonstrate that the idealized Canadian family is shifting to "diversify whiteness"[1279] and diversify heterosexuality to capture subtle expansions of Canadian families, they do so without reorganizing the relationship between the family and the state or the relationships within families themselves. Borrowing from Brenda Cossman, I suggest that these cases are stories that "accommodate sexual difference within the broader matrix of familialized heteronormativity."[1280] I present the facts of each case before exploring the themes that emerged from my discourse analysis.

[1278] Abraham, *A Family Is What You Make It,* 406.
[1279] Malinda Smith. "Diversity in Theory and Practice: Dividends, Downsides, and Dead-Ends." In *Contemporary Inequalities and Social Justice in Canada*, edited by Janine Brodie, 43-68. Toronto: University of Toronto Press, 2018.
[1280] Brenda Cossman. "Sexing citizenship, privatizing sex." *Citizenship Studies* 6, no. 4 (2002): 483-4.

6.4.1 C.C. (Re)

On April 4, 2018, in Newfoundland and Labrador, Supreme Court Justice Robert Fowler issued a landmark decision in *C.C. (Re)*.[1281] In its unprecedented acknowledgement of a polyamorous relationship, the decision recognized three romantically involved adults – J.M., J.E., and C.C. – as the legal parents to their young daughter, known to the courts as *A*, who was born in 2017.[1282] A Canadian national news media article reports that the parents, J.E., J.M., and C.C., were preparing for a "drawn-out court battle" given that there was no legal precedent for a polyamorous family seeking to have all parents' names on a birth certificate.[1283] A was born into an intentionally polyamorous arrangement, which was a "a stable and loving family relationship" between the three adults since 2015.[1284] The partners in the relationship were not married, and although the identity of the mother, C.C., is clear, it is not known whether J.M. or J.E. is the biological father to A.[1285] J.M. and J.E, along with C.C., sought the legal recognition of their parenthood to A, however, the Vital Statistics Division of Newfoundland's Ministry of Service refused to grant that designation. Under the *Vital Statistics Act* only two parents could be listed on a child's birth certificate.[1286] As a result, J.M., J.E., and C.C. sought a declaration of three legal parents through the court, pursuant to section 7 of the *Children's Law Act*.[1287] The issue

[1281] The full decision is available online via WestlawNext Canada: https://nextcanada-westlaw-com.login.ezproxy.library.ualberta.ca/Document/I6962b7f95ffb00a1e0540021280d7cce/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=2018+NLSC+71.
[1282] The details of the case presented here are drawn from Justice Fowler's legal decision and Canadian news media articles. To date, the parents have chosen to remain relatively anonymous.
[1283] Jonny Hodder. "All in the family: Meet 3 parents who won a historic legal victory for polyamorous families." *CBC News*. June 20, 2018.
[1284] *C.C. (Re)* at 34.
[1285] Ibid., at 8.
[1286] Ibid., at 9.
[1287] Ibid.

before the court was whether the Supreme Court of Newfoundland and Labrador had the jurisdiction to make a declaratory order of parentage for more than two parents.[1288]

Justice Fowler's decision notes that he had "little doubt" that the province's (nearly 30-year-old) legislation "ha[d] not addressed the circumstance of a polyamorous family relationship."[1289] He clearly states that references to parents in the *Children's Law Act* refer to the singularity of parentage:

> [The sections of the *CLA*] speak to a "man" in the singular and at no time is there a reference which would lead one to believe that the legislation in this Province considered a polyamorous relationship where more than one man is seeking to be recognized in law as the father (parent) of the child born of that relationship.[1290]

He ruled in favour of the family, finding that the legal recognition of all three adults as parents was in the "best interest of the child" and that the gap in provincial legislation concerning parentage (which made it impossible for a child to have more than two parents) triggered the Court's *parens patriae* jurisdiction, enabling him to fill a legislative gap. Justice Fowler found that A. was "born into what is believed to be a stable and loving family relationship which, although outside the traditional family model, provides a safe and nurturing environment."[1291] In granting the application, Justice Fowler asserted that legislators could not, or did not, imagine the complex array of family relationships that would emerge with changing social norms and care needs. He suggested that it was not the intention of the legislation to "discriminate against" children but instead to bring about their "equal status."[1292] When the legislation was first introduced, it was not uncommon for children born outside of wedlock to be treated differently under law— a result of the centuries-long tradition of *filius nullius* — and so the legislation's

[1288] Ibid., at 10.
[1289] Ibid., at 19.
[1290] Ibid., at 20.
[1291] Ibid., at 34.
[1292] Ibid., at 33.

intent was to remedy that form of discrimination.[1293] In the closing paragraphs of his decision, Justice Fowler references the Supreme Court of Canada's decision that a court may use *parens patriae* to "fill a gap in legislation" if the legislation in question does not limit the jurisdiction of the court.[1294] As such, he remedied gaps in the *Children's Law Act* and the *Vital Statistics Act* and found that by "J.M. and J.E. are the parents of the child, A., born of the polyamorous relationship with C.C., the mother of the child."[1295]

This decision is noteworthy in that it appears to have opened the door for the recognition of legal polyamorous parentage in Canada, at least insofar as it assisted Justice Wilkinson's decision in *BCSC 767*, and for the opportunity it presents to parents, scholars, jurists, and policy makers to think critically about the ways legal and social conceptions of family and parenthood are changing in Canada, as well as what is to be done because of these social changes. Nonetheless, while *C.C. (Re)* is a seemingly progressive decision, I argue that proponents of the legal and social expansion of the definition of parent should remain cautious. The success of this decision hinges on the dyadic and monogamish heterosexuality of J.E., J.M., and C.C.'s relationships, despite being in a polyamorous relationship structure. J.E. and J.M. are each in a monogamous, heterosexual relationship with C.C., J.E. and J.M. are not in romantic or sexual relationships with one another and, based on the available information, none of the parties are in romantic or sexual relationships with anyone outside their family. Notably, this is a stark contrast to perceptions of multi-parentage and multi-conjugality in the *Polygamy Reference* where the best interest of the child was inextricably linked to the criminalization of polygyny. In the *Reference*, it is not possible to conceive of multi-parentage in a way that benefits children

[1293] Ibid.
[1294] Ibid., at 39.
[1295] Ibid., at 40.

because the multi-parentage is polygynous. In fact, the *Polygamy Reference* is explicit in stating that monogamy is the best way to ensure equity, "mutual support, protection, and edification" for parents and children.[1296] Next, I turn towards the facts of *BCSC 767* before presenting the findings from both cases.

6.4.2 BCSC 767

BCSC 767 also concerns legal parentage for three adults in a polyamorous relationship. The petitioners were Oliva, Eliza, and Bill who, at the time of the case, "[had] been living together in a committed polyamorous relationship since 2017."[1297] The petitioners describe their relationship as a "triad" (a common term in polyamorous communities) so, unlike J.M., J.E., and C.C., they each have a relationship with one another.[1298] Bill and Eliza were the initial romantic relationship and began their romantic relationship in the early 2000s. In 2013, they met Olivia and in 2016 their romantic relationships with Olivia began.[1299] When Olivia began her relationships with Bill and Eliza she knew that they were trying to conceive a child but did not "nail down" the particulars of how Olivia would relate to the child.[1300] In early 2018, Eliza conceived via sexual intercourse with Bill and without the use of assisted reproductive technologies.[1301] As a result, the three parent option in BC's *FLA* was not available to them. In the fall of 2018, Olivia, Eliza, and Bill welcomed their first child, Clarke. Eliza and Bill are Clarke's biological parents per the requirements of the *FLA* and as such, were the two legal parents listed on their child's birth

[1296] *Reference* at 209.
[1297] *BCSC 767* at 1. These are not the real names of the petitioners; Justice Wilkinson anonymized the parents' and child's name to protect their privacy.
[1298] Ibid., at 8.
[1299] Ibid., at 9.
[1300] Ibid., at 10.
[1301] Ibid.

registration.[1302] Because Olivia was not listed on Clarke's birth registration, she did not have legal parental rights for Clarke, despite the adults' intention to raise him together.

The presiding judge, Sandra Wilkinson, notes that while Eliza's evidence demonstrates that all three adults agreed – prior to conception – that Olivia would have a parenting role, it was unclear if she was going to be a "full parent."[1303] However, at some point during Eliza's pregnancy, all three came to agree that Olivia would be a full parent.[1304] It is worth highlighting the similarities between Olivia, Eliza, and Bill's arrangement and that of Della Wolf, BC's "first" baby born to three legal parents. Della also has two mothers and a father, an agreement made pre-conception, though the conjugal arrangement is different, and her birth transpired using reproductive technologies. In Della's case, the two mothers are partners, and neither are romantically involved with Della's father. And yet, as Justice Wilkinson notes, the *FLA* did not envision polyamorous parents, so Clarke's parents could not have – via legislation – sought legal parentage for their baby. These instances reveal the complex relationship of sex, reproduction, law, and the "facts of nature." In *BCSC 767*, Clarke was born through heterosexual reproduction, which is closer to "nature" as it is articulated in the law. In Della's case, two mothers, a donor, and science paved the way but also required the law to intervene.

Justice Wilkinson's decision is clear about Olivia's "very active role in preparing for Clarke's birth" which included "inducing lactation" so that she could assist in feeding Clarke.[1305] Because Olivia was not considered a legal parent, she was not eligible for paid parental leave, however she took four weeks of unpaid leave to be with her family.[1306] Since Clarke's birth,

[1302] Ibid., at 1.
[1303] Ibid., at 10.
[1304] Ibid.
[1305] Ibid., at 11.
[1306] Ibid.

Eliza, Oliva, and Bill have shared parenting responsibilities and their arrangement allows each parent to have one-on-one time with Clarke and time alone.[1307] The family has taken holidays together and also spent time, together, with all three of their families of origin.[1308] Justice Wilkinson also notes that "like other families, they have adjusted their home life and parenting arrangements to accommodate the changes brought on by the COVID-19 pandemic."[1309] Oliva, Eliza, and Bill "live openly as a polyamorous family to their families and friends" but are not open at work, for "fear of reprisal and discrimination."[1310]

What brought the case to court was their pursuit of a declaration of legal parentage for Olivia and to amend Clarke's birth registration to reflect his parentage.[1311] *The Attorney General* opposed the petitioners' order and *The Registrar General* and *Vital Statistics Agency* did not take a position.[1312] As in *C.C. (Re)*, Justice Wilkinson used her *parens patriae* jurisdiction to declare Olivia to be Clarke's third legal parent. She also required that his birth registration be amended to reflect his three legal parents.[1313] Given her use of *parens patriae*, Justice Wilkinson did not pursue the petitioners' *Charter* argument, however she notes that it would not have been successful in any event.[1314] According to s. 30 of the *FLA*, a child can have three legal parents *if* that child is conceived through assisted reproduction.[1315] Clarke's conception falls under s. 26 of

[1307] Ibid., at 13.
[1308] Ibid., at 13-14.
[1309] Ibid., at 15.
[1310] Ibid., at 16.
[1311] Ibid., at 2.
[1312] Ibid., at 4.
[1313] Ibid., at 6.
[1314] Ibid., at 83. Justice Wilkinson explains that she does not need to consider the *Charter* argument since she used her *parens patriae* jurisdiction. However, she confirms that the *Charter* argument would not have succeeded because the petitioners did not show that s. 26 of the *FLA* clearly disadvantaged them based on "family status" as an "analogous ground" under s. 15 of the *Charter*.
[1315] Ibid., at 22. See also: s. 30 *Family Law Act*, S.B.C. 2011, c. 25.

the *FLA* which designates Eliza as his legal mother and Bill his presumptive (legal) biological father.[1316]

The Attorney General argued that, in the absence of legal parentage, Olivia was recognized as a "guardian", that the differences between a parent and guardian were "nominal", and that a declaration of parentage would not provide Olivia with "many more, if any more, substantive rights."[1317] Justice Wilkinson strongly rejected this formulation by arguing that there are important distinctions between parentage and guardianship (notably, similar arguments were made in *Rutherford*, one of the preceding cases to ON's *AFAEA*). She indicated that the law's differentiation between these roles is evidence of this distinction and that a declaration of legal parentage "is also a symbolic recognition of a parent-child relationship" that "should not be minimized."[1318] Further, she outlined the myriad other rights and responsibilities that flow from legal parentage and that do not obtain from guardianship. She stated that "parentage determines lineage and a child's rights on intestacy, citizenship, potential access to parental leave, and certain financial obligations, among other things."[1319] To illustrate this point, she referenced *Cabianca v. British Columbia* to affirm the significance of an accurate birth registration for the child and their family.[1320] Justice Wilkinson observed:

> [t]he importance of a child's birth registration cannot be underestimated. It is a document that describes a child's origin and provides rights to both parents and children. It should be inclusive and reflect the intentions of those involved with the child's birth.[1321]

[1316] Ibid., at 31.
[1317] Ibid., at 41.
[1318] Ibid.
[1319] Ibid., at 46.
[1320] *Cabianca v. British Columbia (Registrar General of Vital Statistics),* 2019 BCSC 2010.
[1321] *BCSC 767* at 41, quoting *Cabianca v. British Columbia (Registrar General of Vital Statistics)*, 2019 BCSC 2010 at 37. In *Cabianca*, the Court explored how legal parentage would be determined for children born via reproductive technologies. Briefly, the details of the case are: two adults, Echo ("E") and Nana ("N"), had been in a same-sex relationship since 2010 and their close friend, Marc ("M"), provided the couple with semen donations. E and N conceived two children with M's donations. Their Donor Agreement stated that M, E, and N would be listed as parents on Registration of Birth. However, the Registrar did not register the first child's birth with three legal parents because the parties did not sign the Donor Agreement prior to conception. After the second child was born, E and N registered the birth online and listed themselves as because the online registration only allowed two parents.

Notably, she referenced *C.C. (Re)* to support her argument and found that the gap in the *FLA* – as it relates to children conceived through sexual intercourse *and* who have more than two parents – enabled her to exercise the court's *parens patriae* jurisdiction. As a result, Justice Wilkinson declared that it was in "Clarke's best interests to have all of his parents legally recognized as such."[1322] She concluded her decision by noting that Clarke was being raised "in a loving and supportive family by three highly capable parents."[1323] *BCSC 767* reflects (and also references) Justice Rosenberg's decision in *A.A.* that "social conditions and attitudes" surrounding family and parentage have shifted, in part through advances in ARTs. These changes created legislative gaps where courts now use *parens patriae* to remedy the deficiency.[1324] Notably, the section of *A.A.* referenced by Justice Wilkinson also emphasizes that depriving a child of legal parentage is contrary to their interests.

Her decision makes brief mention of the *Polygamy Reference* wherein she counters the Attorney General's position that the province had in fact considered polyamory when drafting the *FLA* (and therefore the exclusion was deliberate). As summarized by Justice Wilkinson, the AG's argument was that the revised parentage schema in the *FLA* came into force almost two years after the *Polygamy Reference*, which "examined, in detail, polyamorous relationships and polygamy…"[1325] Justice Wilkinson did not agree with the AG and made a strong argument, drawing on Hansard debates, that legislators were not considering children born of polyamorous

---

M, E, and N applied for a declaration of parentage that recognized all parties as legal parents of their two children. Justice MacDonald ruled that s. 31(3) was broad enough to give the Court jurisdiction to correct M, E, and N's non-compliance with the pre-conception requirement. Additionally, the Court found that to uphold the non-compliance would be counter to the child's best interests. As such, M was declared a legal parent of the first child. The Court also found that the Registrar had authority under the province's *Vital Statistics Act* to remedy "technical errors" on birth registrations and so M was also granted legal parentage of the second child.

[1322] *BCSC 767* at 82.
[1323] Ibid., at 92.
[1324] *A.A. v. B.B.* at 35, 37.
[1325] *BCSC 767* at 61.

arrangements. She observes that the legislature's consideration of more than two parents in the context of ARTs "does not necessarily mean the legislature contemplated the possibility a child might have more than two parents in other contexts."[1326] She then unequivocally states:

> In fact, it is clear to me that the legislature was not reviewing the concept of parentage in the context of children conceived through sexual intercourse. Those in the petitioners' circumstances were not put before the legislature for consideration.[1327]

It appears that Justice Wilkinson's engagement with polygamy is only by way of responding to the AG's argument. However, her reference provides a subtle distinction between polyamory and polygamy by reflecting the *Reference's* own treatment of polyamory and polygamy as separate categories. Presumably, this was because the *Polygamy Reference* was more focused on marriage than parentage, but this begs the question – if the situation before the courts in *BCSC 767* concerned the legal recognition of the conjugal relationship among the parents, would the outcome have been the same? Or does the presence of the child and the focus on parentage somehow modify the presence of poly-conjugality? And why would that be the case in a situation of polyamory but not polygyny? The answer, I argue, is because mainstream polyamory (that which appears in Canadian news and, I suspect, here before the courts) is about Whiteness, secularism, liberalism, and equal rights whereas polygyny is made out as cult-like religiosity with orientalist inflections. In any case, that is certainly the distinction reinforced by Chief Justice Bauman, which I explore further below.

Having summarized *C.C. (Re)* and *BCSC 767*, I now turn to my discourse analysis emerging from these cases. Culled from these sources, I argue that moving beyond the "rule of two" is now a legal possibility, but within narrow circumstances. The law can envision multi-parentage as acting in the best interests of the child *if* the conjugal relationships between parents

[1326] Ibid., at 67.
[1327] Ibid., at 67.

affirms dyadic hetero- or homonormativity and/or the relationships' gendered norms affirm the primacy of the private monogamish nuclear family. This is the case in *BCSC 767* where two mothers and one father are in a relationship with one another, and yet the mothers take on highly traditional maternal roles.

6.4.3 Whiteness, monogamy, and "polyamory is not group sex"

Historically, polyamory has played a central role in Western sexual liberation ideology that, as Jin Haritaworn et. al. argue, "profoundly shaped the cultural practices and political debates in many social movements."[1328] For example, the "commune movements" in the 1960s and 1970s were key sites for experimenting with new relationship forms, household organization, and sexual politics, often drawing on feminist, gay, and socialist critiques of the family, monogamy, and private property.[1329] Against this backdrop, polyamory emerged in a very public way through "sexually emancipatory discourses" that aimed to "provide languages and ethical guidelines for alternative lifestyles and sexual and intimate relationships beyond the culture of 'compulsory monogamy.'"[1330] According to scholarly accounts, polyamory represents the possibility that "stands for the assumption that it is possible, valid and worthwhile to maintain intimate, sexual, and/or loving relationships with more than one person."[1331] In the *Polygamy Reference*, Justice Bauman helpfully points out that polyamory is "not group sex" and, other than their approach to intimacy, "polyamorists live mainstream lives fully integrated with their communities."[1332] Via this assertion, Justice Bauman juxtaposes polyamory's "mainstream" and "integrated" practice with the marginal and isolated deviance of polygyny. Notably, the

[1328] Haritaworn et. Al., *Poly/logue*, 518.
[1329] Ibid.
[1330] Ibid.
[1331] Ibid.
[1332] *Reference* at 435.

Polygamy Reference uses polyamory to marginalize polygyny in the same way that many polyamorists themselves normalize their intimacy by vilifying polygyny.[1333]

The poly-conjugality present in polyamory and polygyny is filtered through conceptualizations of race, class, gender, and sexuality in different ways. In the former, poly-conjugality is perceived as a contemporary iteration of the nuclear family and in the latter, poly-conjugality is perceived as a "barbaric cultural practice".[1334] Importantly, these cases reveal Thompson's assertions that examining the regulation of intimacy in Canada involves uncovering how sexuality is raced and gendered and the co-construction of patriarchy, capitalism, and White supremacy.[1335] More specifically, the historical and contemporary racialization of polygyny as a form of hyper-sexual deviance reveals how "unstable" the category of race really is.[1336] The different mechanisms through which race, sexuality, and intimacy were, and continue to be, governed in Canada demonstrate that these categories are not fixed or natural, but are continually reproduced and reconfigured.

Neither *C.C. (Re)* or *BCSC 767* revealed the racial identities of its family members. The absence of this information makes it difficult to read the how the intersection of race and sexuality operates in these cases. However, popular (including blogs, forums, and social media sources of record) and scholarly discussions of poly-conjugality are clear about the intersecting relationships between race, gender, and sexuality and it bears discussion here.[1337] Thus, while it would be a mischaracterization to present polyamory as wholly "suppressed or oppressed,"[1338] so

[1333] Park, *Polyamory Is to Polygamy*.
[1334] Canada. "Zero Tolerance for Barbaric Cultural Practices Act: An Overview." https://www.canada.ca/en/news/archive/2014/11/zero-tolerance-barbaric-cultural-practices-act-overview.html.
[1335] Thompson, *Raced Ideas and Gendered Intimacies*, 355.
[1336] Ibid.
[1337] See: Burns, *Black Polyamory*; Denike, *The Racialization*; Ertman, *Race Treason*; Rambukkana, *Fraught Intimacies*, Schippers, *Beyond Mongoamy*; Simula, Sumerau, and Miller, *The Use of Gender*.
[1338] Rambukkana, *Fraught Intimacies*, 38.

too would it be a mischaracterization to assume that polyamory is insulated from power imbalances, inequality, and discrimination. Additionally, the vast and nuanced literature on intersectionality demonstrates that the multiplicity of peoples' identities are made up of both axes of privilege and oppression that come to bear in public and private life.[1339] All intimate relationships are produced through, and by, systems of oppression and inequality like gender and race, and so the mere assertion that polyamory is a form of "ethical non-monogamy" committed to equality does not shield polyamorists from reproducing gendered or raced hierarchies, in theory or in practice.

As Rambukkana notes, much of poly discourse is "hampered" by an uncritical reification of privilege.[1340] Thus, instead of engaging in an intimate practice that challenges intimate privilege and hierarchies of gender, race, and class, polyamory can reinforce these systems.[1341] The consequences of this are examined in popular writing on polyamory. Elisabeth Sheff, a prominent scholar of polyamory, wrote a *Psychology Today* post titled "Diversity and Polyamory: Polys are diverse in some ways and homogeneous in others, like race and class."[1342] Her post highlights the pervasive Whiteness of many polyamorous spaces and argues that most mainstream polyamorous communities share common and privileged features. Some of these include living in predominantly urban or suburban locales, high levels of education, and professional careers.[1343] Moreover, she writes that in the United States, the interconnections

[1339] Ibid., see also: Kimberlé Crenshaw. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics." *University of Chicago Legal Forum* (1989): 139-168; Leslie McCall. "The Complexity of Intersectionality." *Signs* 30, no. 3 (2005): 1771–800; and Nira Yuval-Davis. "Intersectionality and Feminist Politics." *European Journal of Women's Studies* 13, no. 3 (2006): 193-209.
[1340] Rambukkana, *Non/Monogamies*, 113.
[1341] Ibid.
[1342] Elisabeth Sheff. "Diversity and Polyamory: Polys are diverse in some ways and homogeneous in others, like race and class." *Psychology Today*. November 27, 2013. https://www.psychologytoday.com/ca/blog/the-polyamorists-next-door/201311/diversity-and-polyamory
[1343] Ibid.

between race and class are amplified in polyamorous communities. In her interviews with polyamorists of colour, they highlighted three primary reasons for the predominance of Whiteness in poly spaces. First, women of colour expressed anxiety surrounding the fetishization or objectification of their race, gender, and sexuality. Second, the long history of stereotyping women of colour as hypersexual, immoral, and sexually deviant continues to harm women of colour and their sexual freedom. Third, the cost of time and money – to participate in poly community events or in multiple romantic and/or sexual relationships – is a barrier for poor and working-class communities. In both Canada and the United States, people of colour are more likely to experience poverty than their White counterparts, making the class barrier a racialized barrier.[1344] Moreover, people of colour and poor, or working-class communities are more likely to experience social surveillance of their intimate lives.[1345]

The racial and class privilege of polyamory is confirmed by a 2014 blog post titled "Couple-Centricity, Polyamory and Colonialism" by the *Critical Polyamorist*, Kim TallBear. In this post, TallBear examines the legacy and manifestations of colonialism in current polyamorous spaces. Specifically, she argues that the "couple-centric" focus of poly communities mirrors broader compulsory monogamy and the nuclear family (even as polyamory tries to resist those ideologies). She describes her experiences attending workshops for polyamorous *couples* to learn how to manage jealousy, discuss relationship boundaries, and determine how and when "others" can join. For TallBear, focusing on couples' experiences continues to centre the nuclear family unit. Elsewhere on her blog, TallBear writes that "polyamory and [relationship anarchy] [are] forms of settler sexuality," that have potential for

[1344] Ibid.
[1345] Ibid.

"partial decolonization."[1346] She notes that practicing polyamory and relationship anarchy are "steps on the road to disaggregating "sexuality" into good relations" that reflect Dakota teachings.

Given the privileging of Whiteness in polyamorous communities and Canadian society more broadly, it is unsurprising that openly polyamorous families who have been featured *positively* in Canadian news stories are White, or at least have White-assuming privilege.[1347] The positive representation of poly-conjugality as White reflects many polyamorists' experiences of their community's predominant Whiteness[1348] and Canada's longstanding history of racializing non-monogamy[1349] and regulation of non-monogamy through criminalization.[1350]

Thus, while *C.C. (Re)* and *BCSC 767* illustrate the law's willingness to consider multi-parentage and multi-conjugality in the best interests of a child, one must read the possibilities and limitations of the decisions through a critical race lens. Critical race theorists, like Richard Delgado, note the limitations of remedies found within liberal institutions infused with "racialized power". [1351] More recently, Thompson reminds us that legislation like the *Indian Act* is "not simply a regulation of the intimate sphere, but a regulation of the sexuality of certain identities."[1352] Thus, the law was a tool through which the Canadian state constructed racial boundaries, hierarchies, and modes of inclusion and exclusion.[1353] Moreover, these boundaries

---

[1346] Kim TallBear. "About." *The Critical Polyamorist.* Blog. http://www.criticalpolyamorist.com/about.html
[1347] Zosia Bielski. "'Boring and normal': The new frontier of polyamorous parenting." *Globe and Mail*. December 2, 2018. https://www.theglobeandmail.com/canada/article-boring-and-normal-the-new-frontier-of-polyamorous-parenting/ and Marillisa Racco. "Polyamory is a world of 'infinite' love. But how do the relationships work?" *Global News*. July 24, 2018. https://globalnews.ca/news/4320857/what-is-polyamory/.
[1348] Al Donato. "Polyamory Can Be Liberating For People Of Colour, Until Racism Gets In The Way." *HuffPost*. November 22, 2019. https://www.huffpost.com/archive/ca/entry/polyamory-poc-canadians_ca_5dcc504ee4b03a7e0293f014 and Rambukkana, *Fraught Intimacies*, 143, 195.
[1349] Gaucher, *Monogamous Canadian Citizenship* and Rambukkana, *Fraught Intimacies*.
[1350] Carter, *The Importance of Being Monogamous*.
[1351] Richard Delgado. *Critical Race Theory: The Cutting Edge*, xxix. Philadelphia: Temple University Press, 1995.
[1352] Thompson, *Racial Ideas and Gendered Intimacies*, 356.
[1353] Ibid.

worked to delineate "who was – and who was not – acceptable as a sexual or marital partner."[1354] Critically, legal apparatuses like the *Indian Act*, were also a means through which the Canadian state gained and maintains title to Indigenous lands. For example, the former section 12.1.b of the *Act* (amended in 1985 under Bill C-31, and again in 2010 under Bill C-3) stripped Indigenous women who married and had children with non-Indigenous men, of their right to pass on Indian legal status. The same rule did not apply to Indigenous men who married and had children with non-Indigenous women.[1355] As Thompson explains, this law weakened Indigenous communities' claims to land, resources, and rights by diminishing the population of people who had status to do so.[1356] Thus, the regulation of race and sexuality was inextricably bound with the accumulation of property and capital and the articulation of the nation.[1357] Returning to *C.C. (Re)* and *BCSC 767*, a critical race analysis once again reveals the unstable categories of race, gender, sexuality, and property and how their articulation in law can serve ever-changing nationalist aims.

[1354] Ibid.

[1355] Ibid., 354. The *Gender Equity in Indian Registration Act* (Bill C-3) received royal assent in 2010. The amendments, which came into effect in 2011, corrected the "third generation" cut-off that Bill C-31 did not remedy and therefore ensured that the grandchildren of women who had lost status were eligible to receive it. Still, Bill C-3 failed in that it did not create equal "entitlements" for grandchildren of matrilineal dissent with those of patrilineal descent. This inequality was then litigated in *Descheneaux v. Canada, 2015 QCCS 3555*, which resulted in Bill S-3, *Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* in 2017. In *Descheneaux v. Canada*, the court ruled that Indian Act provisions regarding registration "unjustifiably violated equality provisions under section 15 of the charter because they perpetuated a difference in treatment between Indian women as compared to Indian men and their respective descendants." In response, Bill S-3 set out to remove gender-based discrimination in Indian registration (See: Government of Canada. "Background on Indian Registration." https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141).

[1356] Ibid. Other examples of the regulation of race, gender, sexuality, and class in Canada include the internment of Japanese people and seizures of their property and prohibitions against Black settlements in Canadian municipalities, like Edmonton. See: Dhamoon, Rita, and Yasmeen Abu-Laban. "Dangerous (internal) foreigners and nation-building: The case of Canada." *International political science review* 30, no. 2 (2009): 163-183 and Oikawa, Mona. *Cartographies of violence: Japanese Canadian women, memory, and the subjects of the internment*. Toronto: University of Toronto Press, 2012.

[1357] Ibid., 356.

As Shelley Park suggests, one could assume that polyamorists and polygamists are aligned in their resistance to compulsory monogamy.[1358] However, the very people who "embrace polyamory as a progressive form of kinship" do so by reinforcing the assumption that polygamy is a "regressive, even barbaric, kinship form" that is antithetical to contemporary gender and sexual equality rights for women, children, and queers.[1359] Even Justice Bauman, in the *Polygamy Reference*, draws on this framing. In his assertion that "polyamory is not casual group sex" and that polyamorists, save for their unique intimate arrangements, are quite normal people, he is also implying that polygynists are *abnormal*.[1360] The reframing of polyamorous poly-conjugality as distinct from "group sex" cannot be separated out from the hypersexualization of polygyny and of the racialization of hypersexuality. This repeats, as Park notes, a "pattern of centering polyamory while marginalizing polygamy".[1361] Moreover, while polyamory is increasingly characterized as "the new gay," polygyny continues to be characterized by "hyper-heteropatriach[y]" and women's economic dependence on men.[1362] In fact, in 2003, the legal scholar Maura Strassberg wrote a defense of polyamory that hinged on the continued criminalization of polygyny.[1363]

Clearly, the nature of the conjugal relationships between adults in polyconjugal structures is key to the state's determination of normality and abnormality. Although both *C.C. (Re)* and *BCSC 767* involve polyamorous parents, their conjugal arrangements differ. In *C.C. (Re)* the parents' relationship is not monogamous overall, but there are two distinct and simultaneous heterosexual relationships – one between J.M. and C.C. and one between J.E. and C.C. – that

[1358] Park, *Polyamory is to Polygamy*, 298.
[1359] Ibid.
[1360] *Reference* at 431.
[1361] Park, *Polyamory is to Polygamy*, 298.
[1362] Ibid.
[1363] Ibid., 299 citing Maura Strassberg. "The Challenge of Post-Modern Polygamy: Considering Polyamory." *Capital University Law Review* 31, no. 3 (2003): 439-563.

form the basis of their polyamorous conjugal arrangement. There are noteworthy correlations between this conjugal arrangement, mono-normativity, and compulsory monogamy. As Robin Bauer describes, mono-normativity is based on the privileged and moral status of "couple-shaped" intimate arrangements.[1364] Relationships that do not conform risk "being ascribed the status of the other, of deviation, of pathology…" (ibid.). Mono-normativity is reinforced by the ideology of compulsory monogamy which asserts that monogamy is the indication of one's "dignity, maturity, reliability…" and the overall "capacity for true love…".[1365] The polyamorous relationship between J.M., J.E., and C.C. is bound by a degree of monogamy. Both J.M. and J.E. are monogamously connected to C.C. who is romantically and sexually involved with both men. Their relationships are "couple-shaped" and "monogam-ish" in nature. In fact, in a CBC article, C.C. said "I'm polyamorous. The boys are both monogamous."[1366] I argue that this is one of the reasons Justice Fowler noted that A. was "born into what is believed to be a stable and loving family relationship which, although outside the traditional family model, provides a safe and nurturing environment."[1367] The family's departure "outside the traditional family model" was not far from the status quo.

At first glance, *BCSC 767* appears to be a clear refutation of the need for couple-shaped monogamish relationships. In this case, Bill, Eliza, and Olivia were all in relationships with one another (forming a "triad") and there is no uncertainty of paternity. However, Olivia fulfilled a very traditional maternal role, evidenced by her commitment and intention leading up to the birth

[1364] Robin Bauer. "Non-Monogamy in Queer BDSM Communities: Putting the Sex Back into Alternative Relationship Practices and Discourse." In *Understanding Non-Monogamies*, edited by Meg Barker and Darren Langdridge, 145. Toronto: Routledge, 2010.
[1365] Christian Klesse. "Contesting the culture of monogamy: consensual nonmonogamies and polyamory." *Introducing the New Sexuality Studies*, edited by Nancy L. Fischer and Steven Seidman, 329. Toronto: Routledge, 2016.
[1366] Jonny Hodder. "All in the family: Meet 3 parents who won a historic legal victory for polyamorous families." *CBC* News. June 20, 2018. https://newsinteractives.cbc.ca/longform/polyamory-parents-birth-certificate.
[1367] *C.C. (Re)* at 34.

of her child (even inducing lactation to feed her son) and taking unpaid leave to care for the child. Both features reflect dominant ideologies of motherhood that hinge on altruistic sacrifice, hyper femininity, and devotion to the reproductive family.[1368] Additionally, Bill, Eliza, and Olivia established clear pre-conception intention, which is a requirement for the recognition of more than two legal parents under BC's *FLA* (however, Olivia could not be recognized as a legal parent under the "new" *FLA* because the child was not conceived using ARTs and she did not have a biological connection to the child). As I argued in Chapter 4, the preconception requirement under the *FLA* also reflects cultural fictions about romantic love, wherein "first comes love, then comes marriage, then comes the baby…".[1369] In this broader cultural narrative about heterosexual love and reproduction, Olivia found a home. The decision's reliance on normalizing discourses, for example "like other families…" and descriptions of family holidays, demonstrate the ways in which Olivia, Eliza, and Bill are just like "normal" (heterosexual, dyadic, and monogamous) families. While the triad structure is a definitive departure from monogamy and mono-normativity, the presence of Olivia's devoted maternalism, their middle-class professional jobs, and pre-conception intention (a requirement under BC'S *FLA* for the recognition of more than two parents) serves to balance the potentially radical challenge to the private nuclear family.

In *C.C. (Re)*, Justice Fowler asserts that "the fact that the biological certainty of parentage is unknown seems to be the adhesive force which blends the paternal identity of both men as the fathers of A."[1370] Justice Fowler's conceptualization of the unknown paternity as an "adhesive bond" transforms two fathers into one composite father, thus reinforcing a dyadic, heterosexual,

[1368] Marlee Kline. "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women." *Queen's Law Journal* 18, no. 2 (1993): 306-342
[1369] Lauren Berlant. "Intimacy: A special issue." *Critical inquiry* 24, no. 2 (1998): 281-288.
[1370] *C.C. (Re)* at 34.

and monogamous family formation. As I noted earlier, until quite recently, the law's ability to determine paternity relied on a legal fiction. The father was the man who was married to, or in a marriage-like relationship with, the mother. Thus, the law made assumptions about the nature of adults' conjugality to determine biological relatedness.[1371] Justice Fowler's assertions that "deny[ing] the recognition of fatherhood (parentage)… would deprive [A] of having a legal paternal heritage with all the rights and privileges associated with that designation"[1372] is an invocation of the law's desire for "fatherfull" families. This illustrates Kelly's assertion that courts can be flexible in determinations of fatherhood to guard against "fatherless families."[1373] In *C.C. (Re)*, Justice Fowler adopts Kelly's "malleability" to ensure A's connection to his "paternal heritage" through not one, but *two*, fathers.[1374]

The focus on "paternal heritage" and the "rights and privileges associated with that designation" confirms what *BCSC 767* found– and what family law acts and legal scholars know to be true – there are distinct rights, responsibilities, and privileges flowing from legal parentage that do not flow from guardianship or close adult-child relationships. However, Justice Fowler's remarks also echo the centuries-long primacy of fatherhood to the maintenance of the family and of the nation-state (recall Justice Bauman's concern over paternal responsibility). This reflects Anne McClintock's survey of the gendered construction of nationalism, where she found that "… the very definition of nationhood rests on the male recognition of identity". [1375] Drawing on Étienne Balibar, she argues that masculinity can only recognize itself when it is aligned with race and "structured [by] the transmission of male power and property."[1376] The state's commitment

[1371] Fiona Kelly. "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family." *Canadian Journal of Women and the Law* 21 (2009): 315.
[1372] *C.C. (Re)* at 35.
[1373] Kelly, *Producting Paternity*.
[1374] *C.C. (Re)* at 35.
[1375] McClintock, *Family Feuds*, 62.
[1376] Ibid.

to finding fathers and determining paternity – socially or biologically – illustrates Balibar's poignant critique of the nation:

> it is around race that [the nation] must unite, with race –an 'inheritance' to be preserved from any kind of degradation –that it must identify both 'spiritually' and 'physically' or 'in its bones'.[1377]

Paternity in *BCSC 767* also did important work. Justice Wilkinson stated that "Bill is presumed to be Clarke's biological father and therefore is also Clarke's parent. I use "presumed" because this is the language used in the *FLA*, *not because there is any doubt Bill is Clarke's biological father*."[1378] Unlike the guesswork involved in *C.C. (Re)*, which worked to secure the paternal relationships, in this case, the *certainty* of paternity served to strengthen the relationship that Olivia, Bill, and Eliza had which then created the conditions that supported the finding that this polyamorous family was in the best interests of their child. Justice Wilkinson argues that the relationship between parent and child guarantees certain rights like citizenship and inheritance but that "most importantly" legal parentage is an "immutable" bond between parent and child that cannot be "broken."[1379] In both cases, the Court practiced a degree of flexibility in granting legal parentage to two three-parent families who were not otherwise envisioned by the provisions of their respective province's family law.

Perhaps *C.C. (Re)* and *BCSC 767* will become touchstone decisions for multiparent polyamorous families. For now, they clearly pose some conceptual and material challenges to the nuclear family form by illuminating what Rambukkana calls "intimate privilege".[1380] Intimate privilege consists of the social, legal, economic, and political privileges accorded to people

[1377] Étienne Balibar. "Racism and Nationalism." In *Race, Nation, Class: Ambiguous Identities*, 64. Edited by Étienne Balibar and Immanuel Wallerstein. London: Verso, 1991.
[1378] *BCSC 767* at 31.
[1379] Ibid.
[1380] Rambukkana, *Fraught Intimacies*.

whose intimate lives adhere to societal norms and expectations; for example, heterosexual and monogamous, or in this case multi-parent relationships that mirror traditional norms in important ways. Polyamorous relationships offer opportunities to challenge ideas surrounding intimacy, sexuality, and conjugality, but those opportunities must be carefully examined within the broader context of poly-conjugality in Canada. The possibilities for polyamorous families' legal recognition, via parentage, will continue to be curtailed by prominent racialized, hypersexualized, and class-based discourses. This also reflects Jessica Barnett's argument that the *Polygamy Reference* reminds polyamorists that they are included in sexual citizenship regimes when they conform to dominant sexual ideologies.[1381] Extending Barnett's analysis, I assert that *C.C. (Re)* and *BCSC 767* provide the same conclusion. Legal parentage was granted because the families in *C.C. (Re)* and *BCSC 767* "[did] not challenge the dominant monogamist social order." Moreover, by closely mirroring the nuclear family, the parents in *C.C. (Re)* and *BCSC 767* do not threaten dominant ideologies of the family "or its attendant distribution of resources."[1382] In these cases, resources are both material (recall Justice Wilkinson's explanation of how a legal parent can pass on property and provide citizenship status) and theoretical. Theoretically, procreation is not simply about creating the next generation, but also about reproducing ideology, race, kinship systems, and the state itself.[1383]

Thus, while polyamory can challenge hegemonic conceptions of "possession and property," Susan Song suggests that polyamory's radical potential is curtailed by the reinvestment in "heterosexual reproduction."[1384] Song draws on Sara Ahmed's conceptualization

---

[1381] Jessica Powell Barnett. "Polyamory and criminalization of plural conjugal unions in Canada: Competing narratives in the s.293 reference." *Sexuality Research and Social Policy* 11, no. 1 (2014): 72.
[1382] Ibid.
[1383] Jacqueline Stevens. *Reproducing the State*. Princeton: Princeton University Press, 1999.
[1384] Susan Song. "Polyamory and Queer Anarchism: Infinite Possibilities for Resistance." In *Queering Anarchism: Essays on Gender, Power, and Desire*, 5. Edited by C.B. Daring, J. Rogue, Deric Shannon, and Abbey Volcano. Oakland: AK Press, 2012.

of "lifelines" to illustrate how polyamory might challenge Western notions of property, like "inheritance and possession."[1385] For Ahmed,

> … thinking about the politics of 'lifelines' helps us to rethink the relationship between inheritance (the lines that we are given as our point of arrival into familial and social space) and reproduction (the demand that we return the gift of that line by extending that line). It is not automatic that we reproduce what we inherit, or that we always convert our inheritance into possessions. We must pay attention to the pressure to make such conversions.[1386]

Ahmed's comment is a reminder that Western forms of marriage and intimacy are structured around compulsory heterosexual reproduction, within a monogamous nuclear unit, and the transmission of property. However, some forms of polyamory offer an opportunity to think of reproduction and inheritance in more expansive ways when those structures focus on "creating new family and relationship forms not invested in sexual ownership and in becoming a part of state-enforced and monitored relations."[1387] Polyamory has potential to disrupt prevailing monogamous norms when it resists attempts to align with normalizing efforts, though this may be difficult when the social and material benefits and rights accorded to legal parents subject families to "state-enforced and monitored relations." On the flip side, families in Bountiful who are *not* seeking state recognition of multi-parentage or poly-conjugality are disappeared through criminalization. In this way, the families in Bountiful reveal the limit of intimate recognition.

The success of *C.C (Re)* and *BCSC 767* is more than a good news story for two Canadian throuples. The expansion of legal parentage also comes with a redrawing of lines around who, or what, constitutes a family and what type of family is still un/deserving of legal recognition. In Canada, the community of Bountiful continues to serve as the illiberal, undemocratic, and inequitable kinship form against which others are judged. However, the law must work in

---

[1385] Ibid.
[1386] Sara Ahmed. *Queer Phenomenology: Orientations, Objects, Others*. Durham: Duke University Press, 2006: 17.
[1387] Song, *Polyamory and Queer Anarchism*, 7.

creative ways to determine which forms of "poly" are acceptable and which are not. The result appears to be a modest expansion of the idealized Canadian family (and its historical heterosexual monogamy) to incorporate an idealized queer family. The new queer family subscribes to homonormativity (not heteronormativity) and thereby affirms Canada's intimate status quo without challenging the nature of kinship itself or the state's relationship to kinship.

6.5 Conclusion

The *Polygamy Reference, C.C. (Re),* and *BCSC 767* are important reminders that legal recognition has significant consequences for our ability to support "the people that matter to us, to organize domestic arrangements that reflect our choices, and to have those choices honored and respected."[1388] This chapter revealed the ways in which polyamory's acceptance might be contingent on its monogamish arrangement and its association with Whiteness. Further, the Whiteness of Canadian polygyny in the *Polygamy Reference* is complicated by moves to foreignness that construct polygyny as the racialized threat from within. One feature of this threat is that it is constructed in both the present and future; the harms of polygyny affect women and children now, but they also risk the foundations of Canadian democracy and the future of the Canadian state.

My analysis demonstrates that the law is open to a degree of poly-conjugality when the nature of the conjugal relationships mirror, or align with, Canada's idealized nuclear family form (as in the case of *C.C. (Re)* and *BCSC 767*). However, the success of J.M., J.E., C.C., and Olivia, Eliza, and Bill must be interpreted cautiously. Reading these cases alongside the *Polygamy Reference* reveals the lacuna of material and social recognition and support for poly-conjugal families and the pervasive and ongoing racialization of poly-conjugal relationships in Canada.

[1388] Lois Harder. "After the Nuclear Age?" *The Vanier Institute of the Family* (June 2011): 2.

C.C. (Re) and *BCSC 767* are made possible, in part, by the reaffirmation of racialized, hypersexual deviance that is present (and criminalized) in the *Polygamy Reference*. In fact, the *Reference* revealed that the courts are not willing to understand multi-parentage as a benefit to children if the parents are conjugally tied by polygyny. Chief Justice Bauman is very clear in his assertion that monogamy is the gold standard of intimacy for its innate ability to provide "mutual support, protection, and edification" for parents and children.[1389]

Together, these cases present different forms of kinship and, as I discuss in the introduction to this dissertation, kinship is a "set of practices"[1390] wherein different forms of relationships "negotiate the reproduction of life and the demands of death."[1391] At some point in our lives, we will all encounter "the reproduction of life and the demands of death," and yet how we are cared for in these moments depend entirely on the viability of our intimate life.

News media and available court documents indicate that polyamorous parents are not flocking to the courts or petitioning legislatures for legal recognition (nor are polygynous families) but their presence, and increasing visibility, indicates that they have not abandoned the idea of family (and in some cases, legal recognition). Clearly, families remain a site of enormous emotional significance and in addition to the "deep investment" people have in families for emotional reasons, families serve important political, social, and economic roles.[1392] People rely on families for physical and emotional care and sustenance, to maintain culture and language, and for material well-being. In turn, the state tasks families with reproducing and maintaining the nation – physically and ideologically.[1393] *C.C. (Re)* and *BCSC 767* demonstrate the family's

---

[1389] *Reference* at 209.
[1390] Cristyn Davies, and Kerry H. Robinson. "Reconceptualising Family: negotiating sexuality in a governmental climate of neoliberalism." *Contemporary Issues in Early Childhood* 14, no. 1 (2013): 42.
[1391] Judith Butler. *Undoing Gender*, 103. London: Routledge, 2004.
[1392] Meg Luxton. "Changing Families, New Understandings." Vanier Institute of the Family (June 2011). https://vanierinstitute.ca/wp-content/uploads/2015/12/CFT_2011-06-00_EN.pdf
[1393] Ibid.

continued importance for intimate life and the state's continued investment in intimate life (and in expanding what forms of intimate life are included in its recognition). Thus, the presence of cases like the *Polygamy Reference*, *C.C. (Re)*, and *BCSC 767* behooves scholars, lawmakers, and policy makers to examine the significance of the expansion of legal parenthood in the context of polyamory and poly-conjugality more broadly. I return to this point next, in the concluding chapter.

CHAPTER 7: THE MODERN FAMILY

7.1 Introduction

I began this dissertation with an epigraph from Katherine O'Donovan's monograph, *Sexual Divisions in Law*. She writes:

> When a particular way of seeing is analyzed, what was accepted as natural is made strange. Part of that strangeness is the realisation that beneath the accepted order of life lie hidden power relations.[1394]

In my analysis of BC's *FLA*, ON's *AFAEA*, and the *Polygamy Reference*, *C.C. (Re)*, and *BCSC 767*, I have similarly "made strange" pieces of legislation and judicial decisions that appeared to reflect positive ideals like "progress," "diversity," and "inclusion" or "women's rights" and "liberal democracy". In the spirit of O'Donovan's words, my research revealed the complex and pervasive relations of power that govern poly-conjugal and multi-parent intimacy and kinship in Canada. The legislation and judicial decisions only modestly depart from familiar kinship structures and do not, in fact, do very much to disrupt patriarchal familial norms and their attendant consequences for racial and class ordering. Further, these cases demonstrate a requirement for a relationship between parentage and conjugality that can be interpreted through a nuclear framework. In this chapter, I conclude my study by summarising my research findings, responding to the research questions that guided the dissertation, and presenting the main contributions of this work to the discipline of political science. I conclude this chapter, and the dissertation, with directions for future research.

7.2 Findings and Contributions

This dissertation asked two interconnected questions: *what does the expansion of legal parentage*

[1394] Katherine O'Donovan. *Sexual Divisions in Law*. Weidenfeld & Nicholson, 1985: 59.

tell us about the Canadian state's interest, and investment, in the governance of kinship? And what are the possibilities, limits, and challenges for re-imagining kinship, intimacy, and parentage? Drawing on Critical Discourse Analysis and Critical Policy Studies, I found that BC's *FLA*, ON's *AFAEA*, *C.C. (Re)*, and *BCSC 767* affirmed a modest expansion of Canada's nuclear family. The legislative and judicial successes are bound by their alignment to the reproduction of genetically related, procreative, and monogamish family units. These instances demonstrate that the law is willing to support poly-conjugality and multi-parentage for families who do not otherwise disrupt the (re)production of heteronormativity, mononormativity, and a diversification of Whiteness. Tellingly, the bright lights of BC's *FLA*, ON's *AFAEA*, *C.C. (Re)*, and *BCSC 767* cast long shadows when these texts are read alongside the *Polygamy Reference*. The *Reference* made clear that Canada is committed to affirming monogamy as the harbinger of liberal democracy, the nation-state, women's and children's rights, and the functioning of intimate life itself. These commitments are articulated through a narrow understanding of acceptable conjugal relationships for, and between, parents and the assumption that children are both the litmus test of the present health of the state and the guarantee of its future.

On the one hand, the possibilities for our intimate lives are endless. The myth of the nuclear family is pre– (and post–) dated by "alternative" kinship structures that work to meet the emotional, physical, and material needs that sustain all forms of life. Strictly speaking, the nuclear family model is the "alternative" form of intimate life because it is more marginal in its occurrence.[1395] As I outlined in Chapters 1 and 2, people have (and will continue to) find ways to live outside the rigidity and inadequacies of the nuclear family. On the other hand, the

[1395] 2021 Census data reveals that there are 4,290,415 couple (married or common-law) families with children. This is 41.8% of census families. This number might seem high and even indicate that the nuclear family is still quite common. Here, I counter that there are likely very few families in this group that reflect the traditional nuclear family form (a husband breadwinner and a wife who labours only as a mother).

mythological and ideological nuclear family provides, as Stephanie Coontz aptly describes, a "foggy lens of nostalgia for a mostly mythical past."[1396] And the problem with nostalgia is that the "complexity" of intimate histories are "buried under the weight of the ideal image."[1397] The erasure of complex and resistant intimacy happens, in part, through the use of normalizing discourse frames that incorporate non-nuclear intimacy as "normal" and "like other families…".[1398] While these strategies are successful in their ability to achieve liberal democratic recognition, they limit the range of possibilities for providing intimate care for one another. Some of these care needs are fundamental to the human experience, and others are more pronounced and produced through the absence of care delivered by the state.[1399] Additionally, Coontz reminds us that any attempts to recuperate an idealized past (or present) are harmful when those idealizations are "inextricably linked to injustices and restrictions" on human liberty.[1400]

In asking and answering these questions, my dissertation makes two key theoretical and empirical contributions to Canadian political science. First, this project and advances debates in critical intimacy and citizenship studies by centering multi-parentage and poly-conjugality. One of the central questions of politics is how we live together, but political science, as a discipline, has eschewed the family as a key site at which to explore that question. To the extent that such analysis occurs, it has been the terrain of the marked feminist political scientist rather than the work of the mainstream.[1401] Further, Canada, as a political jurisdiction, is noted as a leader in

[1396] Stephanie Coontz. "The Way We Never Were: For much of the century, traditional "family values" have been more myth than reality." *The New Republic*. March 29, 2016.
[1397] Ibid.
[1398] *BCSC 767* at 15.
[1399] Andreas Chatzidakis, Jamie Hakim, Jo Litter, and Catherine Rottenberg. *The care manifesto: The politics of interdependence*. Verso Books, 2020.
[1400] Coontz, *The Way We Never Were*.
[1401] Jacqueline Stevens. *Reproducing the State*. Princeton: Princeton University Press, 1999.

progressive relationship recognition – the case studies in this dissertation are evidence for that reputation. And yet, my findings also reveal the limits of Canada's openness to relationship diversity, particularly when it comes to parentage.

While experiences of multi-parentage and poly-conjugality are wide-spread, people often experience stigma resulting from presumptions about sexual morality and the ability to parent.[1402] Moreover, by constructing non-monogamous intimacy as abnormal or immoral, families are excluded from social and legal recognition and material support. However, my dissertation also makes clear that scholars must approach indicators of social "progress" with caution and nuance. The personal accounts of families featured in discussions surrounding BC's *FLA* and ON's *AFAEA* demonstrate that these legislative changes had profound meaning for their abilities to live authentically and provide materially for their loved ones. Similarly, C.C., J.M., J.E. (*C.C. (Re)*) and Olivia, Bill, and Eliza's (*BCSC 767*) cases were successful, and the presiding judges made it possible for these parents to provide important social and material supports to their children by receiving recognition from the law. And yet, my analysis in Chapters 4, 5, and 6 demonstrate the many ways in which these case studies are "both, and" stories. More families will have their multi-parent and poly-conjugal arrangements affirmed *and* there remains a persistent, pervasive push for the re-drawing of inclusion and exclusion. The multi-parent and poly-conjugal families in Bountiful, BC are one example of intimate arrangements that are shadowed by the *FLA*, *AFAEA*, *C.C. (Re)*, and *BCSC 767*.

In other words, the expansion of legal parentage has the potential to move beyond "the rule of two" but I argued that Canadians must also consider the ways in which BC's *FLA*, ON's *AFAEA*, *C.C. (Re)*, *BCSC 767*, and *Polygamy Reference* reproduce and reinforce the hetero- and

[1402] Léa J. Séguin. "The good, the bad, and the ugly: Lay attitudes and perceptions of polyamory." *Sexualities* (2017): 1-22. Step-parenting is another example of a long-pilloried relationship.

homonormative nuclear family. Specifically, my analysis of these cases demonstrates how the law continues to regulate intimacy along lines of sexuality, race, gender, and class. By modestly expanding what forms of relationships constitute the Canadian nuclear family, the state incorporates forms of queer kinship without addressing the hegemony of Western kinship systems. As Cristyn Davies and Kelly Robinson argue, queer families "are perceived to destabilise the foundations on which moral family life and social values are built."[1403] In particular, critics are concerned about children such that "the child" is both the material and symbolic vessel through which "family relations and practices, knowledge, and the law are constructed and monitored."[1404] But these threats are less substantial when those same queer families do not actually destabilise hegemonic intimacy, but reinforce it. Thus, this project tackled thorny assumptions about intimate life at the heart of the expansion of legal parentage: those further from monogamy, heteronormativity, and Whiteness are deemed less desirable, less able parents, partners, and members of political communities.

Second, this project extends queer and feminist political theory by challenging the presumption that certain forms of non-normative intimacy (like polygyny) are inherently "bad" while others (like polyamory) are emancipatory. The reinforcement of ab/normal expressions of intimacy, even under the guise of "women's rights" or the "best interests of the child" is connected to forms of governance that assist in constructing definitions of family as well as who "'belongs' in that family, by virtue of defining who qualifies as a legally recognized parent or child or partner."[1405] Here, my work extends the important contributions that queer theorists have

[1403] Cristyn Davies and Kerry H. Robinson. "Reconceptualising family: Negotiating sexuality in a governmental climate of neoliberalism." *Contemporary Issues in Early Childhood* 14, no. 1 (2013): 39-40.
[1404] Ibid.
[1405] Cahn, *The New Kinship: Constructing Donor-Conceived Families*, 34.

made regarding the heteronormative underpinnings of law and policy that restrain queer lives.[1406] Although it is true that all families are impacted by the expectations of a traditional, conservative family form, non-nuclear and/or or poly-conjugal intimate arrangements are distinctive because they are deemed to be particularly risky familial forms. Since these forms of intimate life are not built around a heterosexual, monogamous, or even sexual marriage contract, they are seen to threaten foundational assumptions about romantic intimacy and sexuality (given that the idealized sexual intimacy is assumed to be heterosexual, coupled, and procreative). Importantly, not all queer intimacy transgresses heteronormativity; some gay and lesbian people (consciously or unconsciously) conform to heteronormative roles and institutions. Lisa Duggan describes this as homonormativity: "a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them."[1407] Thus, as Alexa DeGagne argues, "homonormative subjects ask to be included into institutions, such as marriage, promising to assimilate to its terms."[1408] Social policy and law, in addition to having material consequences for citizens, serves a "symbolic function" by privileging certain family forms and law "[constructs] some identities, persons, and families as 'normal' while others are deemed 'deviant.'"[1409] Legal parentage is a similar institution that requires assimilation for recognition.

7.3 Directions for Future Research

Over the course of this project, I identified two primary areas for future research. First, the reproductive capacities and experiences of trans people featured marginally in debates

[1406] Mary Bernstein and Renate Reimann, eds. *Queer families, queer politics: Challenging culture and the state*. Columbia University Press, 2001: 420.
[1407] Lisa Duggan. "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, ed. R. Castronovo and D. D. Nelson. Duke University Press, 2002: 179.
[1408] Alexa DeGagne. "Investigating Citizenship, Sexuality and the Same-Sex Marriage fight in California's Proposition 8" (PhD diss., University of Alberta, 2015), 21.
[1409] Bernstein and Reimann, *Queer families, queer* politics, 14.

surrounding the expansion of legal parentage in British Columbia and Ontario. While advocates for ON's *AFAEA* made comments about trans inclusion, specifically with respect to nomenclature on birth registration, their commentary assumed that trans people could be (or ought to be) subsumed under the category of gay and lesbian parents. In this way, transness was lumped in with mainstream lesbian and gay parents to affirm the normality of trans people. Unfortunately, this strategy does a profound disservice to trans people who are committed to disrupting binary gender categories *and* silences opportunities to discuss the challenges that trans people face with respect to reproduction. For example, Carla Pfeffer notes the absence of a "theoretical and empirical sociological scholarship" centred on the experience of trans families.[1410] For Pfeffer, this absence is concerning, in part, because trans families highlight "perplexing sociolegal dilemmas" surrounding relationship nomenclature and sex, gender, and sexuality classifications.[1411] Moreover, Laura Nixon argues that trans reproductive health is "shadowed" by mainstream lesbian and gay rights movements and reproductive health movements.[1412] Health care is a fundamental human right and the erasure of trans experiences forces trans people to choose between the right to have gender affirming care as health care or the right to have reproductive health care.[1413]

In 2015, Jake Pyne, Greta Bauer, and Kaitlin Bradley published the results of their study of trans parents' experiences across Ontario. At the time of publication, the authors estimated that 24.1% of trans people in Ontario were parents,[1414] 77.9% were biological parents to their

[1410] Carla Pfeffer. "Normative Resistance and Inventive Pragmatism: Negotiating Structure and Agency in Transgender Families." *Gender and Society* 26, no. 4 (2012): 576.
[1411] Ibid.
[1412] Laura Nixon. "The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People." *Journal of Women and the Law* 20, no. 5 (2013): 74.
[1413] Blas Radi. "Reproductive injustice, trans rights, and eugenics." *Sexual and Reproductive Health Matters* 28, no. 1 (2020): 396-407.
[1414] Jake Pyne, Greta Bauer, and Kaitlin Bradley. "Transphobia and Other Stressors Impacting Trans Parents." *Journal of GLBT Family Studies* 11 (2015): 112.

children,[1415] 18.1% reported having no legal access to their children,[1416] and 12% reported seeing their children less because they are trans.[1417] Though Pyne, Bauer, and Bradley's study did not address trans parents' experiences with adoption or assisted reproductive technologies, other studies demonstrate that trans people experience discrimination in family planning processes.[1418] For example, their analysis revealed that 32% of respondents wanted to have more children in the future, but less than 22% had health care providers who spoke with them about "fertility preservation prior to medical transition."[1419] The authors assert that practitioners need to support "prospective trans parents in researching and considering their future options"[1420] which will require practitioners' own investment in their ongoing education. This reflects Fenning Lowik's findings that trans people experience "pervasive cisnormativity" and "informational and institutional erasure" in their pursuit of health care.[1421] Just as legislation like the *FLA* and *AFAEA* do not adequately address the needs and experiences of trans parents (or prospective parents), Pyne, Bauer, and Bradley note that the increasing presence of lesbian and gay experiences in research has not cleared a similar path for trans people.[1422] In fact, the federal government only just started collecting census data on trans and non-binary Canadians, which means that the "dearth of information about trans-led families" will continue for some time.[1423]

[1415] Ibid., 116.
[1416] Ibid.
[1417] Ibid.
[1418] Ibid., 122, citing Rachel Epstein. "Married, single or gay? Queerying and transforming the practices of assisted human reproduction" (PhD diss., York University, 2014); Jake Pyne. *Transforming family: The struggles, strategies and strengths of trans parents*. Sherbourne Health Centre, 2012; Lori E. Ross, Rachel Epstein, Scott Anderson, and Allison Eady. "Policy, practice and personal narratives: Experiences of LGBTQ people with adoption in Ontario, Canada." *Adoption Quarterly* 12 (2009): 272–293.
[1419] Pyne et. al., *Transphobia and Other Stressors*, 122.
[1420] Ibid.
[1421] A.J. Fenning Lowik. "Gendered and Reproductive Becomings: Trans People, Reproductive Experiences and the B.C. Health Care System" (PhD diss., University of British Columbia, 2021).
[1422] Pyne et. al., *Transphobia and Other Stressors*.
[1423] Samantha Landry, Arseneau, Erika, and Elizabeth K. Darling. ""It's a Little Bit Tricky": Results from the POLYamorous Childbearing and Birth Experiences Study (POLYBABES)." *Archives of Sexual Behavior* 15 (2021): 1479-1490.

The second area of future research pertains to polyamorous families' experiences of pregnancy, birthing, and parenting. A recent study conducted by the McMaster Midwifery Research Centre revealed that participants devoted an enormous amount of time and effort to finding care providers who would respect and affirm their polyamorous relationships.[1424] This included "[considering] pros and cons of numerous situations and manifestations of family structures in order to make choices that would be best for their futures and the futures of their children."[1425] Their decisions included a careful assessment of a health provider's potential for discrimination on the basis of family structure, resulting, as Samantha Landry, Erika Arseanu and Elizabeth Darling found, in participants often choosing midwifery care so that they could give birth in their homes, and limit the possibility of facing discrimination in hospital.[1426] The families they interviewed reported their encounters with mononormativity in the health care system, specifically with respect to "administrative barriers" like forms that did not have enough room to list all partners as parents on intake forms and newborns' identification bracelets.[1427] Clearly, the strides made by the *AFAEA* have not entirely mitigated the social and legal barriers that poly-conjugal and multi-parent families encounter. Their findings support Lea Seguin's analysis, reviewed in Chapters 2 and 6, that the presence of children in polyamorous relationships adds complicated features to already existing stigma. On a more positive note, and contrary to BB's suggestion, in Chapter 4, that this family structure is too much work, participants also indicated that "having more partners led to feeling more supported, particularly

[1424] Ibid., 1482.
[1425] Ibid.
[1426] Ibid.
[1427] Ibid.

surrounding pregnancy and childbirth."[1428] This support was multifaceted and included financial, logistical, physical, mental, and emotional forms of care.[1429]

7.4 Conclusion

When I tell people that I am a political scientist, they often respond "it's an exciting time in politics!" This might be a goodwill gesture for what is otherwise a loss for words, but I usually reply, "it's *always* an exciting time in politics!" The conversation then turns towards the latest election results or leadership campaigns, and I soon learn that we are thinking quite differently about what constitutes "politics" (and what makes it exciting). For me, the excitement of political science rests in the opportunities to think deeply, critically, and creatively about political communities and the relationships that comprise them. For some, these kinship structures are premised upon "blood and marriage" and for others they are based on intention. And in all cases, the presumptive privacy and naturalness of intimate life hides carefully constructed membership rules for forming families and political communities, thereby enabling the state to intervene in intimate lives with relative ease.[1430] That said, history tells us that "cultural rules are open to negotiation and change"[1431] and during the time I have researched and written this dissertation (and the temporal markers represented in the case studies), Canadians have witnessed some exciting possibilities for rethinking intimate life. As a political scientist, I am interested in forms of life that support our collective flourishing, so the hopeful possibility is that non-normative intimate arrangements can push back against "cultural ideals" and that there are more

[1428] Landry et. al., "*It's a Little Bit Tricky"*.
[1429] Ibid.
[1430] Jacqueline Stevens. *Reproducing the state*. Princeton: Princeton University Press, 1999. Some of this ease is facilitated by a particular state's orientation to privacy and intimate life, and the socio-political circumstances under which the intervention occurs. The *Polygamy Reference* is an example of the "ease" of state intervention but also the way this intervention can be obfuscated by claims to things like human rights, or equality.
[1431] Laura Mamo. *Queering reproduction: Achieving pregnancy in the age of technoscience*, 245. Durham: Duke University Press, 2007.

possibilities for organizing our lives to sustain us well. But there is no guarantee that they will. Such is the stuff of politics.

BIBLIOGRAPHY

Government Documents

Jurisprudence

A.A. v. B.B., 2007 ONCA 2 (CanLII)

AWV JEW, 2010 NBQB 414, [2011] WDFL 2307

British Columbia Birth Registration No. 2018-XX-XX5815, 2021 BCSC 767.

Cabianca v. British Columbia (Registrar General of Vital Statistics), 2019 BCSC 2010.

Connolly v Woolrich and Johnson et al. [1867]

Criminal Code, R.S.C. 1985, c. C-46, s.290

Descheneaux v. Canada, 2015 QCCS 355

E. (Mrs.) v. Eve, 1986 CanLII 36 (SCC), [1986] 2 SCR 388

Grand v. (Ontario) Attorney General, 2016 ONSC 3434

Halpern v. Canada (Attorney general), 2003 CanLII 26403 (ON CA)

Hyde v. Hyde and Woodmansee [L.R.] 1 P. & D. 130

M.D.R. v. Ontario (Deputy Registrar General), 2006 CanLII 19053 (ON SC)

Molodowich v Penttinen, 1980 CanLII 1537 (ON SC)

M. v. H., 1999 CanLII 686 (SCC), [1999] 2 SCR 3

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

Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588

Re K. (1995), 23 O.R. (3d) 679 (Ont. Ct. Prov. Div)

Reynolds v. United States 1878

Trociuk v British Columbia (Attorney General), 2003 SCC 34, [2003] 1 SCR 835.

Young v. Young 1993 CanLII 34 (SCC), [1993] S.C.J. No. 112 (Q.L.)

(1835) 2 Cl & Fin 488

Legislation

All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016, S.O. 2016, c. 23 - Bill 28

An Act to amend the Children's Law Reform Act, the Vital Statistics Act and other Acts with respect to parental recognition, 2015.

Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général), 2017.

An Act to provide for the support of Bastard Children, and the punishment of the Mother and reputed Father, SNS 1758, c 19

Assisted Human Reproduction Act (S.C. 2004, c. 2)

Bill 137, Cy and Ruby's Act (Parental Recognition), 2015

Civil Marriage Act (S.C. 2005, c. 33)

Constitution Act 1982

Family Law Act, SBC 2011, c 25

Gender Equity in Indian Registration Act (Bill C-3)

Legitimacy Act, RSO 1970, c 242

Ontario Regulation 391/97: Child Support Guidelines

Vital Statistics Act, R.S.O. 1990, c. V.4, s. 10(4).

Zero Tolerance for Barbaric Cultural Practices Act S.C. 2015, c. 29

Debates

British Columbia. Legislature. 40th Parl., 2nd Sess., May 26, 2014

British Columbia. Legislature. 40th Parl., 2nd Sess., May 12, 2011

British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 21, 2011.

British Columbia. Legislature. Debates. 39th Parl., 4th Sess., November 17, 2011.

Canada. Parliament. Debates, 6th Parl., 4th Sess., (1890).

Ontario. Legislature. Debates. 41st Leg., 2nd Sess., November 29, 2016.

Ontario. Legislature. Debates. 41st Leg., 2nd Sess., October 3, 2016.

Standing Committees

Ontario. Legislature. Standing Committee on Social Policy. Submission (*REAL Women of Canada*). Exhibit No. SP41-2/01/501. November 1, 2016.

Ontario. Legislature. Standing Committee on Social Policy. Submission (Teressa Pierre, Director, *Parents as First Educators*). Exhibit No. SP41-2/01/666. November 1, 2016.

Ontario. Legislature. Standing Committee on Social Policy. Submission (Benjamin Fitzgerald Howe). Exhibit No. SP41-2/01/063. October 18, 2016.

Ontario. Legislature. Standing Committee on Social Policy. Submission (Henry and Elaine Togeretz). Exhibit No. SP41-2/01/008. October 17, 2016.

Ontario. Legislature. Standing Committee on Social Policy. Submission (Suzanne Marson). Exhibit No. SP41-2/01/010. October 17, 2016.

Ontario. Legislature. Standing Committee on Social Policy. 41st Leg., 2nd Sess., October 18, 2016.

Ontario. Legislature. Standing Committee on Social Policy. 41st Parl., 2nd Sess., October 16, 2016.

Submission to Standing Committee on Social Policy. Exhibit No. SP 41-2/01/63. October 18, 2016.

Affidavits

Angela Campbell. Affidavit. June 4, 2010 (*Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588).

David Eby. Affidavit. January 28, 2010 (*Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588).

Joseph Henrich. Affidavit. 15 July 2020 (*Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588).

Raquel Bernadette Grand. Affidavit. April 4, 2016 (Submission to Standing Committee on Social Policy. Exhibit No. SP 41-2/01/63. October 18, 2016).

Winston Blackmore. Affidavit. January 21, 2010 (*Reference re: Section 293 of the Criminal Code of Canada,* 2011 BCSC 1588).

Primary Material

AA. Interview with author. Edmonton, Alberta. August 6, 2020.

BB. Interview with author. Edmonton, Alberta. August 14, 2020.

CC. Interview with author. Edmonton, Alberta. September 2, 2020.

DD. Interview with author. Edmonton, Alberta. December 3, 2020.

FF. Interview with author. Edmonton, Alberta. January 27, 2021.

GG. Interview with author. Edmonton, Alberta. November 26, 2020.

JJ. Interview with author. Edmonton, Alberta. March 10, 2021.

Kirsty Mathers McHenry. Interview with author. Edmonton, Alberta. December 10, 2020.

KK. Interview with author. Edmonton, Alberta. May 19, 2021.

LL. Interview with author. Edmonton, Alberta. June 15, 2021.

MM. Interview with author. Edmonton, Alberta. July 27, 2021.

NN. Interview with author. Edmonton, Alberta. February 22, 2021.

QQ. Interview with author. Edmonton, Alberta. February 9, 2021.

Secondary Material

Abraham, Haim. "A Family Is What You Make It: Legal Recognition and Regulation of Multiple Parents." *Journal of Gender, Social Policy and the Law* 25 no. 4 (2019): 405-445.

Ahmed, Sara. *Queer Phenomenology*. Durham: Duke University Press, 2006.

"Aims and Scope." *Critical Policy Studies*. Taylor and Francis Online. https://www.tandfonline.com/action/journalInformation?show=aimsScope&journalCode=rcps20

Althusser, Louis. "Ideology and Ideological State Apparatus." In *Lenin and Philosophy and Other Essays*. London: New Left Books, 1971.

Anapol, Deborah. *Polyamory in the 21st Century: Love and Intimacy with Multiple Partners*. Toronto: Rowman & Littlefield Publishers, 2010.

Arnup, Katherine, Andrée Lévesque, and Ruth R. Pierson. *Delivering Motherhood: Maternal Ideologies and Practices in the 19th and 20th Centuries*. Toronto: Routledge, 1990.

Bacchi, Carol Lee. "Policy Studies: Traditional Approaches." In *Women, Policy and Politics: The Construction of Policy Problems*, 17-31. London: SAGE Publications, 1999.

Bahkt, Natasha, and Lynda M. Collins. "Are You My Mother: Parentage in a Nonconjugal Family." *Canadian Journal of Family Law* 31 (2018): 105-150.

Baker, Maureen. *Families, Labour and Love: Family Diversity in a Changing World*. Vancouver: University of British Columbia Press, 2001.

Bakhtin, Mikhail. *Speech Genres and Other Late Essays*. Austin: University of Texas Press, 1986.

Bala, Nicholas. "Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships." *Queen's Law Journal* 29 (2003): 41-114.

Balibar, Étienne and Immanuel Wallerstein, eds. *Race, Nation, Class: Ambiguous Identities*. London: Verso, 1991.

Barnett, Jessica Penwell. "Polyamory and Criminalization of Plural Conjugal Unions in Canada: Competing Narratives in the s. 293 Reference." *Sexuality Research and Social Policy* 11, no. 1 (2014): 63-75.

Barrera, Jorge. "Indigenous child welfare rates creating 'humanitarian crisis' in Canada, says federal minister." *CBC News*. November 2, 2017. https://www.cbc.ca/news/indigenous/crisis-philpott-child-welfare-1.4385136.

Bauer, Robin. "Non-Monogamy in Queer BDSM Communities: Putting the Sex Back into Alternative Relationship Practices and Discourse." In *Understanding Non-Monogamies*, 142-153. Edited by Meg Barker and Darren Langdridge. Toronto: Routledge, 2010.

Bell, David. "Pleasure and Danger: The Paradoxical Spaces of Sexual Citizenship*." Political Geography* 14, no. 2 (1995): 139–53

Bendall, Charlotte and Rosie Harding. "Heteronormativity in Dissolution Proceedings Exploring the Impact of Recourse to Legal Advice in Same- Sex Relationship Breakdown." In

Philosophical Foundations of Children's and Family Law, 134-152. Edited by Elizabeth Brake and Lucinda Ferguson. London: Oxford University Press, 2018.

Berlant, Lauren. "Intimacy: A Special Issue." *Critical Inquiry* 24, no. 2 (1998): 281-88.
--. *The Queen of America goes to Washington City: Essays on Sex and Citizenship*. Durham: Duke University Press, 1997.

Berlant, Lauren, and Michael Warner. "Sex in Public." *Critical inquiry* 24, no. 2 (1998): 547-566.

Bernstein, Mary, and Renate Reimann, eds. *Queer Families, Queer Politics: Challenging Culture and the State*. New York: Columbia University Press, 2001.

Bhandar, Brenna. *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership*. Durham: Duke University Press, 2018.

Bhaskar, Roy. *Scientific realism and human emancipation*. Routledge, 2009 [1986].

Bielski, Zosia. "'Boring and normal': The new frontier of polyamorous parenting." *Globe and Mail*. December 2, 2018. https://www.theglobeandmail.com/canada/article-boring-and-normal-the-new-frontier-of-polyamorous-parenting/

Biletski, Anat and Anat Matar. "Ludwig Wittgenstein." *Stanford Encyclopedia of Philosophy* (2020): 1-24.

Blackstock, Cindy. "The Canadian Human Rights Tribunal on First Nations Child Welfare: Why If Canada Wins, Equality and Justice Lose." *Children and Youth Services Review* 33, no. 1 (2011): 187-194.

--. "The Complainant: The Canadian Human Rights Tribunal on First Nations Child Welfare." *McGill Law Journal* 62, no. 2 (2016): 285–328

Blackstock, Cindy, Muriel Bamblett, and Carlina Black. "Indigenous Ontology, International Law and the Application of the Convention to the Over-representation of Indigenous Children in Out of Home Care in Canada and Australia." *Child Abuse & Neglect* 110 (2020): 1-11.

Blee, Kathleen M. *Women of the Klan: Racism and Gender in the 1920s*. Berkeley: University of California Press, 2008.

Bloomberg, Linda D., and Marie Volpe, eds. *Completing Your Qualitative Dissertation: A Roadmap from Beginning to End*, 32-44. London: SAGE Publications, 2008.

Bolton, Anne M. "Whatever Happened to Eve." *Manitoba Law Journal* 17, no. 2 (1988): 219-226.

Blum, Linda. *At the breast: Ideologies of breastfeeding and motherhood in the contemporary United States*. Boston: Beacon Press, 2000.

Boot, Joe, and Ryan Eras. "MPPs say Farewell to Family." *The Ezra Institute for Contemporary Christianity*. December 12, 2016. https://www.ezrainstitute.com/resource-library/blog-entries/mpps-say-farewelll-to-family/#_edn2.

Bond, Shirley. "B.C.'s new family law reflects modern society." *Vancouver Sun*. March 27, 2013. http://www.vancouversun.com/life/family+reflects+modern+society/8161327/story.html.

Borden, Liz. "Non/Monogamies in Canadian Children's Picture Books." In *The Space and Places of Canadian Popular Culture*, 92-101. Edited by Victoria Kannen and Neil Shyminsky. Toronto: Canadian Scholars Press, 2016.

Bourdieu, Pierre. *Language and Symbolic Power*. Cambridge: Polity, 1991.

Boyd, John-Paul. "Polyamory and the Family Law Act: Surprisingly Happy Bedfellows." *JP Boyd on Family Law: the Blog by Collaborative Divorce Vancouver*. October 11, 2014.

--. "Polyamory in Canada: Research on an Emerging Family Structure." *The Vanier Institute of the Family.* April 11, 2017. https://vanierinstitute.ca/polyamory-in-canada-research-on-an-emerging-family-structure/

--. "Perceptions of Polyamory in Canada." *Canadian Research Institute for Law and the Family*. December 1, 2017. https://prism.ucalgary.ca/bitstream/handle/1880/107212/Perceptions_of_Polyamory_-_Dec_2017.pdf?sequence=1&isAllowed=y

Boyd, Susan. "Demonizing mothers: Fathers' rights discourses in child custody law reform processes." *Journal of the Motherhood Initiative for Research and Community Involvement* 6, no. 1 (2004): 52-74.

Boyd, Susan, and Jennifer Flood. "Illegitimacy in British Columbia, Saskatchewan, Ontario, and Nova Scotia: A Legislative History." 2015: 1-54. https://commons.allard.ubc.ca/emeritus_pubs/8/

Boyd, Susan, and Claire F. L. Young. "From Same-Sex to No Sex: Trends Towards Recognition of (Same-Sex) Relationships in Canada." In *Open Boundaries: A Canadian Women's Studies Reader*, 217-229. Edited by Barbara A. Crow and Lise Gotell. Toronto: Prentice Hall, 2005.

Brake, Elizabeth. *Minimizing Marriage: Marriage, Morality, and the Law*. London: Oxford University Press, 2011.

Brake, Elizabeth. "Recognizing Care: The Case for Friendship and Polyamory." *Syracuse Journal of Law and Civic Engagement* (2015): 1-20.

Brake, Elizabeth, and Joseph Millum. "Parenthood and Procreation." *Stanford Encyclopedia of Philosophy* (2018): 1-56.

Bramham, Daphne. *The secret lives of saints: Child brides and lost boys in a polygamous Mormon sect*. Toronto: Random House Canada, 2009.

Brennan, Samantha, and Bill Cameron. "How Many Parents Can a Child Have? Philosophical Reflections on the 'Three Parent Case'." *Dialogue* 54, no. 1 (2015): 45-61.

British Columbia, Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (British Columbia: Civil and Family Law Policy Office, 2010).

Brittain, Donald, dir. *The Champions, Part 2: Trappings of Power* (1978; Canadian Broadcasting Corporation, National Film Board of Canada). Film.

Brodie, Janine. "Globalization, Canadian Family Policy, and the Omissions of Neoliberalism." *North Carolina Law Review* 88 (2009): 1560-1592.

--. "Meso-discourses, state forms and the gendering of liberal-democratic citizenship." *Citizenship Studies* 1, no. 2 (1997): 223-242.

--. "We are all equal now: Contemporary gender politics in Canada." *Feminist Theory* 9, no. 2 (2008): 145-164.

Brook, Heather. *Conjugality: Marriage and Marriage-like Relationships Before the Law*. New York: Palgrave Macmillan, 2016.

--. *Conjugal Rites: Marriage and Marriage-Like Relationships Before the Law*. New York: Palgrave Macmillan, 2007

--. "Just Married? Adversarial Divorce and the Conjugal Body Politic." *Feminism and Psychology* 14, no. 1 (2004): 81-99.

Bruck, Jan. "Best friends become first to co-parent in Canada." *BBC News*. March 22, 2017. https://www.bbc.com/news/av/39343045

Bryce, George K. "The New Family Law Act: What clinical counsellors need to know about BC's new legislation before they provide counselling services to families undergoing separation or divorce." *British Columbia Association of Clinical Counsellors*, 4. July 26, 2013.

Buchanan, Marshall. "The Father of His Country, Being a Brief Study of the Intersection of Fatherhood and the Rhetoric of State Power in the Late Republic and Early Principate of Rome." Master's thesis, University of British Columbia, 2016.

Bucholtz, Mary. "The Politics of Transcription." *Journal of Pragmatics* 32, no. 10 (2000): 1439-1465.

Busby, Karen. "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere." *Canadian Journal of Women and the Law* 25, no. 2 (2013): 284-314.

Buss, David M. "Evolutionary Psychology: A New Paradigm for Psychological Science." *Psychological Inquiry* 6, no. 1 (1995): 1-30.

Buss, David M. & David P. Schmitt. "Sexual Strategies Theory: An Evolutionary Perspective on Human Mating." *Psychological Review* 100, no. 2 (1993): 204-232.

Butler, Judith. *Bodies that Matter: On the Discursive Limits of Sex*. London: Routledge, 1993.

--. *Gender Trouble*. London: Routledge, 1990.

--. *Undoing Gender*. London: Routledge, 2004.

Byrne, Bronagh, and Laura Lundy. "Children's rights-based childhood policy: A six-P framework." *The International Journal of Human Rights* 23, no. 3 (2019): 357-373.

Cahn, Naomi. *The New Kinship: Constructing Donor-Conceived Families*. New York: New York University Press, 2013.

Caldwell, Johanna, and Vandana Sinha. "(Re) Conceptualizing Neglect: Considering the Overrepresentation of Indigenous Children in Child Welfare Systems in Canada." *Child Indicators Research* 13, no. 2 (2020): 481-512.

Califia, Patrick. *Public Sex: The Culture of Radical Sex*. San Francisco: Cleis Press, 2000.

Canada. "Polygyny and Canada's Obligations under International Human Rights Law." Department of Justice, 2006.

Canada. Special Joint committee on child Custody and Access. *Proceedings of the Special Joint Committee on Child Custody and Access* (Ottawa, Public Works and Government Services, 1998).

Canada. "Zero Tolerance for Barbaric Cultural Practices Act: An overview." (Ottawa, 2014). https://www.canada.ca/en/news/archive/2014/11/zero-tolerance-barbaric-cultural-practices-act-overview.html.

Campbell, Angela. “Bountiful’s Plural Marriages.” *International Journal of Law in Context* 6, no. 4 (2010): 343-361.

--. “Conceiving Parents Through Law.” *International Journal of Law, Policy and the Family* 21, no. 2 (2007): 242-273.

--. “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis.” In *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports*, Report #1, i–63. Ottawa: Status of Women, 2005.

Card, Claudia. “Against Marriage and Motherhood.” *Hypatia* 11, no. 3 (1996): 1-23.

--. “Gay Divorce: Thoughts on the Legal Regulation of Marriage.” *Hypatia* 22, no. 1 (2007): 24–38

Carl, Nicole, and Sharon Ravitch. “Interviews.” In *The SAGE Encyclopedia of Educational Research, Measurement, and Evaluation*, 873-877. Edited by Bruce B. Frey. London: SAGE Publications, 2018.

Carpenter, Christopher J. “Meta-analyses of Sex Differences in Responses to Sexual Versus Emotional Infidelity: Men and Women are More Similar than Different.” *Psychology of Women Quarterly* 36, no. 1 (2012): 25-37.

Carroll, Megan. “Managing without moms: Gay fathers, incidental activism and the politics of parental gender.” *Journal of Family Issues* 39, no. 13 (2018): 3410–3435.

Carsten, Janet. *After Kinship*. Cambridge: Cambridge University Press, 2004.

Carter, Sarah. *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada in 1915*. Athabasca: Athabasca University Press, 2008.

Cere, Daniel, and Douglas Farrow. *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment*. Montreal: McGill-Queen’s Press, 2004.

Challborn, Margot R. “Autonomous Mothers and Social Policy: How the CCTB, UCCB, and Alberta Child Care Subsidies Govern Women’s Autonomy in Motherhood.” Master’s thesis, University of Alberta, 2016.

Chambers, Lori. *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969*. Toronto: University of Toronto Press, 2007.

Chapman, Terry L. “Women, Sex, and Marriage in Western Canada, 1890-1920.” *Alberta History* 33, no. 4 (1985): 1-12.

Chatterji, Madhabi. “Evidence on ‘What Works’: An Argument for Extended-Term Mixed-Method (ETMM) Evaluation Designs.” *Educational Researcher* 33, no. 9 (2005): 3–13.

Chatzidakis, Andreas, et al. *The Care Manifesto: The Politics of Interdependence*. New York: Verso Books, 2020.

Chouliaraki, Lilie and Fairclough, Norman. *Discourse in late modernity*. Edinburgh University Press, 1999.

Chunn, Dorothy E., Susan Boyd, and Hester Lessard, eds. *Reaction and Resistance: Feminism, Law, and Social Change*. Vancouver: University of British Columbia Press, 2011.

Clarkson, Chris. *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862-1940*. Vancouver: University of British Columbia Press, 2007

Codd, John A. “The construction and deconstruction of educational policy documents.” *Journal of Education Policy* 3, no. 3 (1988): 235-247.

Collier, Richard. “‘Waiting Till Father Gets Home’: The Reconstruction of Fatherhood in Family Law.” *Social and Legal Studies* 4 (1995): 5-30.

Collins, Patricia Hill. *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. London: Routledge, 2002.

--. “It’s All in the Family: Intersections of Gender, Race, and Nation.” *Hypatia* 13, no. 3 (1998): 62-82.

--. “Will the “Real” Mother Please Stand Up?: The Logic of Eugenics and American National Family Planning.” In *Revisioning Women, Health and Healing: Feminist, Cultural and Technoscience Perspectives*, 266-282. Edited by Adele E. Clarke, Virginia Olesen. London: Routledge, 2013.

Cook, Rachel and Lisa Kelly. “Polygyny and Canada’s Obligations under International Human Rights Law.” *Family, Children and Youth Section Research Report, Department of Justice*. September 2006: 1.

Coontz, Stephanie. *Marriage, A History: How Love Conquered Marriage*. New York: Penguin, 2006.

--. *The Way We Never Were: American Families and the Nostalgia Trap*. New York: Basic Books, 1992.

--. “The Way We Never Were: For much of the century, traditional “family values” have been more myth than reality.” *The New Republic*. March 29, 2016.

Cossman, Brenda. "Sexing citizenship, privatizing sex." *Citizenship Studies* 6, no. 4 (2002): 483-506.

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

--. "Beyond Beyond Conjugality." *Canadian Journal of Family Law* 30, no. 2 (2017): 227-263.

Cott, Nancy. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, 2002.

Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis: University of Minnesota Press, 2014.

--. "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada." *Contemporary Political Theory* 6, no. 4 (2007): 437-460.

Cowden, Mhairi. "Capacity, claims and children's rights." *Contemporary Political Theory* 11, no. 4 (2012): 362-380

Crenshaw, Kimberlé. "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color." *Stanford Law Review* (1989): 1241-1299.

Davies, Cristyn, and Kerry H. Robinson. "Reconceptualising Family: Negotiating Sexuality in a Governmental Climate of Neoliberalism." *Contemporary Issues in Early Childhood* 14, no. 1 (2013): 39-353.

Dart, Christopher. "Birth of a Family: The Sixties Scoop Explained." *CBC Documentaries*. November 19, 2017. https://www.cbc.ca/cbcdocspov/features/the-sixties-scoop-explained

Datta, L. "Multimethod Evaluations: Using Case Studies Together with Other Methods." In *Evaluation for the 21st Century: A Handbook,* 344-359. Edited by E. Chelimsky and W. R. Shadish. Thousand Oaks, CA: Sage, 1997.

--. "Intersectionality and Feminist Politics." *European Journal of Women's Studies* 13, no. 3 (2006): 193-209.

Day, David C. "The Capable Minor's Healthcare: Who Decides?" *Canadian Bar Foundation* 86, no. 3 (2008): 379-420.

D'Emilio, John. "Will the Courts Set Us Free?" In *The Politics of Same-Sex Marriage*, 39-64. Edited by Craig A. Rimmerman and Clyde Wilcox. Chicago: University of Chicago Press, 2007.

Dean, Mitchell. *Governmentality: Power and Rule in Modern Society*. Toronto: John Wiley & Sons, 1999.

De Fina, Anna and Barbara Johnstone. "Discourse Analysis and Narrative." In *The Handbook of Discourse Analysis*, 152-167. Edited by Deborah Tannen, Heidi E. Hamilton, and Deborah Schrifin. New York: John Wiley & Sons, 2015.

Deer, Jessica. "Indigenous Activists Draw Parallels Between Residential Schools and Children Detained at U.S. Border." *CBC News*. June 20, 2018. https://www.cbc.ca/news/indigenous/indigenous-activists-draw-parallels-between-residential-schools-and-children-detained-at-u-s-border-1.4714868.

DeGagne, Alexa. "Investigating Citizenship, Sexuality and the Same-Sex Marriage Fight in California's Proposition 8." Doctoral dissertation, University of Alberta, 2015.

Delgado, Richard. *Critical Race Theory: The Cutting Edge*. Philadelphia: Temple University Press, 1995.

Dempsey, Deborah. "Conceiving and negotiating reproductive relationships: Lesbians and gay men forming families with children." *Sociology* 44, no. 6 (2010): 1145-1162.

Denike, Margaret. "The Racialization of White Man's Polygamy." *Hypatia* 25, no. 4 (2010): 852-874.

Denzin, Norman K. & Yvonna Lincoln. *Handbook of qualitative research*, 3rd ed. London: SAGE, 2005.

Dermott, Esther. *Intimate Fatherhood*. London: Routledge, 2008.

Dhamoon, Rita. and Yasmeen Abu-Laban. "Dangerous (internal) foreigners and nation-building: The case of Canada." *International political science review* 30, no. 2 (2009): 163-183.

Donato, Al. "Polyamory Can Be Liberating For People Of Colour, Until Racism Gets In The Way." *HuffPost*. November 22, 2019. https://www.huffpost.com/archive/ca/entry/polyamory-poc-canadians_ca_5dcc504ee4b03a7e0293f014

"Don't rush with Family Law Act." *Times Colonist*. November 11, 2019.

Dreher, Tanja. "The 'Uncanny Doubles' of Queer Politics: Sexual Citizenship in the Era of Same-Sex Marriage Victories." *Sexualities* 20, no. 1–2 (2017): 176-195.

Duggan, Lisa. "The New Homonormativity: The Sexual Politics of Neoliberalism." In *Materializing Democracy: Toward a Revitalized Cultural Politics*, 175-194. Durham: Duke University Press, 2003.

Dunn, William N. *Public Policy Analysis*. Routledge, 2005.

Edwards, Jeanette. *Born and Bred: Idioms of Kinship and New Reproductive Technologies in England*. Oxford: Oxford University, 2000.

Edwards, Jeanette and Marilyn Strathern. "Including our own." In *Cultures of Relatedness: New Approaches to the Study of Kinship,* 149-166. Edited by J. Carsten. Cambridge: Cambridge University Press, 2000.

Eekelaar, John. "Family Law and Legal Theory". *Philosophical Foundations of Children's and Family Law*, 41-58. Edited by Elizabeth Brake and Lucinda Ferguson. London: Oxford University Press, 2018.

Eisner, Elliott W. *The enlightened eye: Qualitative inquiry and the enhancement of educational practice*. New York: Macmillan, 1991.

Erickson, Frederick. "Qualitative Methods in Research on Teaching." In *Handbook of Research on Teaching,* 3rd ed., 119–161. Edited by Merlin C. Wittrock. New York: Macmillan, 1986.

Ertman, Martha. "Race Treason: The Untold Story of America's Ban on Polygamy." *Columbia Journal of Gender and Law* 19, no. 1 (2010): 287-366.

Esteban, Marta B. "Children's Participation, Progressive Autonomy, and Agency for Inclusive Education in Schools." *Social Inclusion* 10, no. 2 (2022): 43-53.

Fairclough, Norman, Jane Mulderrig, and Ruth Wodak. "Critical Discourse Analysis." In *Discourse Studies: A Multidisciplinary Introduction*, 357-378. Edited by Teun Van Dijk. London: SAGE Publications, 2011.

Fairclough, Norman. "Critical Discourse Analysis as a Method in Social Scientific Research." In *Methods of Critical Discourse Analysis*, 121-138. Edited by R. Wodak and M. Meyer. London: SAGE Publications, 2001.

--. "Critical discourse analysis and critical policy studies." *Critical Policy Studies* 7, no. 2 (2013): 177-197.

--. *Discourse and Social Change*. Cambridge: Polity, 1992.

--. *New Labour, New Language*. London: Routledge, 2000*b*.

--. "Critical Discourse Analysis in Researching Language in the New Capitalism: Overdetermination, Transdisciplinarity and Textual Analysis." In *Systemic Linguistics and Critical Discourse Analysis*. Edited by C. Harrison and L. Young. London: Continuum, 2004.

"Family Law in BC: Quick Reference Tool." *Legal Aid Society of British Columbia*. https://api.lss.bc.ca/resources/pdfs/pubs/Family-Law-in-BC-Quick-Reference-Tool-eng.pdf.

Fausto-Sterling, Anne. "The Five Sexes: Why Male and Female Are Not Enough." *The Sciences* (March/April) (1993): 20-25.

findlay, barbara, and Zara Suleman. *Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act*, prepared for the Continuing Legal Education Society of British Columbia, January 2013.

Fineman, Martha A. "Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency." *Journal of Gender, Social Policy, and Law* 8 (2000): 18-20.

--. *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. London: Routledge, 1995.

Fisher, Jill A. "Gendering Science: Contextualizing Historical and Contemporary Pursuits of Difference." In *Gender and the Science of Difference*, 1-25. New Brunswick: Rutgers University Press, 2004.

Foucault, Michèle. *L'Ordre du discours*. Paris: Gallimard, 1971.

--. *Discipline and Punish: the Birth of the Prison*. Harmondsworth: Penguin, 1979.

"Frequently asked questions about the new BC Family Law Act." *Tyleen Underwood Law Office*. https://tyleenunderwood.ca/frequently-asked-questions-about-the-new-bc-family-law-act/.

Gagnon, John H. and William Simon. *Sexual Conduct*. London: Hutchinson, 1973.

Gamson, Joshua. *Modern Families: Stories of Extraordinary Journeys to Kinship*. New York: New York University Press, 2015.

Garwood, Eliza. "Reproducing the homonormative family: Neoliberalism, queer theory and same-sex reproductive law." *Journal of International Women's Studies* 17, no. 2 (2016): 5-17

Gaucher, Megan. "Monogamous Canadian Citizenship, Constructing Foreignness and the Limits of Harm Discourse." *Canadian Journal of Political Science* 49, no. 3 (2016): 519-538.

--. "One Step Forward, Two Steps Back? Relationship Recognition in Canadian Law Post-Same-Sex Marriage." *Atlantis: Critical Studies in Gender, Culture & Social Justice* 36, no. 2 (2014): 61-72.

Ginsburg, Faye D. *Contested Lives: The Abortion Debate in an American Community.* Berkeley: University of California Press, 1989.

Ginsburg, Faye D. and Rayna Rapp, eds. *Conceiving the new world order: The global politics of reproduction*. Berkeley: University of California Press, 1995.

Gordon Barringer, Sarah. *Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*. Chapel Hill: University of North Carolina Press, 2002.

Greene, Jennifer C., Valier Caracelli, & Wendy F. Graham. "Toward a conceptual framework for multimethod evaluation designs." *Educational Evaluation and Policy Analysis* 11, no. 3 (1989): 255–274

Hall, Margaret Isabel. "The Vulnerability Jurisdiction: Equity, Parens Patriae, and the Inherent Jurisdiction of the Court." *Canadian Association of Comparative and Contemporary Law* 2, no. 1 (2016): 185-225.

Hamilton, Laura, and Elizabeth A. Armstrong. "Gendered Sexuality in Young Adulthood: Double Binds and Flawed Options." *Gender & Society* 23, no. 5 (2009): 589-616.

Hammons, Stacy A. "Assisted Reproductive Technologies: Changing Conceptions of Motherhood?" *Affilia* 23, no. 3 (2008): 270-280.

Harder, Lois. "After the Nuclear Age?" *Vanier Institute of the Family*, 2011.

--. "How queer!? Canadian approaches to recognizing queer families in the law." *Whatever: A Transdisciplinary Journal of Theories and Studies* 4 (2021): 303-328.

--. "Rights of Love: The State and Intimate Relationships in Canada and the United States." *Social Politics* 14, no. 2 (2007), 155-181.

--. "The State and The Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada." *Signs: Journal of Women in Culture and Society* 34, no. 3 (2009): 633-658

Harder, Lois and Michelle Thomarat. "Parentage law in Canada: The numbers game of standing and status." *International Journal of Law, Policy and the* Family 26, no. 1 (2012): 62-87.

Haritaworn, Jin, Chin-ju Lin, and Christian Klesse. "Poly/logue: A Critical Introduction to Polyamory." *Sexualities* 9, no. 5 (2006): 515-529.

Harrison, Laura. "Brown Bodies, White Eggs: The Politics of Cross-Racial Gestational Surrogacy." In *Twenty-first Century Motherhood: Experience, Identity, Policy, Agency*, 261-275. Edited by Andrea O'Reilly. New York: Columbia University Press, 2010.

Haslanger, Sally. *Resisting reality: Social construction and social critique*. London: Oxford University Press, 2012.

Hay, Colin. *Political Analysis: A Critical Introduction*. London: Palgrave Macmillan, 2002.

Hegel, G. W. F. *Elements of the Philosophy of Right*. Edited by Allen W. Wood. Translated by H. B. Nisbet. Cambridge: Cambridge University Press, 1995.

Heyes, Cressida. "Identity Politics." *Stanford Encyclopedia of Philosophy* (2020): 1-37.

--. *Line Drawings: Defining Women through Feminist Practice*. Ithaca: Cornell University Press, 2000.

Hodder, Jonny. "All in the Family: Meet 3 Parents Who Won a Historic Legal Victory for Polyamorous Families." *CBC News*. June 20, 2018. https://newsinteractives.cbc.ca/longform/polyamory-parents-birth-certificate

hooks, bell. *All about Love: New Visions*. New York: William Morrow, 2000.

--. *Feminist Theory: From Margin to Center*, 2nd ed., 144. Cambridge: South End, 2000.

Holland, Winifred H. *Unmarried Couples: Legal Aspects of Cohabitation*. Toronto: Carswell, 1982.

Howarth, David. "Power, Discourse, and Policy: Articulating a Hegemony Approach to Critical Policy Studies." *Critical Policy Studies* 3, no. 3-4 (2010), 309-335.

Hrdy, Sarah Blaffer. *Mothers and Others: The Evolutionary Origins of Mutual Understanding*. Cambridge: Belknap Press of Harvard University Press, 2009.

Hunter, Nan. "Marriage, Law and Gender: A Feminist Inquiry." In *Sex Wars: Sexual Dissent and Political Culture*, 107-22. Edited by Duggan, Lisa and Nan D. Hunter. London: Routledge, 1995.

Hurley, Mary C. "Bill C-38: The Civil Marriage Act." Legislative Summary, Parliamentary Information and Research Service. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/381LS502E#:~:text=Bill%20C%2D38%20defines%20civil,11%20May%20through%2014%20June.

Ingraham, Chrys. "One Is Not Born a Bride: How Weddings Regulate Heterosexuality." In *Introducing the New Sexuality Studies*, 494-499. Edited by Nancy L. Fischer and Steven Seidman. London: Routledge, 2016.

Ireton, Julie. "Raising Elaan: Profoundly Disabled Boy's 'Co-Mammas' Make Legal History." *CBC News*. February 21, 2017. www.cbc.ca/news/raising-elaan.

Jerome, Amanda. "Ottawa lawyers' declaration of parentage illustrates shift in family law." *The Lawyer's Daily*. February 28, 2017. https://www.thelawyersdaily.ca/articles/2610.

Johnson, R. Burke and Andrew J. Onwuegbuzie. "Mixed Methods Research: A Research Paradigm Whose Time Has Come." *Educational Researcher* 33, no. 7 (2004): 14–26.

Kallianes, Virginia, and Phyllis Rubenfeld. "Disabled Women and Reproductive Rights." *Disability & Society* 12, no. 2 (1997): 203-222.

Kaplan, E. Ann. "The Politics of Surrogacy Narratives: 1980s Paradigms and Their Legacies in the 1990s." In *Playing Dolly: Technocultural Formations, Fantasies, and Fictions of Assisted Reproduction*, 116-133. Edited by E. Ann Kaplan and Susan Squier. New Brunswick: Rutgers University Press, 1999.

Kapusta, Stephanie J. "Contesting Gender Concepts, Language and Norms: Three Critical Articles on Ethical and Political Aspects of Gender Non-conformity." PhD diss., University of Waterloo, 2015.

Kelly, Fiona. "Gendering legal parenthood: Bio-genetic ties, internationality and responsibility." *Windsor Year Book of Access to Justice* 25, no. 1 (2007): 63-94.

--. "Multiple-Parent Families under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting." *University of British Columbia Law Review* 47 (2014): 565-595.

--. "Nuclear Norms or Fluid Families-Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law." *Canadian Journal of Family Law* 21 (2004): 133-178.

--. "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family." *Canadian Journal of Women and the Law* 21, no. 2 (2009): 315-351.

--. "(Re)forming parenthood: The assignment of legal parentage within planned lesbian families." *Ottawa Law Review* 40 (2008): 185-222.

Keller, James. "B.C. reforms would make court the last resort for family disputes." *The Canadian Press*. July 19, 2010.

Klesse, Christian. "Contesting the culture of monogamy: consensual nonmonogamies and polyamory." In *Introducing the New Sexuality Studies*, 325-336. Edited by Nancy L. Fischer and Steven Seidman. New York: Routledge, 2016

--. "Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance." *Sociological Research Online* 24, no. 4 (2018): 625-643.

--. “Theorizing multi-partner relationships and sexualities– Recent work on non-monogamy and polyamory.” *Sexualities* 21, no. 7 (2018): 1109-1124.

Kline, Marlee. “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women.” *Queen’s Law Journal* 18, no. 2 (1993): 306-342.

Knight, Edwin. “Are child laws archaic in British Columbia?” *Port Alberni Times*. February 19, 2015.

Kristeva, Julia. “Word, dialogue and novel.” In *The Kristeva Reader*, 34-68. Edited by Torril Moi. Oxford: Blackwell, 1986.

Kronick, Rachel, Cécile Rousseau, and Janet Cleveland. “Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study.” *American Journal of Orthopsychiatry* 85, no. 3 (2015): 287-294.

Kuczynski, Leon and Susan Lollis. “The Child as Agent in Family Life.” In *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space, and Disciplines*, 197-229. Edited by Hillel Goelman, Sheila K. Marshall, Sally Ross. Toronto: University of Toronto Press, 2004.

Kupenda, Angela Mae. “Two Parents are Better Than None: Whether Two Single African American Adults-Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other-Should Be Allowed to Jointly Adopt and Co-Parent African American Children.” *Louisville Journal of Family Law* 35, no. 4 (1997): 703-720.

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

Lakoff, George. *Moral Politics: What Conservatives Know that Liberals Don’t.* Chicago: University of Chicago Press, 1996

Landry, Samantha, Arseneau, Erika, and Elizabeth K. Darling. ““It’s a Little Bit Tricky”: Results from the POLYamorous Childbearing and Birth Experiences Study (POLYBABES).” *Archives of Sexual Behavior* 15 (2021): 1479-1490.

Lowik, A.J. Fenning. “Gendered and Reproductive Becomings: Trans People, Reproductive Experiences and the B.C. Health Care System.” PhD diss., University of British Columbia, 2021.

Laufer-Ukeles, Pamela. “Mothering for Money: Regulating Commercial Intimacy.” *Indiana Law Journal* 88 (2013): 1223-1279.

Lasch, Christopher. *Women and the Common Life: Love, Marriage, and Feminism*. New York: WW Norton, 1997.

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

Law Reform Commission of Nova Scotia. *Final Report: The Legal Status of the Child Born Outside of Marriage in Nova Scotia*. Government of Nova Scotia, 1995.

Lazar, Michelle. "Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis." *Critical Discourse Studies* 4, no. 2 (2007): 141-164.

--, ed. *Feminist Critical Discourse Analysis*. London: Palgrave, 2005.

Leap, William. "Queer Linguistics and Critical Discourse Analysis." In *The Handbook of Discourse Analysis*, 661-680. Edited by Deborah Tannen, Heidi E. Hamilton, and Deborah Schrifin. New York: John Wiley & Sons, 2015.

Leifso, Justin. *Shapeshifting: Political rationalities, Lean, and the transforming landscapes of Canadian public bureaucracies*. PhD diss., University of Alberta, 2020.

Lewis, Jane. *Children, changing families and welfare states*. Cheltenham: Edward Elgar Publishing, 2006.

--. *The End of Marriage? Individualism and Intimate Relationships*. Cheltenham: Edward Elgar, 2001.

--. *Children, changing families and welfare states*. Cheltenham: Edward Elgar Publishing, 2006.

Lenon, Suzanne. "'Why is Our Love an Issue? Same-Sex Marriage and the Racial Politics of the Ordinary." *Social Identities* 17, no. 3 (2011): 351-372.

--. "Polygamy, State Racism, and the Return of Barbarism: The Coloniality of Evolutionary Psychology." *Studies in Social Justice* 16, no. 1 (2022): 143-161.

Little, Margaret. *No Car, No Radio, No Liquor Permit: The Moral Regulation of Single Mothers in Ontario, 1920-1997*. Oxford: Oxford University Press Canada, 1998.

Locke, John. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press, 1988.

Lucas, DeWayne L. "Same-Sex Marriage in the 2004 Election." In *The Politics of Same-Sex Marriage*, 243-272. Edited by Craig A. Rimmerman and Clyde Wilcox. Chicago: University of Chicago Press, 2007.

Luxton, Meg. *Changing Families, New Understandings*. *Vanier Institute of the Family*, 2011.

--. *Feminism and Families: Critical Policies and Changing Practices*. Nova Scotia: Fernwood Publishing, 1997.

Mabry, Linda. "Case Study in Social Research." In *The SAGE Handbook of Social Research Methods*, 214-227. Edited by Pertti Alasuutari, Leonard Bickman, and Julia Brannen. London: SAGE Publications, 2008.

Mamo, Laura. *Queering Reproduction: Achieving Pregnancy in the Age of Technoscience*. Durham: Duke University Press, 2007.

--. "Queering the Fertility Clinic." *Journal of Medical Humanities* 34, no. 2 (2013): 227-239.

Manitoba Law Reform Commission. *Assisted Reproduction: Legal Parentage and Birth Registration*. Government of Manitoba, 2014.

Mason, Jennifer. "Tangible Affinities and the Real Life Fascination of Kinship." *Sociology* 42, no. 1 (2008): 29-45.

Marchia, Joseph, and Jamie M Sommer. "(Re)Defining Heteronormativity." *Sexualities* 22, no. 3 (2019): 267–95.

Mathen, Carissima. "Reflecting Culture: Polygamy and the Charter." *Supreme Court Law Review* 57 (2012): 357-374.

Marx, Karl. "The Communist Manifesto." In *Selected Writings*, 157-186. Edited by Lawrence Simon. London: Hackett Publishing, 1994.

Mayo, Cris. "Pushing the Limits of Liberalism: Queerness, Children, and the Future." *Educational Theory* 56, no. 4 (2006): 469-487.

McCall, Leslie. "The Complexity of Intersectionality." *Signs: Journal of Women in Culture and Society* 30, no. 3 (2005): 1771-1800.

McClintock, Anne. "Family Feuds: Gender, Nationalism and the Family." *Feminist Review* 44, no. 1 (1993): 61-80.

McHenry, Jennifer Mathers. "Opinion: Ontario's laws make no sense for same-sex couples who have kids." *Precedent*. September 6, 2016. https://lawandstyle.ca/tag/teplitsky/

McGillivray, Anne. "Childhood in the Shadow of Parens Patriae." In *Multiple Lenses, Multiple Images: Perspectives on the Child across Time, Space and Disciplines*, 38-72. Edited by Hillel Goelman, Sheila Marshall, and Sally Ross. Toronto: University of Toronto Press, 2004.

McKeen, Wendy. *Money in Their Own Name: The Feminist Voice in Poverty Debate in Canada, 1970-1995*. Toronto: University of Toronto Press, 2004.

McRuer, Robert. *Crip Theory: Cultural Signs of Queerness and Disability*. New York: NYU Press, 2006.

Milan, Anne. "Marital Status: Overview, 2011." *Statistics Canada*. Ottawa: Government of Canada, 2013. https://www150.statcan.gc.ca/n1/pub/91-209-x/2013001/article/11788-eng.htm

Mill, John Stuart. *The Subjection of Women*. Edited by Susan Moller Okin. London: Hackett Publishing, 1988.

Millbank, Jenni. "The Limits of Functional Family: Lesbian Mother Litigation in the era of the Eternal Biological Family." *International Journal of Law, Policy and the Family* 22, no. 2 (2008): 149-177

Mint, Pepper. "The Power Dynamics of Cheating: Effects on Polyamory and Bisexuality." *Journal of Bisexuality* 4, no. 3-4 (2004): 55-76.

Mitchell, Barbara A. *Family Matters: An Introduction to Family Sociology in Canada*. Toronto: Canadian Scholars, 2017.

Mole, Richard C.M. "Homonationalism: Resisting nationalist co-optation of sexual diversity." *Sexualities* 20, no. 5-6 (2017): 660-662.

Morgensen, Scott. "Settler Homonationalism: Theorizing Settler Colonialism Within Queer Modernities." *GLQ* 16, no. 1-2 (2010): 105-131.

Motschenbacher, Heiko. *Language Gender and Sexual Identity: Poststructuralist Perspectives*. Amsterdam: John Benjamins, 2010.

--. "'Now Everybody Can Wear a Skirt': Linguistic Constructions of Non-Heteronormativity at Eurovision Song Contest Press Conferences." *Critical Discourse Studies* 24, no. 5 (2013): 590-614.

Motschenbacher, Heiko, and Martin Stegu. "Queer Linguistic Approaches to Discourse." *Discourse and Society* 24, no. 5 (2013): 519-535.

Morgan, David H. J. *Family Connections: An Introduction to Family Studies*. Cambridge: Polity, 1996.

Munby, Sir James. "Protecting the Rights of Vulnerable and Incapacitous Adults – The Role of the Courts: An Example of Judicial Law-making." *Child and Family Law Quarterly* 26 (2014): 64-77.

Murphy, Leisha. "Are you my mother?" *Connect Family Law Blog*. June 8, 2017.

Murray, Charles A. *The Underclass Revisited*. Washington: American Enterprise Institute, 1999.

Mykitiuk, Roxanne. "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies." *Osgoode Hall Law Journal* 39 (2001): 771-815.

Nagel, Stuart S. *Handbook of Public Policy Evaluation*. London: SAGE Publications, 2002.

Nath, Nisha. "Defining Narratives of Identity in Canadian Political Science: Accounting for the Absence of Race." *Canadian Journal of Political Science* 44, no. 4 (2011): 161-193.

Naqvi, Yasir. Twitter post, November 29, 2016, 3:25 PM. https://twitter.com/Yasir_Naqvi/status/803726613833728000.

Neale, Bren and Carol Smart. "Experiments with parenthood?." *Sociology* 31, no. 2 (1997): 201-219.

Nedelsky, Jennifer. "Reconceiving Rights as Relationship." *Review of Constitutional Studies* 1, no. 1 (1993): 1-26.

Nixon, Laura. "The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People." *William & Mary Journal of Race, Gender, and Social Justice* 20, no. 1 (2013): 73-103.

Nordqvist, Petra. "Feminist Heterosexual Imaginaries of Reproduction: Lesbian Conception in Feminist Studies of Reproductive Technologies." *Feminist Theory* 9, no. 3 (2008): 273-292.

--. "Genetic Thinking and Everyday Living: On Family Practices and Family Imaginaries." *The Sociological Review* 65, no. 4 (2017): 865-881.

--. "'Out of Sight, Out of Mind.' Family Resemblances in Lesbian Donor Conception." *Sociology* 44 (2010): 1128–1144.

Nussbaum, Felicity. "The Other Woman: Polygamy, Pamela, and the Prerogative of Empire." In *Women, 'Race,' and Writing in the Early Modern Period*. Edited by Margo Hendricks and Patricia Parker. London: Routledge, 1994.

O'Donovan, Katherine. *Sexual Divisions in Law*. London: Weidenfeld & Nicholson, 1985.

Olssen, Mark, John Codd, and Anne-Marie O'Neill. "Critical Policy Analysis: A Foucauldian Approach." In *Education Policy: Globalization, Citizenship and Democracy*, 39-58. London: SAGE Publications, 2004.

Ontario. Office of Attorney General. "Ontario to Introduce Legislation Ensuring Equal Treatment for All Families: Legislation Would Address Legal Uncertainty for Parents and Children." *News Release*. September 29, 2016. https://perma.cc/PT2Q-VW57

Oppenheimer, Mark. "Married, with Infidelities," *New York Times Magazine*. June 30, 2011. https://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html

Orsini, Michael, and Miriam Smith, eds. *Critical Policy Studies*. Vancouver: University of British Columbia Press, 2007.

Palazzo, Nausica. *Legal Recognition of Non-Conjugal Families*. London: Bloomsbury Publishing, 2021.

Park, Shelley M. "Polyamory is to Polygamy as Queer is to Barbaric?" *Radical Philosophy Review* (2017): 297-328.

Pascoe, Cheri J. *Dude, You're a Fag: Masculinity and Sexuality in High School*. Berkeley: University of California Press, 2011.

Paterson, Stephanie, Francesca Scala, and Marlene K. Sokolon, eds. *Fertile Ground: Exploring Reproduction in Canada*. Montreal: McGill-Queen's Press, 2014.

Pfeffer, Carla A. "Normative resistance and inventive pragmatism: Negotiating structure and agency in transgender families." *Gender & Society* 26, no. 4 (2012): 574-602.

Pierce, Roger. "Completing a Literature Review: Accessing Published Information." In *Research Methods in Politics*, 100-116. London: SAGE Publications, 2011.

Polikoff, Nancy D. "Law That Values All Families: Beyond (Straight and Gay) Marriage." *Journal of the American Academy of Matrimonial Lawyers* 22, no. 1 (2009): 85-104.

--. "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families." *Georgetown Law Journal* 78, no. 3 (1990): 559-576.

Plummer, Ken. "The sexual spectacle: Making a public culture of sexual problems." In *Handbook of Social Problems: A Comparative International Perspective,* 521-541. Edited by George Ritzer. London: SAGE Publications, 2003.

Puar, Jasbir. "Rethinking homonationalism." *International Journal of Middle East Studies* 45, no. 2 (2013): 336-339.

Puri, Jyoti. "Sexuality, State, and Nation." In *Introducing the New Sexuality Studies*, 477-484. Edited by Nancy L. Fischer and Steven Seidman. London: Routledge, 2016.

Pyne, Jake, Greta Bauer, and Kaitlin Bradley. "Transphobia and other stressors impacting trans parents." *Journal of GLBT Family Studies* 11, no. 2 (2015): 107-126.

Racco, Marillisa. "Polyamory is a world of 'infinite' love. But how do the relationships work?" *Global News*. July 24, 2018. https://globalnews.ca/news/4320857/what-is-polyamory/.

Radbord, Joanna. "The Birth of the All Families are Equal Act: Reconceptualizing Parentage in Ontario." *Ontario Family Law Reporter* 31, no. 8 (2018): 93-112.

Radi, Blas. Reproductive injustice, trans rights, and eugenics." *Sexual and Reproductive Health Matters* 28, no. 1 (2020): 396-407.

Rambukkana, Nathan. *Fraught Intimacies: Non/Monogamy in the Public Sphere*. Vancouver: University of British Columbia Press, 2015.

Rankin, Pauline. "Sexualities and national identities: Re-imagining queer nationalism." *Journal of Canadian Studies* 35, no. 2 (2000): 176-196.

Razack, Sherene, Sunera Thobani, and Malinda Smith, eds. *States of Race: Critical Race Feminism for the 21st Century*. Toronto: Between the Lines, 2010.

Regan, Paulette. *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada*. Vancouver: University of British Columbia Press, 2010.

Rich, Adrienne. "Compulsory heterosexuality and lesbian existence." *Signs* 5, no. 4 (1980): 631–660.

Richardson, Diane. "Desiring Sameness? The Rise of a Neoliberal Politics of Normalization." *Antipode* 37, no. 3 (2005): 515-535

Riley, Denise. "The right to be lonely." *Differences: A Journal of Feminist Cultural Studies* 13, no. 1 (2002): 1-13.

Ritchie, Jane and Liz Spencer. "Qualitative Data Analysis for Applied Policy Research." In *The Qualitative Researcher's Companion,* 305-329. Edited by A. M. Huberman and M. B. Miles. London: SAGE Publications, 2002.

Roberts, Dorothy. "Racial Disparity in Reproductive Technologies." *Chicago Tribune*. January 29, 1998. https://www.chicagotribune.com/news/ct-xpm-1998-01-29-9801290086-story.html.

Robertson, John A. "Collaborative Reproduction: Donors and Surrogates." In *Children of Choice: Freedom and the New Reproductive Technologies*, 104-5. Princeton: Princeton University Press, 1994.

Robinson, Kerry, and Cristyn Davies. "Docile Bodies and Heteronormative Moral Subjects: Constructing the Child and Sexual Knowledge in Schooling." *Sexuality & Culture* 12, no. 4 (2008): 221-239.

Robson, Ruthann. "Compulsory Matrimony." In *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, 313-218. Edited by Martha Fineman, Jack E. Jackson, and Adam P. Romero. London: Routledge, 2016.

Rose, Nikolas. *Governing the Soul: The Shaping of the Private Self.* London: Routledge, 1990.

Roseneil, Sasha and Shelley Budgeon. "Cultures of Intimacy and Care Beyond "the Family": Personal Life and Social Change in the Early 21st Century." *Current Sociology* 52, no. 2 (2004): 135-159.

Ross, Lori E., Rachel Epstein, Scott Anderson, and Allison Eady. "Policy, practice and personal narratives: Experiences of LGBTQ people with adoption in Ontario, Canada." *Adoption Quarterly* 12 (2009): 272–293

Roulston, Kathryn. "Doing Interview Research." *Reflective Interviewing: A Guide to Theory and Practice*, 96-114. London: SAGE Publications, 2010.

Roulston, Kathryn, and Myungweon Choi. "Qualitative Interviews." In *The SAGE Handbook of Qualitative Data Collection*, 233-249. Edited by U. Flick. London: SAGE Publications, 2018.

Rubin, Gayle. "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality." In *Pleasure and Danger: Exploring Female Sexuality*, 267-319. Edited by Carole S. Vance. London: Routledge, 1984.

Salkind, Neil J. *Encyclopedia of Research Design*. London: SAGE Publications, 2010.

Salmansohn, Karen. "Do Open Marriages Work?" *CNN*. March 23, 2010. http://www.cnn.com/2010/LIVING/personal/03/23/o.open.marriages.work/index.html

--. *Prince Harming Syndrome: Break Bad Relationship Patterns for Good*. New York: Langenscheidt Publishing Group, 2009.

Schippers, Mimi. *Beyond Monogamy Polyamory and the Future of Polyqueer Sexualities*. New York: New York University Press, 2018

Schützwohl, Achim, and Stephanie Koch. "Sex Differences in Jealousy: The Recall of Cues to Sexual and Emotional Infidelity in Personally More and Less Threatening Context Conditions." *Evolution and Human Behavior* 25, no. 4 (2004): 249-257.

Scoffield, Heather. "Census: Nuclear Family Is No Longer the Norm in Canada." *Toronto Star*. September 19, 2012. https://www.thestar.com/news/canada/2012/09/19/census_nuclear_family_is_no_longer_the_norm_in_canada.html#:~:text=Statistics%20Canada%20found%20that%2044.5,per%20cent%20increase%20from%202006.

Shackelford, Todd K., Gregory J. LeBlanc, and Elizabeth Drass. "Emotional Reactions to Infidelity." *Cognition and Emotion* 14, no. 5 (2000): 643-659.

Shaw, Rob. "B.C. proposes new approach to divorce." *Phoenix Star*. July 20, 2010.

Schneider, David. *American Kinship: A Cultural Account*. Chicago: University of Chicago Press, 1968.

Seidman, Stephen. "Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes." In *Fear of a Queer Planet: Queer Politics and Social Theory*, 105-142. Edited by Michael Warner. University of Minnesota Press, 1991.

Sedgewick, Eve. *Epistemology of the Closet*. Berkeley: University of California Press, 2008 (1990).

Séguin, Léa J. "The Good, the Bad, and the Ugly: Lay Attitudes and Perceptions of Polyamory." *Sexualities* 22, no. 4 (2017): 669-690.

Shanley, Mary Lyndon. "Surrogacy: Reconceptualizing Family Relationships in an Age of Reproductive Technologies." In *Philosophical Foundations of Children's and Family Law*, 293-312. Edited by Elizabeth Brake and Lucinda Ferguson. London: Oxford University Press, 2018.

Sheff, Elisabeth. "Diversity and Polyamory: Polys are diverse in some ways and homogeneous in others, like race and class." *Psychology Today*. November 27, 2013. https://www.psychologytoday.com/ca/blog/the-polyamorists-next-door/201311/diversity-and-polyamory

--. "Polyamorous Families, Same-Sex Marriage, and the Slippery Slope." *Journal of Contemporary Ethnography* 40, no. 5 (2011): 487-520.

--. *The Polyamorists Next Door: Inside Multiple-Partner Relationships and Families*. Rowman & Littlefield, 2013.

Shingler, Benjamin. "Canada Aims to Avoid Detaining Migrant Children, But It Happens." *CBC News*. June 20, 2018. https://www.cbc.ca/news/canada/montreal/canada-detention-children-united-states-1.4709632.

Shultz, Marjorie Maguire. "Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality." *Wisconsin Law Review* 2 (1990): 297-398.

Sikkema, John. "Freudian slips can be found in Ontario's 'All Families Are Equal Act'." *LifeSite*. November 28, 2016.

Simpson, Audra. "The Ruse of Consent and the Anatomy of 'Refusal': Cases from Indigenous North America and Australia." *Postcolonial Studies* 20, no.1 (2017): 18–33.

Sinclair, Raven. "The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias." *First Peoples Child & Family Review: An*

Interdisciplinary Journal Honouring the Voices, Perspectives, and Knowledges of First Peoples through Research, Critical Analyses, Stories, Standpoints and Media Reviews 11, no. 2 (2016): 8-18.

Slick, Matt. "What is Polyamory?" *Christian Apologetics and Research Ministry*, 2010. https://carm.org/what-is-polyamory.

Smart, Carol. "The "new" parenthood: fathers and mothers after divorce." In *The 'New' Family?*, 100-115. Edited by Elizabeth B. Silva and Carol Smart. London: SAGE, 1999.

Smith, Malinda. "Diversity in Theory and Practice: Dividends, Downsides, and Dead-Ends." In *Contemporary Inequalities and Social Justice in Canada*, 43-66. Edited by Janine M. Brodie. University of Toronto Press, 2018.

Smith, Samuel. "Ontario Seeks Redefinition of Family; Mother, Father Replaced by Up to 4 'Parents'." *The Christian Post*. November 1, 2016.

Snow, David. "Measuring Parentage Policy in the Canadian Provinces: A Comparative Framework." *Canadian Public Administration* 59, no. 1 (2016): 5-25.

--. "Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act." *Canadian Journal of Law and Society* 32, no. 3 (2017): 329-348.

Song, Susan. "Polyamory and Queer Anarchism: Infinite Possibilities for Resistance." In *Queering Anarchism: Essays on Gender, Power, and Desire*, 1-9. Edited by C.B. Daring, J. Rogue, Deric Shannon, and Abbey Volcano. Oakland: AK Press, 2012.

Spencer, Dale C., and Raven Sinclair. "Settler Colonialism, Biopolitics, and Indigenous Children in Canada." In *The Sociology of Childhood and Youth in Canada*. Edited by Xiaobei Chen, Rebecca Raby, and Patrizia Albanese. Toronto: Canadian Scholars, 2017.

Statistics Canada. "Census Family." Government of Canada, 2021. https://www23.statcan.gc.ca/imdb/p3Var.pl?Function=UnitI&Id=1314048

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

--. *States Without Nations: Citizenship for Mortals*. New York: Columbia University Press, 2009.

Stevens, Lisa Patel and Thomas W. Bean. "Critical Policy Analysis in Local Contexts." In *Critical Literacy: Context, Research, and Practice in the K-12 Classroom*, 111-122. London: SAGE Publications, 2007.

Steel, Freeda M. "Recent Family Law Developments in Manitoba." *Manitoba Law Journal* 13 (1981): 323-350.

Stacey, J. *In the Name of the Family: Rethinking Family Values in the Postmodern Age*. Beacon Press, 1996.

Strassberg, Maura I. "The Challenge of Post-Modern Polygamy: Considering Polyamory." *Capital University Law Review* 31 (2003): 439-441.

Strathern, Marilyn. *Reproducing the Future: Essays on Anthropology, Kinship and The New Reproductive Technologies*. Manchester, UK: Manchester University Press, 1992.

Stychin, Carl. *A Nation By Rights*, 3. Philadelphia: Temple University Press, 1998.

Sweet, Joanna. "Equality, democracy, monogamy: Discourses of Canadian nation building in the 2010–2011 British Columbia polygamy reference." *Canadian Journal of Law and Society* 28, no. 1 (2013): 1-19.

Swift, Karen. "Risky women: the role of risk in the construction of the single mother." In *The Legal Tender of Gender: Law, Welfare and the Regulation of Women's Poverty*, 143-163. Edited by A.M. Gavigan and D.e. Chunn. Oxford: Hart Publishing, 2010.

Talbot, Christine. "Turkey is in Our Midst": Orientalism and Contagion in Nineteenth-Century Anti-Mormonism." *Journal of Law and Family Studies* 8, no. 2 (2006): 363-389.

Taylor, Jillian. "Little Difference Between U.S. Child Detention and CFS, says Indigenous Advocate." *CBC News*. June 21, 2018. https://www.cbc.ca/news/canada/manitoba/cfs-indigenous-manitoba-kids-migrant-detention-centres-1.4716876.

Taylor, Rupert. "Political Science Encounters 'Race' And 'Ethnicity.'" *Ethnic and Racial Studies* 19, no. 4 (1996): 884-895.

Taylor, Sandra. "Critical Policy Analysis: Exploring Contexts, Texts and Consequences." *Discourse: Studies in the Cultural Politics of Education* 18, no. 1 (1997): 23-35.

Taylor, Verta. *Rock-a-by baby: Feminism, self-help and postpartum depression*. London: Routledge, 2016.

"There's No Place for The State in the Bedrooms of the Nation." *CBC Archives*. https://www.cbc.ca/player/play/1811727781

"Three Adults in Polyamorous Relationship Declared Legal Parents of Child." *The Globe and Mail*. June 14, 2018. https://www.theglobeandmail.com/canada/article-three-adults-in-polyamorous-relationship-declared-legal-parents-of-2/

Teman, Elly, and Zsuzsa Berend. "Surrogacy as a Family Project: How Surrogates Articulate Familial Identity and Belonging." *Journal of Family Issues* 42, no. 6 (2021): 1143-1165.

Thobani, Sunera. *Exalted Subjects: Studies in the Making of Race and Nation in Canada*. Toronto: University of Toronto Press, 2007.

Thompson, Charis. *Making Parents: The Ontological Choreography of Reproductive Technologies*. Cambridge: MIT Press, 2005.

Thompson, Debra. "Is Race Political?" *Canadian Journal of Political Science* 41, no. 3 (2008): 525-547.

Torgerson, Douglas. "Harold D. Lasswell and Critical Policy Studies: The Threats and Temptations of Power." In *Handbook of Critical Policy Studies*. Edited by Anna Durnová, Douglas Torgerson, Frank Fischer, and Michael Orsini. Cheltenham: Edward Elgar Publishing, 2015.

Torraco, Richard J. "Writing Integrative Literature Reviews: Guidelines and Examples." *Human Resource Development Review* 4, no. 3 (2005): 356-367.

Treloar, Rachel, and Susan B. Boyd. "Family law reform in (Neoliberal) context: British Columbia's new family law act." *International journal of law, policy and the family* 28, no. 1 (2014): 77-99.

United Nations. "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)", *Convention on the Rights of the Child*, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11%20

Vaara, Eero and Janne Tienari. "Critical Discourse Analysis." In *Encyclopedia of Case Study Research*, 245-247. Edited by Albert J. Mills, Gabrielle Durepos, and Elden Wiebe. London: SAGE Publications, 2010.

Valverde, Mariana. "'When the Mother of the Race is Free': Race, Reproduction, and Sexuality in First Wave Feminism." In *Gender Conflicts: New Essays in Women's History*, 3-26. Toronto: University of Toronto Press, 1992.

van de Sande, Adje and Peter Menzies. "Native and Mainstream Parenting: A Comparative Study." *Native Journal of Social Work* 4, no. 1 (2003): 126-139.

Velleman, J. David. "Family history." *Philosophical Papers* 34, no. 3 (2005): 357-378.

Volosinov, Valentin I. *Marxism and the Philosophy of Language*. New York: Seminar, 1973 [1928].

Warner, Michael. *The Trouble with Normal*. New York: The Free Press, 1999.

--. *Fear of a Queer Planet: Queer Politics and Social Theory.* Minneapolis: University of Minnesota Press, 1991.

Ward, Peter W. "Unwed Motherhood in Nineteenth-Century English Canada." *Historical Papers* 16, no.1 (1981): 34-56.

Weeks, Jeffrey, Brian Heaphy, and Catherine Donovan. *Same Sex Intimacies; Families of Choice and Other Life Experiments.* London: Routledge, 2001.

Weitzman, Geri. "Therapy with Clients Who Are Bisexual and Polyamorous." *Journal of Bisexuality* 6, no. 1-2 (2006): 137-164.

Wilkinson, Eleanor. "What's Queer about Monogamy Now?" In *Understanding Non-Monogamies*, edited by Meg Barker and Darren Langdridge, 243-254. New York: Routledge, 2010.

Willey, Angela. "Monogamy's Nature: Colonial Sexual Science and Its Naturecultural Fruits." In *Undoing monogamy: the politics of science and the possibilities of biology*, 25-44. Durham: Duke University Press, 2016.

Wittgenstein, Ludwig. *Philosophical Investigations*. Oxford: Basil Blackwell, 1953.

Yeatman, Anna. *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State*. London: Routledge, 1990.

Young, Jessica M. "'We Are Pioneers': Polyamorists' Stigma Management Strategies." Doctoral dissertation, Southern Illinois University, 2014.

Yuval-Davis, Nira. "Intersectionality, Citizenship and Contemporary Politics of Belonging." *Critical Review of International Social and Political Philosophy* 10, no. 4 (2007): 561–574.